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THE POLITICS OF INTELLECTUAL PROPERTY[♦]

JESSICA LITMAN^{*}

In May 2005, Keith Aoki invited me to participate on a panel on “The Politics of Copyright Law” at the 2006 Association of American Law Schools (“A.A.L.S.”) mid-year meeting workshop on Intellectual Property in Vancouver, British Columbia. The panel, renamed “The Politics of Intellectual Property,” and moderated by Keith, included talks by Justin Hughes, Mark Lemley, Jay Thomas, and me, and it was followed by three concurrent sessions on “The Politics Concerning Moral Rights,” “The Politics of Global Intellectual Property,” and “The Politics of Patent Reform.” I’m not sure what the organizing committee had in mind when it put together our panel. Judging from the speakers invited to participate, it seems likely that the organizers expected us to talk about how intellectual property (“IP”) law plays out in Washington. (Mark and Jay had been active in extant efforts to draft patent reform legislation, Justin has served as a policy expert in the patent office, and I’ve spent a large chunk of my life writing about the copyright legislative process.) Since nobody gave us explicit instructions, though, I took the opportunity to talk about something that had been on my mind. Although the A.A.L.S. had recently begun to make Annual Meeting talks available as podcasts, it did not record the 2006 mid-year meeting, and the text of the talk I gave has been sitting unread on my hard drive ever since. A few months ago, Justin Hughes wrote to ask me for a citation to the talk. When I told him it had never been published, he suggested that I agree to publish it here.

I think the reason the committee invited me to speak on a panel discussing the politics of intellectual property is that they expected me to discuss the political process that surrounds the enactment of copyright legislation. What I’d really like to talk about is the politics of copyright scholarship. So, I’m going to start with the first and quickly segue into the second.

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^{*} John F. Nickoll Professor of Law and Professor of Information. I’d like to thank Keith Aoki, Justin Hughes, Jane Ginsburg, and Jon Weinberg. © 2009 Jessica Litman.

For the past 100 years, Congress has relied on lobbyists for copyright-affected industries to get together with each other and negotiate the language for any new copyright legislation.¹ When all the lobbyists have worked out their disagreements and arrived at language they can all live with (commonly with some House and Senate Report language to accompany it), they give it to Congress and Congress passes the bill, often by unanimous consent.²

This explains some things that tend to characterize copyright legislation, like why enacted copyright bills are so long and internally inconsistent, why it takes Congress so long to pass them, and why so many of the provisions in copyright laws look more like rent-seeking than information policy. Once the process got entrenched, it became very difficult to reform it, even if members of Congress had had the stomach to try. As soon as book publishers and motion picture studios and record companies and television broadcasters discovered the advantages of a legislative process in which they jointly controlled the playing field, it became nearly impossible to wrest that control away. The inter-industry negotiation process has gotten more and more dysfunctional, as more and more lobbies showed up and demanded a seat at the bargaining table.³

I've argued in much of my published work that this kind of process gives short shrift to the public interest in copyright legislation. A variety of organizations have shown up claiming to speak for the public interest, including, over the years, the American Bar Association, the American Civil Liberties Union, the Consumers Union, and the Electronic Frontier Foundation, without ever getting a seat at the table. Similarly, ad hoc groups (like the Digital Future Coalition) have done intensive work behind the scenes without ever getting to be real players. Once upon a time, the Copyright Office saw that role as an integral part of its mission. Over the past fifty years, though, the Copyright Office has gradually come to see its most important constituents as the entities who own copyrights, and has seemed increasingly willing to subordinate the interests of both authors and the public to the interests of the publishers, record labels, software and motion picture companies who dominate its client base.⁴

One might naïvely expect that our elected senators and rep-

¹ I explored this theme in detail in JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

² See, e.g., 146 CONG. REC. S10,498 (2000) (Senate passes Work Made for Hire and Copyright Corrections Act by unanimous consent); 144 CONG. REC. S11,672 (1998) (Senate passes Sonny Bono Copyright Term Extension Act by unanimous consent).

³ See LITMAN, *supra* note 314, at 35-69, 122-50.

⁴ See, e.g., Laura N. Gasaway, *The New Access Right and Its Impact on Libraries and Library Users*, 10 J. INTEL. PROP. L. 269 (2003); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994).

representatives are giving proposed legislation a careful look to make sure it advances the public interest, but they don't seem to see that as their role; rather, they seem to think that their job is to ensure that the important stakeholders have had an opportunity to sit down at the table and work things out with each other.

