

Murphy's Law



UNIVERSITY OF DETROIT MERCY LAW LIBRARY NEWSLETTER

May 2009

Going Electronic: Law journals across the country are abandoning the print format



Back in November, law library directors from Columbia University, Cornell University, Duke University, Georgetown University, Harvard University, New York University, Northwestern University, Stanford University, the University of Chicago, the University of Pennsylvania, the University of Texas, and Yale University met at Duke Law School in order to discuss how law journals can better cope with rising costs, environmental concerns, and improving access to academic legal writing. Together the

directors drafted the *Durham Statement on Open Access to Legal Scholarship*.

The Durham Statement calls on law schools to abandon print format journals and publish electronically instead. Signatories must also agree to keep their electronic journals open and available for posterity.

Although some law journals are able to offset costs with royalties, most are not. Going digital makes sense for most schools. And there are other benefits. Moving online allows schools to reduce their paper consumption, while increasing their journal's potential readership base. Moreover, everyone benefits from increasing practitioner

and interdisciplinary consumption of legal scholarship, along with increased exposure in academe.

The Durham Statement is posted on line at <http://cyber.law.harvard.edu/publications/durhamstatement#signatories>. The drafters are hoping that more schools will sign on and join them in moving legal scholarship online. Recent signatories include, Boston College Law School, University of Cincinnati Law School, Saint Louis University Law School, and University of Maine School of Law.

This may be something for the University of Detroit Law School to consider. ☐

New Online Research Guides on the Library Website

Writing a brief or research paper involving an unfamiliar area of law can be daunting. To help, the law library has begun developing research and subject guides on a variety of law related topics.

The new research guides, such as *International Law Research Guide* and *Researching Michigan Legislative History*, offer basic instruction on how to conduct research on a specific area of law. The li-

brary's subject guides, such as *Mexican Law Guide* and *Canadian Law Guide*, provide general background information on a topic. Both research and subject guides identify resources for further study that are available here at the law library and provide links to free online resources.

The library will be adding new guides periodically, so let us know about any areas

of special interest or perceived need.

All current (and future) guides can be found on the library's web page. From the library home page, <http://www.law.udmercy.edu/lawlibrary/index.html>, click on Research Resources, then scroll down to Legal Research and Writing. ☐

Special points of interest:

THE LAW LIBRARY HAS RECENTLY EXPANDED ITS COLLECTION OF MICHIGAN HOUSE AND SENATE JOURNALS BACK TO 1836, MAKING IT EASIER FOR PATRONS INTERESTED IN MICHIGAN LEGAL HISTORY TO DO RESEARCH—NO MORE (OR AT LEAST FEWER) TRIPS TO LANSING!

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Does A Brand New FOIA Policy Mean that It's Business As Usual?



Over the past thirty years, a change of party in the White House has meant a change of policy for the Freedom of Information Act ("FOIA"). Similarly, over the same period of years, the Lions' faithful have dreaded fall all summer long because the changing of the leaves signals the return of the Lions to the field, dazzling fans with new feats of mediocrity. With a new party in the White House and a new front office at Allen Park, now is as good a time as any to take stock of

these longstanding trends.

The Lions' prospects for bucking the trend can be dealt with in short order. Approaching the statistical probability of death and taxes, the Lions will almost certainly disappoint and embarrass their fans again next year. In light of the change in leadership, however, let's reserve judgment until the team is on the field. Besides, Bubbles the Lion, the longtime team logo that struck fear in the heart of no one, has been sacked. In his place is a new,

edgier logo, featuring such fearsome accoutrements as teeth and – wait for it – an eye. Maybe, just maybe, that eye will help the Lions see their way back to relevance in the NFL.

While the jury is still out on the Lions, we have received a clear signal from the White House that Obama, the "change president", won't break tradition when it comes to FOIA policy. Following Democratic executives before

Continued on Page 3 under FOIA.

