American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

Spring 1996

Caught in the Net of Copyright

Peter Jaszi
American University Washington College of Law, pjaszi@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev

Part of the Intellectual Property Law Commons

Recommended Citation
Peter Jaszi, *Caught in the Net of Copyright*, 75 Oregon Law Review 299 (1996).
Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/2108

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

PETER JASZI*

Caught in the Net of Copyright

AS an overture to this Comment, I'd like to begin with one of my favorite passages from the recent National Information Infrastructure (NII) Task Force Working Group Report on Intellectual Property and the NII—the so-called White Paper.[1] The passage is not one of the deceptively bland legislative proposals—nor one of the strategic half-truths in the purported summary of current copyright law. Rather, it is a passage from the section on copyright awareness, and it is an excellent example of a good idea gone wrong. The good idea is that our elementary and secondary schools could take a role in preparing students for electronic citizenship, by, among other things, generating discussion of issues associated with intellectual property ownership. Unfortunately, the working out of this idea in the White Paper smacks more of a program of mind control than one of genuine education. High schoolers, we are told, should be taught to "just say yes" to licensing.[2] The message for teaching the primary grades is similar. The White Paper notes that "basic concepts of intellectual property . . . are easily taught at a young age. More complicated topics . . . would likely be reserved for later study. However, complexity of the subject matter alone is not the only consideration."[3] There are different ways of reaching these young students. For instance, the lesson that the White Paper advocates is as follows:

> Certain core concepts should be introduced at the elementary school level—at least during initial instructions on computers or the Internet, but perhaps even before such instruction. For example, the concepts of property and ownership are easily explained to children because they can relate to the underlying

* Professor, American University, Washington College of Law; B.A., 1968; J.D., 1971, Harvard. Internet: pjaszi@american.edu.

[1] INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter White Paper].

[2] *Id.* at 208.

[3] *Id.* at 207.

> notions of property—what is "mine" versus what is "not mine," just as they do for a jacket, a ball, or a pencil.[4]

When I first read this passage, I realized that there was something deeply skewed about the White Paper's project—for this recommended description of intellectual property for beginners was not one I recognized. The message is profoundly different from the ordinary 'Net user's understanding of rights and duties, grounded as that understanding is in an ethic of information sharing. It fails to recognize what I have spent my teaching career trying to demonstrate to students: that information is a special kind of property, one which—unlike a ball or a jacket—improves, rather than degrades, with use. And perhaps most seriously, considering the function of the White Paper, this description deviates from the understanding of rights in information which traditionally has characterized American copyright—one in which the public interest in reasonable access to information has been afforded as much weight, in balancing, as the private interest in control. The more I read of the White Paper, the more I realize that the same off-center feeling is true of the document as a whole.

What, then, is afoot? Is the 'Net changing copyright—or the other way around? It's a question to which, for once (and wouldn't my students be surprised to hear it!), I have a fairly clear answer. Copyright is changing or is in the process of changing. Unless something is done to arrest current trends, as things stand now, the network environment is at risk of being swept up in a general restructuring of American copyright law which has been taking place, without much fanfare, over the past few years. This process, to begin with, had little if anything to do with new information technology, but it now threatens to prevent that technology from achieving its full cultural and economic potential. This process—the background music to the White Paper program—is my main subject today.

Briefly, the restructuring of copyright has had the cumulative effect of privileging the interests of "content providers"—a fine new euphemism for corporate copyright owners—over the interests of information users. In addition, it is putting at risk the principle of assured public access to the fruits of creativity which traditionally has been one of the pillars of our copyright system. For me, this principle means several things: namely, copyright

---

[4] *Id.* at 205.

should operate to assure the existence of a robust, constantly replenished public domain—an informational commons on which we are all free to draw in our research and teaching, and for our various creative projects. Accordingly, the special structures of copyright doctrine which exist to assure a reasonable level of public access even where copyrighted works are concerned, such as the doctrine of fair use,[5] should be preserved and nurtured.

