

Does Copyright Law Need to Be Reformed?

Considering the issues involved in developing a simplified new copyright law and associated administrative mechanisms.

The U.S. Copyright Act of 1976 (1976 Act), like kindred laws of other nations, is too long, complex, incomprehensible, and unbalanced. It is also sadly lacking in normative heft. This column will consider why it might be a good idea to reform copyright laws, why it may be difficult to undertake such a reform, and how one might go about making copyright laws simpler, more comprehensible, more balanced, and more normative. (For further discussion of the issues explored in this column, see [1].)

WHY IS COPYRIGHT PROBLEMATIC?

The first modern copyright law, the Statute of Anne, was quite short and comprehensible. It only covered maps, charts, and books. One reason why copyright laws became longer and more complex is that over time, legislatures extended copyright to new subject matters, such as musical works, photographs, and

choreography, that required some rules tailored to the manner in which such works were exploited.

But in the past few decades, copyright laws have become unnecessarily long, complex, difficult to comprehend, and biased toward the copyright industry groups who have largely written them to serve their interests.

The incomprehensibility of many copyright provisions didn't matter much as long as they only affected industry groups whose lawyers could decode the statute for them.

Advances in technologies have, however, democratized the creation and dissemination of new works of authorship and brought ordinary persons into the copyright realm not only as users of others' works, but also as creators. One reason why a simpler copyright law is needed is to provide a comprehensible normative framework for all of us who create, use, and disseminate works of authorship.

Another problem with U.S. copyright law is that it is the intellectual work product of a copyright reform process initiated in the late 1950s; it was enacted without serious thought to how it would apply to computers, com-

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puter programs, or computer networks.

In 1965, the Register of Copyrights opined that “it would be a mistake, in trying to deal with such a new and evolving field as that of computer technology to include an explicit provision [on computer-related uses] that could later turn out to be too broad or too narrow.”

Technology developers, educational institutions and libraries, among others, were understandably displeased at the prospect of having to resolve foreseeable disputes over these questions through litigation based on a statute that was intentionally not clarified to deal with them.

The controversy over these and other new technology questions was so intense that the copyright revision process was stalled between 1965 and 1976 while various stakeholders debated how the revised law should handle the new technology issues. One scholar suggested that the revision bill should be rethought from scratch to take new technologies into account, but Congress was weary of copyright revision and in no mood to rethink how computer technologies should reshape copyright law. The 1976 Act was, consequently, passed with a

1950s/1960s mentality built into it, just at a time when computer and communication technology advances were about to start creating the most challenging and vexing copyright questions ever. Much the same is true of copyright laws of other nations.

Thirty years after enactment of the 1976 Act, with the benefit of considerable experience with computer and other advanced technologies, it may finally be possible to think through in a more comprehensive way how to adapt copyright law to digital networked environments as well as how to maintain its integrity as to existing industry products and services that do not exist outside of the digital realm.

WHY REFORM MAY BE DIFFICULT

Meaningful copyright reform is unlikely in the next decade for several reasons. For one thing, national legislatures, particularly the U.S. Congress, have many other challenges to deal with, including the Iraq war, global warming, immigration reform, tax reform, just to name a few. In the grand scheme of things, copyright law just isn't very important.

U.S. copyright industries have, moreover, largely prospered under the rubric of the 1976 Act. It may

be a flawed statute, but it is not so flawed that it is completely dysfunctional for the industries it principally regulates.

To paraphrase an adage, copyright industry groups and lawyers are likely to prefer the devil they know to the devil that might emerge from a copyright reform project. Those with the most clout in the copyright legislative process are unlikely to perceive the present copyright law as unbalanced, and they would almost certainly vigorously resist attempts to recalibrate the copyright balance in a way that might jeopardize the advantages they perceive the present statute as providing them.

A copyright reform project would also require significant amounts of time, money, and energy. It would likely bring to the surface many highly contentious issues, such as those manifested in the legislative struggles that led to the Digital Millennium Copyright Act (DMCA) of 1998. Even modest reform efforts, such as that undertaken to update library copying privileges, have proven difficult.

WHY REFORM IS WORTH A TRY

Copyright reform may be difficult to achieve, but still worthwhile. For one thing, many copyright professionals share my

view that the current statute is akin to an obese Frankensteinian monster (even if we would not necessarily agree on every detail of the problems). Many would welcome a model law or principles project as a way to restore a positive and more normatively appealing vision of copyright as a “good” law.