"WDL OFFERS AN INVALUABLE PLATFORM FOR THE FREE FLOW OF INFORMATION, FOR INTERNATIONAL SOLIDARITY, FOR THE CELEBRATION OF CULTURAL DIVERSITY AND FOR THE BUILDING OF INCLUSIVE KNOWLEDGE SOCIETIES. WITH PROJECTS LIKE THE DIGITAL LIBRARY, THE CULTURAL AND SOCIETAL POTENTIAL OF DIGITAL TECHNOLOGIES COME INTO THEIR OWN."
KOICHIRO MATSUURA,
UNESCO DIRECTOR-GENERAL

A Brand New World Digital Library!

It's not law related, but its worth checking out. The Library of Congress, in partnership with UNESCO and thirty-two other partners, has just launched the first World Digital Library ("WDL") at <http://www.wdl.org/en/#>.

The project promoters hope the library will be a first step towards bringing people together across the globe.

The WDL offers free internet access to scholarly materials. Its stated mission is to:

- "promote international and intercultural understanding;
- expand the volume and variety of cultural content on the Internet;
- provide resources for educators, scholars, and general audiences;

- build capacity in partner institutions to narrow the digital divide within and between countries."

Items in the collection range from a Treatise on the Craft of Weight Measurement to the Book of Hours, and include maps, manuscripts, rare books, musical scores, recordings, films, prints, photographs, and architectural drawings. α

More Culture; Less Big Business

Lawrence Lessig, *FREE CULTURE* (Penguin Press, 2004)

In the introduction to his 2004 book, *Free Culture*, Lawrence Lessig recounts an episode of American legal history where a promising new technology collided with a deeply rooted legal principle. "American law [at the time] held that a property owner presumptively owned not just the surface of his land," but "all the space

above" as well. Lawrence Lessig, *Free Culture* 1 (Penguin Press, 2004). Although the idea of an individual owning space above his land may have caused legal scholars some consternation, it did not create any practical problems. At least not before the Wright brothers came along with a newfangled

idea—the airplane.

The showdown between airplanes and the law took place in 1945. On a North Carolina farm, chickens were dying. Terrified by low-flying military aircraft, the chickens were flying right into barn walls. The property owners filed suit, claiming that the government was trespassing



FOIA (Continued from Page 2)

him, President Obama lauded FOIA for its profound impact on the transparency and accountability of our government. “In our democracy, the Freedom of Information Act...is the most prominent expression of a profound national commitment to ensuring an open government.” (Barack Obama, Freedom of Information Act, Memorandum, January 22, 2009). On day one, President Obama issued a memorandum titled, “Transparency and Open Government.” The next day, he issued a presidential memorandum announcing changes to the United State’s FOIA policy.

Over the last thirty years, the stock method used by new administrations hoping to effect a FOIA policy change has been to amend the standard governing the applicability of FOIA exemptions. The Department of Justice (the “D.O.J.”) is responsible for defending agency decisions to deny record requests under FOIA. By changing the threshold standard for determining whether the D.O.J. will defend an agency decision to deny a request, the President can effectively change the scope of disclosure.

A new administration can also change FOIA policy by issuing a directive to agencies mandating greater use of discretionary disclosures. In his memo, for example, President Obama has urged agencies to “adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in

FOIA.” (Obama, Freedom of Information Act, Memorandum, January 22, 2009).

Ashcroft’s October 12, 2001 memorandum on the Freedom of Information Act, written shortly after President Bush took office, similarly announced a dramatic shift in FOIA policy. In his memo, Ashcroft asked agencies to consider fully the range of interests implicated by discretionary disclosure of government information, interests that included national security and protecting sensitive business information. In order to protect fundamental values such as safeguarding national security, enhancing effectiveness of law enforcement and protecting business information, Ashcroft urged agencies to disclose information only after “full and deliberate consideration” of how disclosure would affect the aforementioned values.

It’s worth noting that Ashcroft’s memo came in the wake of the 9/11 catastrophe. It was natural for the Executive branch to tighten its grip on the free flow of government information. But history suggests that 9/11 had far less influence than one might assume. The Ashcroft memo was not the harbinger of the strong anti-disclosure sentiment that was the hallmark of the Bush administration’s FOIA policy; it was the natural product of long held Republican sentiments regarding FOIA.

