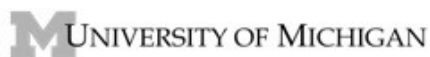


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SI 519/PubPol 688

Writing Assignment 1

Topic 4

The Purpose of Copyright: The Encouragement of Learning

October 21, 2008

The Purpose of Copyright: The Encouragement of Learning

According to the Progress Clause (Article I, Section 8, Clause 8) of the U.S. Constitution, the fundamental purpose of copyright is “to Promote the Progress of Science and the useful Arts.” I concur that the advancement of public learning should be the purpose of copyright. This is not, however, the function of copyright under current law. According to UCLA Law Professor Neil Netanel, copyright serves three functions: production (economic incentive to create and distribute), structural (enables a market for published works), and expressive (“it reinforces the social and political importance of individuals’ new, original contributions to public discourse”).¹ The Progress Clause acknowledges that in order to promote public knowledge, creators of original works should be able to “secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” If the underlying purpose of copyright remains the advancement of public knowledge, then the current federal copyright legislation is inconsistent with this objective.

Successes of current federal copyright law

I. Copyright rewards originality, not effort

Copyright does not reward effort, it protects original expression. This was re-enforced by *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) which ruled that no matter how much effort was spent in collecting and organizing the contact information contained in a phonebook, there was no original expression and it therefore did not merit copyright protection. This promotes learning by ensuring protection of original works only. By prohibiting unauthorized duplication and excluding facts from copyright protection, copyright provides an incentive to produce innovative, transformative works.

¹ Netanel, Neil Weinstock. *Copyright's Paradox*. Oxford: Oxford University Press, 2001, 82.

II. Copyright protects expression, not the underlying ideas

Copyright protects a creator's original expression but not the underlying idea. In *Mazer v. Stein*, 347 U.S. 201 (1954) the Supreme Court stated, "Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea -- not the idea itself."² This distinction allows for the open debate and discussion of original works. University of Michigan Law Professor Jessica Litman adds, "The chief purpose of copyright is to promote learning, and learning would be frustrated if facts and ideas could not be freely used and reused."³

III. Fair Use Doctrine enables limited use of copyright materials

The *Copyright Act of 1976 (17 U.S.C. § 107)* codified previous common law practices that enabled the use of copyrighted materials under certain conditions. The four factors which determine Fair Use are: 1) the purpose and character (e.g. non-commercial vs. educational) of the use, 2) the nature of the original work, 3) the portion of the original work used, and 4) the effect on the market of the original work. Fair Use Doctrine promotes learning by allowing the use of copyrighted for purposes of classroom instruction as well as social commentary or parody. *Suntrust v. Houghton Mifflin Co.*, 252 F. 3d 1165 (11th Cir. 2001) held that the novel *The Wind Done Gone* by Alice Randall, which used some of the same characters and scenes from *Gone with the Wind* by Margaret Mitchell, was a fair use: "It is principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of *GWTW*. Randall's literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War."⁴ In *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), the rap group 2 Live Crew's parody of "Oh Pretty Woman" was judged to be fair use. Though it used a substantial portion of the original work, the parody was viewed as significantly transformative and original.

² *Mazer v. Stein*, 347 U.S. 201 (1954)

³ Litman, Jessica. *Digital Copyright*. New York: Prometheus Books, 2006, 17, <http://hdl.handle.net/2027.42/56221> (accessed 20 October 2008).

⁴ *Suntrust v. Houghton Mifflin Co.*, 252 F. 3d 1165 (11th Cir. 2001)

Shortcomings of current federal copyright law

I. Retroactive extension rewards existing copyright holders without increasing learning

When the first U.S. copyright act was passed in 1790, copyright protection lasted for 14 years and was renewable for one additional term of 14 years. “America's Congress has lengthened copyright terms 11 times in the past four decades.”⁵ In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Supreme Court upheld that the retroactive extension of copyright in 1998 was constitutional as it meets the “limited times” criteria laid forth in the copyright clause. Copyright protection now lasts 70 years plus the life of the author for individual works and 120 years from creation or 95 years from publication for corporate works. This extension hinders learning as “in concert with copyright’s expansion... copyright is increasingly treated more akin to conventional property than a finely honed instrument of expressive diversity.”⁶ Some estimate that the 1998 Copyright Term Extension Act adds a mere 7 cents to the previous incentive to create original works.⁷ Eldred’s lawyer, Larry Lessig asserted that “retrospective extensions cannot possibly change the amount of work created in the 1920s, they do not promote progress.”⁸ Lessig has “proposed a seventy-five-year term, granted in five-year increments with a requirement of renewal every five years.”⁹

