WHICH SIDE ARE YOU ON?: The Vanishing Middle in U.S. Copyright Policy Discourse

It is the thesis of this presentation that various stakeholders in the U.S. copyright system, who not so long ago participated actively in a societal discussion of how to "balance" private rights with public access, now are actively reconstituting themselves into two camps – the "protectionists" and the "secessionists" – with little or no shared vocabulary or common interest. Twenty five years ago, when the Copyright Act of 1976 was still brand new legislation, representatives of authors, distributors and consumers often quarreled about specific copyright policy issues. But they generally voiced adherence to a unitary vision of the purposes of copyright: to enrich the store of knowledge by providing incentives to creativity. And most acknowledged, and least in general terms, the centrality of the "fair use" doctrine.

Today, this is no longer the case: most distributors (including publishers, film studios, record companies, etc.) unabashedly (and successfully) argue that the best copyright law is one that permits them to maximize return on investment; faced with this challenge, many consumerists (using that term broadly to include many cultural institutions) and some creators are increasingly drawn to self-help solutions that depend on the creation of voluntary copyright-free zones. In this re-sorting of stakeholder positions the likely losers are individual information practitioners, including creators who rely for support, however tenuously, on the copyright system and consumers and scholars whose projects depend on reasonable levels of access to copyrighted materials.

The "protectionist" strand in the development contemporary copyright law is manifested in many legislative and judicial developments of the past decade, including (to name only a few):

- The 1998 Sonny Bono Copyright Term Extension Act (subsequently upheld by the U.S. Supreme Court in Eldred v. Ashcroft, which added 20 years to the duration of most present and all future copyrights;

- The every-greater scope of protection against unauthorized adaptation (as distinct from conventional commercial piracy) afforded to literary, musical and artistic copyrights in the courts;

- The increasing reach of judge-made doctrines of "indirect" liability for copyright infringement, including institutional responsibility for the activities of members, customers or patrons;

- The dramatic enhancement of potential civil and criminal penalties for copyright infringement; and

- The Digital Millennium Copyright Act (also 1998), which created a new level of "paracopyright" law, consisting of new prohibitions against (and new penalties for) the "circumvention" of electronic locks (such as passwords or encryption) applied to copyrighted works in digital form.

The "protectionists" have been largely successful in discrediting public access to information as a factor in the making of copyright policy. Efforts by the copyright "public interest" community to confront this trend in the courts and in Congress have – to date – met with little success.

The latter fact may help to explain the new prominence of the "secessionist" tendency already mentioned. Prominent examples include:

- The "open source" software movement, which relies on voluntary contributions by distributed networks of volunteer programmers to produce and continually improve computer programs which are made available for use (and further adaptation) to the general public;

- The rise of electronic "open access" journals and on-line utilities such as the Public Library of Science, by means of which scholars in the sciences and humanities are sharing voluntarily the content of publications that would formerly have been controlled (by means of copyright ownership) by commercial publishers: and

- "Creative Commons," the initiative to encourage creators of new (and old) works of art, literature and music to make them broadly (and non-exclusively) available public use subject to one or more standard restrictions (such as prohibitions on adaptation to new media or requirements of authorship credit).

These diverse manifestations share a common reliance on the power of community action, a non-economically-oriented vision of incentives for information production, and an attitude toward copyright that mirrors Coriolanus' toward Rome: "Thus I turn my back: There is a world elsewhere...."

As magnificent as the "secessionist" experiments may be, they also share certain limitations. Obviously, they are anathema to large, corporate holders of copyrights. More disturbingly, they have little relevance to individual artists, musicians, writers and scholars who rely on commercial market (whether general or specialized) for their livelihood; how ever much these small creators might (in principle) like to give their works away, the economic realities that prevent them from doing so today are likely to prevail in the foreseeable future. And they border on the irrelevant for the many teachers, students, researchers and others (including contemporary artists) whose practices involve extensive reference to the modern historical and cultural record.

Institutions holding significant collections of materials subject to actual or potential copyright claims (including museums, libraries and archives) should resist being seduced into "protectionist" attitudes by an incomplete vision of short-term interest into the "protectionist" camp by an incomplete vision of short-term interest. And while they may wish to participate in some "secessionist" projects, they should avoid an exclusive association with this emerging community. Ultimately, only a revitalized discourage of appropriately limited rights and rightful

limitations can serve both the goals of these institutions, and the larger ends of the communities they exist to serve. But in an environment where there is less and less space for meaningful conversation (or even a civil exchange of views) between advocates of polarized approaches to copyright policy and practice, rediscovering the middle way is a significant challenge.

Nevertheless, three short- and medium-term goals suggest themselves:

! Building public support for policy changes designed to "roll back" the worse excesses of recent protectionist legislation, including the revision of the Digital Millennium Copyright Act to incorporate a "fair use"-like defense to unauthorized circumvention. This is the objective of H.R. 107 (the Digital Media Consumers Rights Act), pending legislation already supported by consumer organizations, the national library associations, technology innovators, and others.

! Cooperating in an effort to develop and publicize disciplinary codes of "best practices" for the use of copyrighted materials. One of the greatest threats to the continued viability of the "fair use" doctrine is the absence of such well-articulated positions; their development would guide individual information practitioners, help to reassure "gatekeepers" (including publishers) that individuals are acting "reasonably" and "in good faith," and help to ward off (or if necessary defend against) predatory claims by copyright owners.

! Helping to foster a legislative solution to the problem of "orphan works" – the large category of materials that are presumptively subject to copyright but lack readily traceable owners who can grant copyright permissions. Many of the materials in question reside in institutional collections, but thanks to term extension and fears of aggressive copyright enforcement, copyright looms larger and larger as a barrier to their productive re-use.

The first of these initiatives is well underway, and moves toward launching second are beginning. The third requires urgent attention.

There remains a window of time in which reclaim copyright law as a field of regulation informed by vigorous competition among alternative visions of the ultimate public interest. But every day that window closes a little further.

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