The Bush administration’s attitude towards secrecy can be traced back nearly thirty

years to the Reagan administration, and to a policy memorandum issued by Reagan’s Attorney General William French Smith. The rhetoric of the Ashcroft memo is nearly a verbatim reproduction of Smith’s May, 1981 memorandum. Smith’s memo provided that the standard to be used by the D.O.J. when determining whether to defend an agency’s denial of a FOIA request, required only a “sound legal basis” for the denial. This standard is virtually identical to Ashcroft’s proposed standard, which directed the D.O.J. to defend agency decisions “unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.” (John Ashcroft, Memorandum, October 12, 2001).

And the old GOP’ers aren’t the only copy cats. President Obama’s ambitious memorandum charts a bold new course right back to the old FOIA policy of the Clinton administration. In a 1993 memorandum, former President Clinton stated, “[e]ach agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems.” (William Clinton, The Freedom of Information Act, Memorandum, October 4, 1993). Compare this with President Obama’s explanation of the “presumption of disclosure” that he has asked executive agencies to embrace.



ON APRIL 23, 2009, THE SENATE JUDICIARY COMMITTEE POSTPONED THE CONSIDERATION OF THE STATE SECRET PROTECTION ACT (S. 417) AND THE FREE FLOW OF INFORMATION ACT OF 2009 (H.R. 985/S. 448) UNTIL APRIL 30, 2009.



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Culture (continued from page 2)



In 1928, a cartoon character was born. An early Mickey Mouse made his debut in May of that year, in a silent flop called “Plane Crazy.” In November, at New York City’s Colony Theater, in the first widely distributed cartoon synchronized with sound, “Steamboat Willie” brought to life the character that would become Mickey Mouse. To learn more, see Lawrence Lessig, *Free Culture*. Retrieved on April 22, 2009, from <http://www.sslug.dk/~chlor/lessig/freeculture/c-piracy.html>.

Many inventors, starting most notably with Edison, have played with the idea of synchronizing sound and images. Radio pioneer Lee DeForest began researching sound on film in earnest in the early 1900s, obtaining approximately thirty-three patents related to sound devices and sound and film devices during the 1920s and 1930s, including one titled “Sound Recording Attachment for Motion Picture Cameras”, Patent No. 1,693,071 and another titled “Apparatus for Reproducing Sound on Film”, Patent No. 2,064,593. To learn more, check out Russell Sanjek, *American Popular Music and Its Business: the First Four Hundred Years, Vol. III* (Oxford University Press, 1988).

on their land. The case made its way up to the U.S. Supreme Court. Based on the prevailing legal doctrine, the property owners were sure to win. They did not.

Writing for the Court, Justice Douglas eliminated hundreds of years of property law “in a single paragraph.” The long-standing principle “has no place in the modern world.” *Id.* at 2. “Common sense revolts at the idea.” *Id.* The farmers were out of luck, but the Court helped to foster a technology that profoundly changed our society.

Lessig believes that this is how law should work when new technologies collide with soon-to-become antiquated legal principles. It was common sense for the Court to reform our notion of property rights in light of a new technology that provided never-before-seen mobility for the American public. Had the Court decided in favour of the farmers, the development of the airline industry would have been fundamentally different. Before charting flight paths, each carrier would have had to acquire permission from every property owner in the line of travel. It is easy to see how this would have complicated the development of the modern airline industry.

Lessig uses this historical anecdote to highlight the absence of common sense in a current legal battle that has raged for more than a decade. The battle is over how intellectual property (“IP”) rights will function in a changing digital environment. Digital technologies have fundamentally changed the way creative property is invented, produced, and distrib-

uted. These changes pose a threat to the established content industry—anyone can publish a book or sing a song online, distributing it globally with a click of a button. In response to this threat, industry groups, such as the Recording Industry Association of America (the “RIAA”) and the Motion Picture Association of America (the “MPAA”) began a crusade to extend the duration and expand the scope of their IP rights. In the process, according to Lessig, these industry giants also managed to banish common sense entirely from the debate.