Obviously, the answer to the question of who is entitled to a seat at the table ends up having enormous influence on the ultimate shape of any legislation, so, lately, a lot of lobbyist energy has gone into questions of who gets to play. In a very clever move about ten years ago, for instance, when the order of the day was the legislation that ultimately became the Digital Millennium Copyright Act, libraries and universities, who have had a historical tendency to raise public interest issues as well as narrow parochial library and university issues, were shunted off into a special, topic-specific negotiation about library copying and distance education, and excluded for a time from the talks that led to the overall strategy of the bill.⁵

That entire legislative process was a lot nastier than the ones that preceded it. People played a kind of hardball that you don't really expect among professionals who know they are going to need to negotiate with each other next year and the year after that. Folks perceived the stakes as very high. They made all sorts of apocalyptic pronouncements. They played what were perceived as underhanded tricks. There's a true story about one guy threatening another guy with bodily harm.⁶ The same underlying negotiation process is what got the bill written, but there was an enormous amount of extra meanness along the way.⁷

Sometime in there, people started talking about what was going on as a "copyright war."⁸ I think everyone meant it metaphorically, even ironically, at the beginning. The metaphor captured something salient about the overheated prose and the extraordinary degree of mutual mistrust that characterized the lobbying and negotiations. The notion caught on, though, and somehow, we lost the sense of irony. I don't think Jack Valenti was being even a little ironic when he insisted that copyright infringers

⁵ See ASS'N OF RESEARCH LIBRARIES, CONFERENCE ON FAIR USE JOINT STATEMENT (1997), <http://www.arl.org/pp/ppcopyright/copyresources/confu.shtml>; BRUCE A. LEHMAN, U.S. PATENT & TRADEMARK OFFICE, THE CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE (1998), <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf>; Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 OHIO ST. L.J. 783 (2001).

⁶ See Ruth Larson, *Patent Chief Accused of Furious Threats; Critical Opinion Article Sparked Dispute*, WASH. TIMES, Feb. 20, 1996, at A6.

⁷ See LITMAN, *supra* note 314, at 122-63.

⁸ See, e.g., Lawrence Lessig, *Re-crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56 (2006); Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 (2002).

are waging a terrorist war against copyright owners.⁹ These days, scholars, journalists, lobbyists all speak completely matter-of-factly about this copyright war we're in the middle of.

In 2003, of course, the United States went off and picked a real war with Iraq, and that gave us some points of comparison. The moral of that story, I think, is that war is almost always a really bad idea. Without in any way intending to trivialize the war in Iraq, moreover, I can say that the digital copyright war shares more characteristics than one would think with what one might want to call an "actual war."

Like actual wars, the copyright wars have been expensive. The lobbying and litigation budgets of the major players have risen to heights that would have been unimaginable a decade ago.¹⁰ That extra money has trickled down to law schools, which have added courses, clinics and faculty over the past decade to meet the perceived demand. We all got fat on this war, but there have been costs.

Most importantly, the copyright war hasn't been very healthy for the copyright law. We've built whole series of costly, poorly designed, and ill thought-out legal fortifications.¹¹ Congress has passed copyright amendments loaded with language designed to defend copyright owners against multiple real and imagined threats. Those new laws haven't performed as advertised, but they have snarled folks up in a host of new technicalities.¹² I per-

⁹ See John Logie, *A Copyright Cold War? The Polarized Rhetoric of the Peer-to-Peer Debates*, FIRST MONDAY, July 7, 2003, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1064/984>; Amy Harmon, *Black Hawk Download: Moving Beyond Music, Pirates Use New Tools to Turn the Net Into an Illicit Video Club*, N.Y. TIMES, Jan. 17, 2002, at G1, available at <http://www.nytimes.com/2002/01/17/technology/circuits/17VIDE.html>.

See Center for Responsive Politics, TV/Movies/Music: Long Term Contribution Trends, <http://www.opensecrets.org/industries/indus.php?ind=B02> (last visited Sept. 18, 2009); Center for Responsive Politics, Computers/Internet: Long Term Contribution Trends, <http://www.opensecrets.org/industries/indus.php?ind=B12> (last visited Sept. 18, 2009); Center for Responsive Politics, Communications/Electronics: Long Term Contribution Trends, <http://www.opensecrets.org/industries/indus.php?cycle=2010&ind=B> (last visited Sept. 18, 2009).