Implicit in the criticism that many of us level at some aspects of the 1976 Act or at proposals to amend it to further strengthen author’s rights or otherwise add another provision on an ad hoc basis is that we have an inchoate vision of a “good” copyright law that a model law or principles project could potentially bring to light.

Second, a reform proposal could provide a platform from which to launch specific reforms (for example, amendments to the 1976 Act to address the orphan works problem) or to object to proposed amendments to the 1976 Act that would further imbalance that statute or contribute further to the clutter from which it currently suffers.

In order to say “no” to entertainment industry proposals to amend copyright law in a more principled way, it would be helpful to articulate a positive conception of copyright that a model law or principles document might bring to light.

Third, copyright reform proposals might, over time, prove useful as a resource to courts and commentators as they try to interpret ambiguous provisions of the existing statute, apply the statute

to circumstances the legislature could not have contemplated in 1976, or extract some principled norm from provisions that as codified, are incomprehensible or nearly so.

Fourth, a model law or principles could stimulate discourse about what a “good” (or at least a better) copyright law might look like. That, in itself, would be valuable. It may be a valuable resource when a more officially sanctioned copyright law reform project is undertaken in the future.

Fifth, it seems to me the right thing to do. Copyright law used to be a lot simpler and more comprehensible than it is today; it can be made so again.

CORE COMPONENTS OF COPYRIGHT

One way to shrink the size of a copyright law is to determine what core elements it needs to contain. Here is a condensation of U.S. law today:

- What is the subject matter of copyright protection? “Works of authorship.”
- What are the eligibility criteria for works and owners?
 - a. Who is eligible: the “author” (but there are special rules for works made for hire);
 - b. What qualities a work must have to qualify for protection: a work must be “original” (the product of some creativity) and “fixed” in a tangible medium of expression; and
 - c. What is the procedure for obtaining rights: rights attach automatically as a matter of law from first fixation of the work

in a tangible medium (notice of © and registration are no longer required, but are advisable for effective protection; registration is necessary for U.S. authors to bring infringement suits).

- What exclusive rights do authors own: to reproduce the work in copies; make derivative works; distribute copies to the public; publicly perform the work; publicly display the work; import the work into the U.S.
- How long do rights last: life of the author plus 70 years for natural persons; 95 years from first publication for corporations.
- What limitations and/or exceptions to the exclusive rights should the law recognize: fair use, certain library and educational uses, making backup copies of software, among others.
- How to judge infringement: infringement occurs when someone violates one of exclusive rights and does not qualify for an exception; the usual test is whether there is substantial similarity in protected expression in the two works and copying of that expression by that defendant.
- What remedies are available if infringement is found: preliminary and permanent injunctive relief; money damages; destruction of infringing copies; attorney fees; costs.

WHAT TO KEEP, WHAT TO CHANGE?

Copyright law should continue to focus on protecting original works of authorship that have been fixed in a tangible medium of expression. Some countries

protect unfixed works, such as performances, by copyright, but the U.S. Constitution speaks of “writings” and seems to call for fixation as a requirement.

Authors should, of course, be the initial owners of any copyrights in their works. Economic efficiency considerations support giving employers ownership of copyrights in works made for hire.

For almost 200 years, U.S. copyright protection was available only to works whose authors complied with a few simple rules about giving notice of their claim of copyright. Published works without a copyright notice were in the public domain and available for free copying and derivative uses.

Although the 1976 Act allowed authors to cure defective notice to some extent, it was not until 1989, in a move little noticed outside the copyright industries, that U.S. copyright law flipped this presumption.

Now, unless you know for sure that something is in the public domain, you dare not use it, even if you can't locate the author in order to take a license. This, along with the extension of the copyright term for 20 additional years, has deprived the public access to many works that should be in the public domain.

The Copyright Office has proposed legislation to limit remedies for reuse of works whose copyright owner cannot be located after a reasonably diligent effort. This “orphan works” legislation is a step in the right direction, but

the problems of too many copyrights and not enough notice of copyright claims and ownership interests run far deeper than that.

With the rise of amateur creators and the availability of digital networked environments as media for dissemination, the volume of works to which copyright law applies and the universe of authors of whom users must keep track have exploded.

Creative Commons has done a useful service in providing a lightweight mechanism for allowing some sharing and reuses of amateur creations, but copyright formalities, such as notice and registration, may have a useful role in reshaping copyright norms and practices in the more complex world that has evolved in recent years.