II. Orphan works limit the lawful use of copyrighted materials

The *Copyright Act of 1976* awarded copyright for original works without registration. As of 1989¹⁰, there is no longer a need to add a copyright symbol © to indicate that a work is protected by copyright. Since copyright registration and markings are not requirements of copyright protection, there is no audit trail to locate the copyright holder of a particular work. This prohibits learning by

⁵ “Cyberlawyer 2.0.” *The Economist*, 6 December 2007.

⁶ Netanel, 7.

⁷ SI 519/PubPol 688 Lecture Notes, University of Michigan – Ann Arbor, September 26, 2008.

⁸ Lesk, Michael. “Copyright Extension: Eldred v. Ashcroft.” *IEEE Computer Society*, 2003, <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=01177000> (accessed 21 October 2008)

⁹ Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin, 2004, 292.

¹⁰ The Berne Convention Implementation Act of 1988 (BCIA).

preventing the partial or complete use of copyrighted materials regardless of value or willingness to pay. It is estimated that over one-fifth of the resources contained in an academic library are orphaned.¹¹

A pending bill, the Shawn Bentley Orphan Works Act of 2008, attempts to address the issue of orphan works. The bill would allow the use of orphaned works after the user has conducted a “diligent search” for the copyright holder using electronic databases, including the Copyright Office records under the condition of attribution. Additionally, it would limit the liability for infringement for non-commercial use should the copyright owner emerge and file an infringement lawsuit. The bill was passed unanimously by the Senate and is currently under review at the House of Representatives.

III. Lack of definition in Fair Use Doctrine

Although the *Suntrust v. Houghton Mifflin (2001)* and *Campbell v. Acuff-Rose Music (1994)* cases provide examples where the use of copyrighted works for commercial nature was justified due to their purposes of commentary or parody, there is still no clear definition of fair use. In *Campbell v. Acuff-Rose Music (1994)* the Supreme Court stated, “The statutory examples of permissible uses provide only general guidance.”¹² In response, many institutions and organizations have created their own guidelines for Fair Use. In 1997, the Conference of Fair Use (CONFU) laid out “Guidelines for Educational Media.” These guidelines define the acceptable portion of a copyrighted work to be 10% and suggest a time limit of two years use of copyrighted works even for educational purposes. While these guidelines may aid individuals and institutions in their copyright analyses, they are not legally binding. In addition, the CONFU guidelines hinder the advancement of *public* learning by limiting it “systematic learning activities including use in

¹¹ Foster, Andrea L. “Legislation to Ease Problem of Orphan Works Is Introduced in Congress.” *The Chronicle of Higher Education*, 25 April 2008, <http://chronicle.com/wiredcampus/index.php?id=2938> (accessed 21 October 2008).

¹² *Campbell v. Acuff-Rose Music (1994)*

connection with non-commercial curriculum-based learning and teaching activities by educators to students enrolled in courses at nonprofit educational institutions”¹³ and other limited uses such as portfolios and conferences.

Closing Remarks

The Progress Clause of the U.S. Constitution was based on Queen Anne of England’s 1709 statute titled “The Encouragement of Learning.” While this was the foundation of copyright law, “copyright has come increasingly to resemble and be thought of as a full-fledged property right rather than a limited federal grant designed to further a particular public purpose.”¹⁴ Copyright law may be necessary to promote the creation and distribution of original works, the private rewards for originality should not surpass the underlying goal of advancing public knowledge. The Shawn Bentley Orphan Works Act of 2008 and Larry Lessig’s proposals to decrease the duration of copyright and require copyright renewal are three policy recommendations that would move toward a better balance of rewarding individual creativity in order to promote public learning.

Sources Consulted

¹³ “Fair Use Guidelines for Educational Media.” The Conference on Fair Use, 17 July 1996, <http://www.utsystem.edu/ogc/intellectualproperty/ccmcguid.htm> (accessed 20 October 2008).