¹¹ See, e.g., 17 U.S.C. §§ 114, 1201 (2006).

¹² Perhaps the best example is the digital performance right for sound recordings, added in 1995, to allow record labels to control Internet transmission of their sound recordings and amended repeatedly and unsuccessfully. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 109, Stat. 336 (1995) (amending 17 U.S.C. § 114); Pub. L. No. 105-80, § 111, Stat. 1529, 1531 (1997) (amending 17 U.S.C. § 114); Digital Millennium Copyright Act, Pub. L. No. 105-304, § 112, Stat. 2860, 2894, 2897 (1998) (amending 17 U.S.C. § 114); Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 116, Stat. 2780, 2781, 2784 (2002) (amending 17 U.S.C. § 114); Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 118, Stat. 2341, 2362-2364 (2004) (amending 17 U.S.C. § 114); Copyright Royalty Judges Program Technical Corrections Act of 2006, Pub. L. No. 109-303, § 120, Stat. 1478, 1481-82 (2006); Webcaster Settlement Act of 2008, Pub. L. No. 110-435, § 122, Stat. 4974 (2008) (amending 17 U.S.C. § 114).

sonally think the war-time mentality has encouraged us to do a fair amount of damage to the fabric of copyright law, and that we'll be cleaning up that mess for decades to come.

Like conventional wars, the copyright war has been intensely polarizing. The conflict has been protracted and venomous. The middle ground seems to have disappeared. Anyone who works or writes in the copyright field is either "one of us" or "one of them." It seems to me that this us-versus-them mentality had some unfortunate effects on the sort of scholarship we all write. I thought I'd take advantage of the podium to bite the hands that feed me, and say some unpopular things on that topic.

I don't want to suggest that there isn't excellent copyright scholarship being written. I can name off the top of my head at least half a dozen scholars who write consistently provocative, interesting new stuff. I read a bunch of articles this year from which I learned something interesting and important that I didn't know before. I won't name anyone; my intention is that everyone in the room can figure that she or he is in that category. But, I also read a lot of pieces for which it was absolutely clear that the author had settled on the answer before coming up with the question. I ran into economic models that had been designed to deliver particular results. In most of those pieces, there was more than one moment where an inconvenient discrepancy or undesirable inference threatened to lead somewhere interesting and unexpected, and, wouldn't you know it, those moments were glossed over or ignored.

Now, there are lots of reasons why someone might feel impelled to write such a piece. One of them, I'm sure, is that we expect so many articles from our untenured faculty that they feel as if they need to write things in a hurry, and it seems easier to write something on a topic on which one already knows what one thinks. Another reason Justin Hughes has noted is that we're better trained as advocates than we are as scholars, so it's natural to write advocacy pieces and tailor our research to generate the citations we imagine we need for our arguments.¹³ But I think the wartime mentality is also playing a big role here.

I think the sense that we're in the middle of a copyright war has pressured many of us to choose sides. One gets a phone call or an email message asking one to sign on to an amicus brief, and one feels as if one needs to declare an affiliation. Or, motivated by a deeply felt conviction that the wrong side of the debate is winning the battle of the rhetorical flourish, one wants to produce the

¹³ See Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 996 (2006).

devastating argument that will turn the tide. In wartime, one is loyal to one's friends and allies. Now is not the moment to suggest that Professor X's latest work might be a little bit sloppy or conclusory.

We're getting to be a large community. Once upon a time, a scholar could read essentially every copyright article, note, or comment published every year. That's no longer possible. As long as we have to choose, why not choose to read the stuff we know we're going to appreciate, because it takes a right-minded view? Indeed, there are enough of us that we can have different conferences for the folks who are them and the folks who are us. And we do that, too.

Not too long ago, I was speaking with a colleague who found herself at a copyright conference in a room of scholars the majority of whom, she felt, were likely to disagree with her. Not everyone, mind you, but more than half. She confessed that she felt uncomfortable sharing her ideas with that crowd, because she couldn't trust the people there not to misuse what she was saying. She was used to copyright meetings where she felt that the people at the conference shared a sense of mission with her, and she was nervous at this one because she believed that some folks' sense of their mission might diverge sharply from her own.

I don't know whether untenured scholars feel some pressure to declare allegiance to (or independence from) some side in this dispute for its own sake, but I wouldn't be surprised if they did, whether because their senior colleague has picked a side and they fear that he or she will evaluate their work in part based on its recommendations, or because they believe that being perceived to be on a particular side is more likely to generate invitations to speak at conferences and participate in symposia.