The importance of assuring public access was roundly affirmed in the debates leading up to the Copyright Act of 1976, the last general revision of our copyright laws, and in the Act itself.[6] By the same token, the records of the legislative history of the 1976 Act reflect the traditional rhetoric of purpose in American copyright—that is, the notion that copyright is, or should be, an incentive to the creation and dissemination of new works to the public.[7] But in the current debates, such as they are, about the innovations which make up the recent pattern of copyright *peristroika*—including the debate now shaping over Senate Bill 1284[8] and House Resolution 2441,[9] the bills to implement the White Paper program—we hear less and less about copyright as a cultural incentive, and more and more about "natural justice" for authors. In that debate, there is also an increasing emphasis on the need to provide for the continued economic well-being of the information and entertainment industries in an increasingly competitive international economic environment.

Where to begin? What should be the first number in my program of selections from the recent copyright reform Hit Parade? Perhaps the most obvious place to start is with a piece of legislation which passed into law, almost unnoticed, back in 1992—The Copyright Renewal Act, which amended section 304 of title 17.[10] This legislation made copyright renewal automatic, and, by that means alone, it dramatically curtailed works protected by copyright before 1978 from entering the public domain. Like so many of the legislative developments I address in the following discus-

[5] The doctrine of fair use originated in the common law and is now codified in the Copyright Act. *See* 17 U.S.C. § 107 (1994).

[6] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-1101 (1994)).

[7] *See, e.g.*, H.R. Rep. No. 1476, 94th Cong., 2nd Sess. (1976).

[8] S. 1284, 104th Cong., 1st Sess. (1995).

[9] H.R. Res. 2441, 104th Cong., 1st Sess. (1995).

[10] The Copyright Renewal Act of 1992, Pub. L. No. 102-307, title I, § 102(a), (d), 106 Stat. 264, 266 (codified as amended at 17 U.S.C. § 304(a), (c) (1994)).

sion, this one occurred with minimal public discussion, and with scant attention on the part of the legislators to the question of exactly how extending the term of protection for works already in existence could be said to promote "the Progress of Science and the useful Arts"[11]—the constitutional standard by which new initiatives in copyright protection should be assessed. To the extent that any justification was offered, it was in terms of the importance of doing "justice" to authors and their families, who were "deprived" of their "rights" by the operation of renewal formalities.[12]

As it turned out, automatic renewal was only an overture. Thus, in 1994, Congress passed the Uruguay Round Agreement Act (URAA)[13] to implement the so-called TRIPS Agreement (the Agreement on Trade-Related Aspects of Intellectual Property Rights) which forms part of the Final Act of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[14] The URAA has the effect of restoring to copyright, as of January 1, 1996, unknown tens or hundreds of thousands of works of foreign origin which are currently in the public domain in the United States. This legislation was justified, in part, on the same rationale of "natural justice" which had been articulated in support of automatic renewal, but much more substantially by reference to our country's international obligations and by the overarching importance of our campaign to promote greater levels of protection for United States works abroad. Although the United States had found it unnecessary to provide retroactive copyright protection for foreign works when we joined the Berne Convention in 1988, our "recommitment" to Berne principles in TRIPS in 1994[15] somehow altered everything—as a matter of geopolitics, if not as a matter of law.

These new rhetorics of justification are now being used to bolster the case for another change in copyright law which is certainly dubious, at best, in terms of traditional domestic copyright

---

[11] U.S. CONST. art. I, § 8, cl. 8.

[12] *See, e.g.*, S. REP. No. 194, 102nd Cong., 1st Sess. (1991).

[13] 19 U.S.C. §§ 3501-3624 (1994).

[14] The TRIPS Agreement was one of several trade agreements incorporated into the World Trade Organization (WTO) Agreement which was negotiated at the end of the Uruguay Round of GATT in 1993. TRIPS requires WTO members to abide by international treaty obligations, such as those provided in the Berne Convention. *See* Gloria C. Phares, *Retroactive Protection of Foreign Copyrights: What Has Congress Be-GATT?*, J. PROPRIETARY RTS., Apr. 1995, at 2.