The exclusive rights provisions need to be rethought. The reproduction right, in particular, has proven particularly vexing in the digital age. In the early 1990s, the *MAI v. Peak* case opined that every temporary copy made in the random access memory of a computer triggers the copyright owner's exclusive right to control reproductions of their works in copies. *MAI* involved a computer repair firm that was held liable for infringement of computer program copyrights because of RAM copies made when the firm turned on the computer in question to repair it.

MAI was such an outrageously wrongheaded decision that Congress overruled it by amending the

statute, but Congress did not at the same time expressly repudiate the dicta that RAM copies infringe unless they have been authorized.

It is, of course, impossible to access, use, read, view, or listen to copyrighted works in digital form without making numerous RAM copies of the work. The 1995 Clinton Administration *White Paper on Intellectual Property and the National Information Infrastructure* took the position that this was and should be the law and sought to inject this rule in the WIPO Copyright Treaty of 1996. This stratagem did not succeed, and later cases have called this conclusion into question. The RAM copy theory should be rejected.

We should probably consider returning to a framework for copyright in which the exclusive rights are narrowly tailored and construed, and in which acts not falling within them were free from copyright constraints.

There should also be room for courts to create new exceptions and limitations, as they did with the fair use and the first sale exceptions, when this is necessary and appropriate to achieving a balance of private and public interests in copyright law.

In the guise of simplifying the exclusive rights provision and articulating certain exceptions to these rights, the 1976 Act broadened the rights substantially. The unregulated spaces of copyright seem to have shrunk considerably, but we can open them up again

through careful construction of new rights provisions. It is also time for copyright law to be more articulate about what rights users have.

Most works of authorship do not need such a long duration of rights as copyright laws now provide. More works should get into the public domain sooner. Shortening the duration of the copyright term would be one way to achieve this objective. Another would be to require periodic renewals of copyright claims for a small registration fee. International treaty obligations will surely be asserted as a reason not to make structural changes to the life + X-years approach to copyright duration, but it is worth thinking more carefully about durational limits.

Although the 1976 Act provides that infringement occurs when someone trespasses on an exclusive right (and this trespass is not excused by an exception or limitation), the statute is silent about how judges or juries should determine whether an infringement has occurred. Although the courts have developed tests for judging infringements and for saying which issues experts can testify about and which they can't, case-based infringement standards are confusing and unpredictable. They too should be clarified.

Courts should have power to stop infringements and to order infringers to pay damages for the harm. The remedy issue most in

need of serious rethinking is under what circumstances so-called statutory damages should be recoverable. U.S. copyright law provides that regardless of whether a copyright owner has suffered any damages at all from an infringement, he or she can ask for statutory damages, and the court can award any amount between \$750 and \$30,000 per infringed work, as the court deems just.

This can go up to \$150,000 per infringed work if the infringement is willful. There are no guidelines at present for how statutory damages are to be awarded. This is too arbitrary to be a fair and reasonable provision.

All parts of a copyright law should be written in plain language so ordinary people, and not just the "high priests" of copyright, can understand what it means and the normative reason that it should be part and parcel of the basic statutory framework.

A good copyright law should also articulate the purposes it seeks to achieve and offer some guidance about how competing interests should be balanced, perhaps through a series of comments on the model law or principles.

In addition to considering what substantive rules should be part of a model copyright law or principles document, it is important to conceive a way to restructure copyright institutions and policy-making processes so the dysfunctions that currently beset copyright lawmaking can be averted or at least mitigated to some degree.

It makes little sense to develop a

new copyright law that is simple, comprehensible, and coherent if there is no mechanism to prevent it from getting cluttered by the same kinds of industry-specific "fixes" and compromises that have made the 1976 Act so bloated.

The simplest way to achieve this objective would be a legislative delegation of rule-making authority to the government office responsible for carrying out copyright-related responsibilities. Many of the industry-specific exceptions now in the 1976 Act, for example, should probably be the byproduct of agency rule-making rather than being in the statute. Perhaps a restructured, more administratively rigorous government copyright office could take on some adjudicative and policymaking functions as well.

A good copyright law is possible, but will only be achievable if someone gets to work in trying to bring it about. This will be an important project for me in the next several years. I welcome suggestions from *Communications* readers about what a good copyright law would look like. **C**

REFERENCE

1. Samuelson, P. Preliminary thoughts on copyright reform. *Utah Law Review* (forthcoming 2007).

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