Don't get me wrong: there are people out there who argue that advocacy makes bad scholarship, but I am not one of them. Some of the most illuminating scholarship I've read has been advocacy. These days, I find myself going back again and again to the work of L. Ray Patterson, whose later work was almost entirely advocacy.¹⁴ I paid too little attention to some of Ray's arguments when I read them the first time, because they seemed so nakedly partisan.¹⁵ A number of years later, though, I'm concluding that

¹⁴ See, e.g., L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict Between Property Rights and Political Rights*, 62 OHIO ST. L.J. 703 (2001); L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S. 365 (2000); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987).

¹⁵ See, e.g., L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* (1991); L. Ray Patterson, *Copyright and "The Exclusive Right" of Authors*, 1 J. INTEL. PROP. L. 1 (1993); L. Ray Patterson, *Understanding Fair Use*, 55 L. & CONTEMP. PROBS. 249 (1992); L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry into a*

there was an enormous reserve of truth underlying that advocacy.¹⁶

Indeed, the kind of article I find most difficult to respect is the piece that casts itself, implausibly, as the sole occupant of the middle ground, usually by mischaracterizing or caricaturing the scholarship it paints as extremist on either side. So, I'm not suggesting that we'd all write better articles if we started to think non-partisan thoughts. My point is a little different: I think that knowing in advance the conclusion you need to reach – whatever it is –, while the bread and butter of law practice, usually results in legal scholarship that may be articulate and persuasive but isn't very interesting, and doesn't in fact advance the ball much. I think the sense that we're in the midst of a copyright war has increased the incidence of work written to flog a familiar point of view, and has seemed to decrease scholarly risk-taking, especially if the risk might result in writing something that would give aid and comfort to the wrong side.

If we keep this up, we'll miss all of the interesting possibilities that might show up if we made more of a habit of questioning our own assumptions. And I think those possibilities are likely to be important in two different areas.

First, the possibilities we haven't thought of, because we feel under siege and unable to find the time and mental room to ask ourselves interesting questions we don't know the answers to, may end up being important in the effort to repair the mess the copyright war has made of the copyright law. What we've come up with so far is not likely to solve the kinds of problems we're seeing. That is, networked digital technology posed serious challenges to copyright law, the legislative process I described responded to those challenges in ways that, in my view, caused more problems than they solved, and the persistent sense of being in the middle of a copyright war has exacerbated unwise and unworkable responses to those problems. Very little of the stuff that we have written so far suggests a way out that is both palatable and plausible. That doesn't necessarily mean that no way out exists; it may mean that we need to think differently to find it.

Second, the increased interest in copyright and intellectual property has engaged a lot of folks – new and established scholars from different fields – who didn't think of themselves as IP scholars but found themselves fascinated by particular IP problems and got sucked in. Yesterday's program on different perspectives is one illustration of that.¹⁷ All of us have colleagues who base them-

¹⁶ *Need for a Federal Statute of Unfair Competition*, 17 U. DAYTON L. REV. 385 (1992).

¹⁶ Ray's final book has just been published posthumously by the Houston Law Review. See L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright*, 46 HOUS. L. REV. 215 (2009).

¹⁷ That panel, "Perspectives on Competition and Intellectual Property," included presen-

selves in other disciplines but dabble in our pond. Some of them eventually move in permanently. I've noticed a defensive tendency on both sides of the divide to greet those scholars who hang with the "thems" rather than the "usses" as "not real" IP or copyright scholars. (The state of being "not real" seems to persist for many years, especially for those who don't teach a traditional IP course.) That's a pity, since there are lots of areas in which our methodology could use additional rigor, and one obvious source of that would be scholars trained in those fields. Moreover, if something that seems like immutable truth to an IP lawyer sounds like incomprehensible nonsense to someone who isn't an IP lawyer, or isn't one yet, maybe there's something worth exploring there. We can't really communicate and collaborate with these relative newcomers, though, if we feel too besieged to entertain the thought that everything that we think we think might be wrong.

tations from perspectives denominated as "Philosophical," "Antitrust," "International," and "Open Source" by Wendy Jane Gordon, Herbert Hovenkamo, Jerry Reichman, and Pamela Samuelson. Outlines of the talks are online at http://www.aals.org/events_2006intpropprogram.php.