

IS COPYRIGHT REFORM NEEDED?

Pamela Samuelson, Berkeley Law
EPIP Conference
Sept. 9, 2011

SHORT ANSWER: YES

- © protection today is too strong, too long, too complicated, outdated, ambiguous, & imbalanced
- Its normative underpinnings are obscured by these complexities, making it hard to respect
- It was perhaps tolerable for it to be complicated when it only regulated a small cadre of specialists, but today it regulates the daily lives of us all
- John Tehranian, Infringement Nation: even without file-sharing, ordinary person might seem to infringe copyrights more than 80X a day
 - Statutory damage liability risk: \$4.5B a year per person
- Less may be more!

SCHOLARLY INTEREST

- Numerous American scholars think © is in need of significant reform
 - Lawrence Lessig, James Boyle, Jessica Litman, Julie Cohen, John Tehranian, Terry Fisher, Neil Netanel, among others
 - Mostly they recommend thinner scope, greater predictability, shorter duration, more recognition of user rights
- National Academies study underway
- Interest in reform in EU as well
 - Stef von Gompel's new book on © formalities
 - Wittem Group draft harmonized EU © law

© REFORM INITIATIVES

- Hargraeves Report recommends some significant changes to UK © law:
 - Creation of digital licensing system to reduce transactions costs and facilitate rights clearances
 - ECL to provide greater access to orphan works
 - New exception to permit data mining in corpus of digital content
 - like nonconsumptive research in proposed GBS settlement
 - New exception to allow © to adapt to unforeseen developments
 - Follow-up on some new exceptions from Gower Rep.

OTHER DEVELOPMENTS

- Europeana digital library initiative aims to preserve cultural heritage, not just PD works
- i2010: Digital Libraries Initiative of EC recommending digitization & online access
- Comite des Sages report, *The New Renaissance* (2011) recommended # changes
- Proposed EU Directive on OW
- WIPO Development Agenda
 - Initiatives for print-disabled, library privileges, etc.

CPP FORMATION

- Initial impetus: I got tired of being a critic of high protectionist initiatives such as DMCA
- Buried in my criticism was a nascent conception about what a “good” © law would look like
- Unlikely that © office or Congress would undertake serious reform any time soon
- But maybe it would be good to start a conversation about © reform
 - Encouraged by some © scholars, but also M Peters
- Mostly academics, but also lawyers from Disney, Warner Bros, Microsoft, IBM, practitioners

CPP REPORT

- Met 3x a year for 2 days each for 3 yrs
- Finished report published in the Berkeley Technology Law Journal (2010)
- Preamble explaining project & process
- Goals:
 - Articulate a set of principles that should undergird a “good” © law
 - Assess the extent to which existing law was consistent
 - Recommend changes to extent inconsistent

EUROPEANS MIGHT LIKE

- Recognition of reasonable attribution right (beyond just certain visual artists)
- Greater leeway to make reuses of orphan works
- Updated privileges for libraries, museums & archives to fulfill cultural preservation & access missions
- More coherent, consistent tests for infringement
- Communication to the public right to deal with digital and other transmissions

MORE DIFFICULT?

- Reinvigoration of formalities
 - Not suggesting reinstatement of old US rules that resulted in public domain for works that failed to comply with formalities
 - But baseline rights for unregistered works, higher level of rights & remedies for registration
 - Similar thoughts to those in Hargraeves rep.
- Need for showing of commercial harm as element of infringement (except when exact/near exact copies in same market)

OTHER CPP IDEAS

- Guidelines for awards of statutory damages
 - Supposed to be “just” but often arbitrary, capricious, inconsistent
 - \$222K vs. Thomas, retrials \$1.92M, \$1.5M for file-sharing 24 songs cf. judge-awards in low teens in other cases
 - Risk has chilling effects on innovation
 - Google Books: \$3.6 trillion exposure
- Small claims court for lesser infringements

I WOULD GO FARTHER

- Narrow exclusive rights to those that involve appropriating commercial value of protected works
 - Leaving many noncommercial reuses (eg, remixes, mashups) unregulated
- More and more principled exceptions, user rights
- Lessen duration, provide incentives for putting in public domain, open access

LEGIS ALTERNATIVES TO GBS

- Allow mass digitization of books with tiered access by qualified entities who are willing to commit to security measures
 - OK to digitize books for preservation purposes
 - OK to display snippets for in-© books (unless RH says no), with links to sources from which books can be lawfully acquired
 - Non-consumptive research privilege, at least for nonprofit researchers
 - Non-expressive uses privilege (e.g., to improve search tools)
 - Full text access for public domain and books known to be “orphans” (take down if RH shows up later)

OW REUSE AS FAIR USE?

Purpose: strongest if nonprofit educational reuse by libraries or universities to promote access to knowledge

Nature of work: orphan status is relevant; many such works are also older & fact-intensive (broader fair use for this)

Amount: whole thing, so cuts vs.

Harm to market: if no RH, no market harm

Other: made diligent search & unlocatable; much public benefit if wider access to orphan works

MICHIGAN BEST PRACTICES

- For books published between 1923-63, search first to see if © renewed
 - If not, in PD
 - If renewed, grad student investigators search for RHs with guidelines for conducting searches
 - If RH cannot be located, search is documented
 - UM announces 90 day cooling period: we think this book is an orphan; if no one shows up to claim it, we will make it available to our research community
 - UM will take down if RH shows up later

POSSIBLE VENUES & MODALITIES FOR REFORM

- **Congress?** Orphan works legislation is possible, but prospects dim for larger effort
- **CONTU II?** Unlikely to happen, not likely to do better than CONTU I (which was backward looking)
- **IP CZAR?** Czar is supposed to focus on enforcement, not on appropriate balance in the law
- **Revive the OTA?** This could help a lot to offer suggestions about options and impacts, but not their job to rewrite the law
- **Courts?** Several things are possible here
- **Copyright Office?** Some things possible here
- **Scholarship, treatises?** Where some of the action is
- **Private ordering?** Lots going on in this domain
- **Social norms & practices?** Lots going on here too
- **International bodies?** Some possibilities here

MANY PRIVATE INITIATIVES

- Various “openness” initiatives:
 - Creative Commons, Science Commons
 - Internet Archive, Open Content Alliance
 - Open source initiatives
 - wikipedia, etc.
 - MIT Open Courseware as a model for other universities
- “Best practices” guidelines for documentary filmmakers, makers of mashups and remixes
- Kindle, iPod/iTunes, downloadable movies
- Google Booksearch settlement & the new BRR
 - Probably the most significant development in © of our era
- Digital rights management technology initiatives (e.g., DVD-CCA)