[15] *See id.*

policy considerations. But this change is one that might still be stopped. I refer to the current legislation in Senate Bill 483 and House Resolution 989, the Copyright Term Extension Act of 1995,[16] which would add twenty years to the term of copyright protection for almost all published works, and add at least ten years to the term of protection for unpublished ones—thus further postponing the entry of these works into the public domain. One set of justifications for this proposal, which I've referred to elsewhere as a "down payment on perpetual copyright on the installment plan,"[17] is cast squarely in terms of "authors' rights." Consider the following selection from the proextension testimony at a September hearing before the Senate Judiciary Committee. The voice we are hearing, sounding a rich fantasy on themes of patriarchal longing, is that of composer Alan Menken, who made his name creating the soundtracks for a series of Disney animated features based on public domain materials, such as *The Little Mermaid*, *Aladdin*, and *Pocahontas*:

> [I]n a way each song is our children, and we put—we bring them into the world and they begin to toddle and then they begin to walk. . . . But there's many, many—a lot of my work that I don't expect will maybe reach fruition until maybe after my life—work that may be rediscovered. I would like that work protected. I would like my children, and their children, and my children's children to be able to keep an archive to protect the use of my work, to see to it that it . . . is being treated fairly. That is an incentive. It is important. You build a career as a composer and a songwriter . . . in your heart.[18]

The other theme sounded by those making the case for copyright term extension—one just as jarring to the ears of the copyright traditionalists like myself—is that of promoting returns to American content providers in the international marketplace, treated as an end in itself, rather than as a means to accomplish some other goal. At a technical level, the proposed legislation is being justified as a measure necessary to bring United States law into conformity with the developing norms of the European Union, and thus to assure United States copyright owners the greatest possible return in royalties from the European market in

---

[16] S. 483, 104th Cong., 1st Sess. (1995); H.R. Res. 989, 104th Cong., 1st Sess. (1995).

[17] *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Judiciary Committee*, 104th Cong., 1st Sess. 24 (Sept. 20, 1995) (unofficial transcript, Federal News Service) (statement of Peter Jaszi, Professor of Law).

[18] *Id.* at 33 (statement of Alan Menken, composer).

books, movies, records, and software. This argument overlooks the price which domestic institutions, domestic creators, and domestic consumers would pay to secure this windfall for the entertainment and information industries.

Consider this aria, delivered by Jack Valenti of the Motion Picture Association of America at the same Senate hearing I mentioned earlier:

> I deal in the real world . . . . And the real world says, as follows: The great advantage the American film industry has over the rest of the world is its ability to form capital, for the most expensive piece of art today is a motion picture. . . . One of the great secrets of the American dominance in the world is their ability to pour into a film enormous resources, the most talented people in the world cost money. . . .
>
> As I started out my presentation, I swept away all legalisms, all academic theories in dealing in what we have to face and the challenges of the world, and that is to make sure that the American film companies continue to have this huge advantage of capital formation based on their libraries . . . .[19]

Subtly, or not so subtly, arguments of this kind teach that the enactment of changes in the law which secure the maximum economic advantage to American information and entertainment enterprises is identified as a proper end in itself for copyright policy.

Taken together, the series of piecemeal legislative initiatives I've been describing amounts to a reconceptualization of American copyright at least as far-reaching as that which occurred in 1976, and perhaps more so in that it entails a turning-away, as it were, from traditional copyright values with their emphasis on interest balancing. Moreover, these tendencies to turn away from traditional copyright values are not only observed in Congress. Recent developments in the courts should be of great concern as well—especially where "fair use" is concerned. For example, last year's decision in the Second Circuit Court of Appeals, *America Geophysical Union v. Texaco Inc.*,[20] is being widely interpreted as an endorsement of the view that where a scheme exists to license copying of protected works for "non-transformative" research or educational use, the "fair use" privi-

---

[19] *Id.* at 24 (statement of Jack Valenti, President and CEO of the Motion Picture Association of America).

[20] American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2nd Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995).

lege should not apply.[21] I must hasten to add that I am by no means sure that this *is* the message of *Texaco*, but I am concerned that it may *become* the message—especially now that the case has been settled and the possibility of Supreme Court review has been forestalled. The narrative of the White Paper, which carries forward the restructuring of American copyright law through its project to impose new copyright discipline on the network environment, bears out this concern.