¹⁴ Netanel, 6.

Summary

Copyright rewards originality, not effort

- Promotes learning by providing legal protection only for original works
- Relevant cases: Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)

Copyright protects expression, not the underlying ideas

- Promotes learning by allowing the open discussion and debate of original works
- Relevant cases: Mazer v. Stein, 347 U.S. 201 (1954)

Fair Use doctrine enables limited use of copyrighted materials

- Promotes learning by allowing the use of a portion to entire copyrighted works for purposes of education, commentary, or parody
- Should be strengthened by additional legislation to clarify current ambiguities about what constitutes fair use
- Relevant cases: Suntrust v. Houghton Mifflin Co., 252 F. 3d 1165 (11th Cir. 2001), Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)

Copyright’s retroactive extension rewards existing copyright holders without increasing learning

- In 1790, copyright lasted for 14 years with a one-time renewal of 14 years. It is currently applied retroactively to 70 years plus the life of the author for individual works and 120 years from creation or 95 years from publication for corporate works.
- Fails to promote learning by automatically extending the copyright of previous works
- Relevant cases: Eldred v. Ashcroft, 537 U.S. 186 (2003)
- Policy proposal: Require copyright to be renewed every five years (Larry Lessig)

Orphan works limit the lawful use of copyrighted materials

- Hinders learning by preventing the use of materials for which the copyright holder is unreachable
- Policy proposal: Shawn Bentley Orphan Works Act of 2008 (passed by the Senate,

“Cyberlawyer 2.0.” *The Economist*, 6 December 2007.

Educational Multimedia Fair Use Guidelines Development Committee. “Fair Use Guidelines for Educational Media.” *The Conference on Fair Use*, 17 July 1996, <http://www.utsystem.edu/ogc/intellectualproperty/ccmcguid.htm> (accessed 20 October 2008).

Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=499&page=340> (accessed 20 October 2008).

Field, Thomas G. Jr. “Focus on Intellectual Property: What is Fair Use?” *U.S. Department of State*, January 2006, <http://usinfo.state.gov/products/pubs/intelprp/fair.htm> (accessed 20 October 2008).

Field, Thomas G. Jr. “Focus on Intellectual Property: What is Intellectual Property?” *U.S. Department of State*, January 2006, <http://usinfo.state.gov/products/pubs/intelprp/> (accessed 20 October 2008).

Foster, Andrea L. “Legislation to Ease Problem of Orphan Works Is Introduced in Congress.” *The Chronicle of Higher Education*, 25 April 2008, <http://chronicle.com/wiredcampus/index.php?id=2938> (accessed 21 October 2008)

Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin, 2004, <http://free-culture.org/freeculture.pdf> (accessed 20 October 2008)

Lesk, Michael. “Copyright Extension: Eldred v. Ashcroft.” *IEEE Computer Society*, 2003, <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=01177000> (accessed 21 October 2008)

Litman, Jessica. *Digital Copyright*. New York: Prometheus Books, 2006, <http://hdl.handle.net/2027.42/56221> (accessed 20 October 2008).

Mazer v. Stein, 347 U.S. 201 (1954), <http://supreme.justia.com/us/347/201/case.html> (accessed 21 October 2008)

Netanel, Neil Weinstock. *Copyright's Paradox*. Oxford: Oxford University Press, 2001.

“Report on Orphan Works.” *Register of Copyrights*, January 2006, <http://www.copyright.gov/orphan/orphan-report-full.pdf> (accessed 21 October 2008)

“S. 2913 - Summary: Shawn Bentley Orphan Works Act of 2008.” *GovTrack.us*, 15 May 2008, <http://www.govtrack.us/congress/bill.xpd?bill=s110-2913&tab=summary> (accessed 21 October 2008)

“Statute of Anne.” *Wikisource*, 26 August 2008, http://en.wikisource.org/wiki/Statute_of_Anne, (accessed 20 October 2008).

Suntrust v. Houghton Mifflin Co., 252 F. 3d 1165 (11th Cir. 2001),
<http://www.law.emory.edu/11circuit/oct2001/01-12200.opn.html> (accessed 20 October
2008).