Considered alone, the legislative recommendations of the White Paper may seem relatively innocuous. But the recommendations cannot be considered alone—instead, they must be read in the context of the commentary which, at least in part, is likely to be served up as its legislative history. The interpretations of present law are in fact tendentious and controversial, and these interpretations give a very particular spin to the "modest" proposals which have now been introduced as Senate Bill 1284 and House Resolution 2441.

So, for example, the commentary on these bills accepts as noncontroversial the widely contested proposition that merely loading a digital work into the active memory of a computer constitutes the making of a "copy," in violation of the copyright of the work's owner.[22] The report's proposal that a new "transmission right"[23] should be written into the current definition of "distribution"[24] needs to be understood in this light, since the combined effect of the interpretation of the existing law and the proposal to modify that law is to make virtually any digital information transaction the stuff of potential copyright liability. In this way, the activity of merely browsing information on the World Wide Web becomes potentially subject to licensing, and Internet access providers—from nonprofit bulletin board operators to large on-line services—are made potentially liable for the behavior of the subscribers and customers.

Nor is it obvious that the doctrine of "fair use" will be able to play an important saving role in the vision of the White Paper. The text of the White Paper goes a long way toward endorsing what I take to be the content providers' preferred interpretation of *Texaco*—that (so to speak) "if you can pay, you should pay."

---

[21] *See id.* at 922-24 (discussing transformative use).

[22] *See* White Paper, *supra* note 1, at 64-66.

[23] *See id.* at 215-18.

[24] *See* 17 U.S.C. § 106 (1994).

In this view, "fair use" has no particular cultural or ethical foundations. Rather, it is an economic artifact of print culture, and one which will cease to play a significant role when "transaction costs" for licensing approach zero, as they may in the electronic environment.

A matter of related concern in the White Paper is the set of new prohibitions it proposes on manufacture and sale of technology designed to circumvent encryption and other technical digital data safeguards.[25] Although the commentary makes clear that these prohibitions would not apply to equipment designed primarily to allow consumers to gain access to public domain information, I find that formulation less than totally reassuring, given the ways in which protected and public domain information tend to be commingled. As a practical matter, I am concerned that the vision of the digital information environment which the White Paper envisions is one in which "content providers" would be enabled to "lock up" substantial amounts of data to which they have no legitimate claims under the laws of intellectual property.

If time permitted, I could comment on some of the other doubtful features of the White Paper's proposals and analyses—for example, its substantial evisceration of the doctrine of "first sale." Instead, in the time that remains, I would like to try to relate the discourse of the White Paper to that of the series of copyright "reform" measures I summarized earlier. Here, as was the case of each of those measures, we get a rich medley of arguments justifying the proposed changes in the law: we hear a bit about natural rights and a lot about the need to make the net safe for corporate investment. Even consumer interests get a kind of backhanded recognition: "An effective intellectual property regime must (1) ensure that users have access to the broadest feasible variety of works by (2) recognizing the legitimate rights and commercial expectations of persons and entities whose works are used in the NII environment."[26]

But perhaps the loudest of all the justifications which we hear is a variation on the siren song of international obligation and opportunity. Often in recent years, as I've suggested, we are told that we must enact this or that piece of domestic copyright legislation, even at the cost of curtailing public access, in order to

---

[25] *See* White Paper, *supra* note 1, at 230-34.

[26] *Id.* at 13.

"keep up" with developing international norms. In the case of the pending legislative proposals on the NII, we hear, instead, that the United States must legislate quickly in order to exercise an international leadership role. The cumulative effect of all these arguments is by now familiar: traditional domestic policy considerations, such as striking the appropriate balance of protection and public access, are being overlooked or marginalized in the copyright policy debate.

I could continue—and I'd be happy to do so—if time allowed. But this very brief outline may be enough to suggest the range of my concerns. I should emphasize, however, that unlike automatic renewal or copyright restoration, the program of the White Paper isn't yet an accomplished fact. Unlike resistance to term extensions, opposition to the White Paper's program isn't a lost cause—yet! There is time and space for those who have concerns about the proposals and implications to speak up, and if you are among them, I hope that you will be heard from in the weeks and months to come.