Before discussing the legal aspects of the IP rights controversy, Lessig puts the issues into context, which is helpful for readers not already familiar with the subject. Over the past fifteen years, our society has gone through a dramatic change brought about by the increasingly widespread use of the Internet. Once a technology reserved for freaks, geeks, and researchers, the Internet is now just as likely being used at a senior center as in a dungeon-master’s basement. Additionally, digital technologies that were prohibitively expensive as recently

In 1928, Buster Keaton (an actor known for a highly physical style of comedy) created and produced popular a silent film about a boy becoming a man while working on a Mississippi riverboat. The film, which was inspired by the song “Steamboat Bill,” was titled “Steamboat Bill, Jr.” Also in 1928, but after Buster Keaton’s film debuted, Walt Disney produced a cartoon parody of “Steamboat Bill, Jr.” titled “Steamboat Willie.” “Steamboat Willie” was a success, in large part, because of its use of a new invention, synchronized sound. “Steamboat Willie” also reintroduced a cartoon character that had appeared earlier that year in a silent movie that flopped. This character was Mickey Mouse.

To learn more, see Lawrence Lessig, *Free Culture*. Retrieved on April 22, 2009, from <http://www.sslug.dk/~chlor/lessig/freeculture/c-piracy.html>.



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FOIA (Continued from Page 3)

“The presumption of disclosure...means that agencies should take affirmative steps to make information public.” (Obama, January 22, 2009).

These partisan-based policy shifts raise an important question. If the policies persist only as long as a given party stays in the White House, do they have any genuine impact? And what about FOIA litigation that was already underway before Obama took office? The answer to the latter question could be answered soon. Pursuant to Presi-

Since 2001, five journalists have been jailed for refusing to name a source in federal court. This situation may become more rare because the Obama administration has expressed support for a Media Shield Bill that the 111th Congress reintroduced this year. The House Bill 985 passed in March, but the Senate version contains a national security exception that some have criticized as overbroad. To learn more, go to http://www.naa.org/PressCenter/SearchPressReleases/2009/Federal-Shield-Bill-Reintroduced-in-Senate.aspx#_ftn1

of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” (Eric Holder, Freedom of Information Act, Memorandum, March 19,

2009).

Given FOIA’s history, it comes as no surprise that the standard articulated by Attorney General Holder is actually a throwback to Janet Reno’s memo from the Clinton years, which provided that the D.O.J. would defend agency decisions “only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest

protected by that exemption.” (Janet Reno, The Freedom of Information Act Memorandum, October 4, 1993). Except Reno continued, “[w]here an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.” (1993).

Although the new rhetoric (same as the old rhetoric) is decidedly pro-disclosure, representing a significant break from the Bush policy, will

it make a difference? To date, D.O.J. lawyers have not taken a noticeably more open approach in pending FOIA litigation. In at least six cases, the Obama government refused to consent to a stay of the proceedings until after Obama issued his new FOIA guide-

lines.

Mr. Holder did specifically address pending litigation in his memo. D.O.J. lawyers are to apply the new guidelines in pending litigation “when, in the judgment of the D.O.J. lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.” (Holder, 2009). Although Holder’s qualification

that his guidance should be “applied if practicable”, raises questions about the Obama administration’s actual commitment to openness. Reno, in contrast, ordered a case-by case review of pending litigation. (Reno, 1993).

How the D.O.J., under Holder’s guidance, ultimately handles FOIA litigation will

answer, in part, whether this administration is truly committed to the lofty goals announced in President Obama’s FOIA memorandum. And Holder’s decisions will determine Obama’s short term impact on FOIA policy. Whether the Obama-Holder guidelines will significantly impact FOIA litigation and FOIA policy over the long haul, however, remains to be seen. But don’t hold your breath. ☐

Although Obama’s administration appears to take open government seriously, it has adopted the Bush administration’s position and asserted the state secrets privilege in three lawsuits. To learn more, go to <http://www.eff.org/cases/jewel>

The state secrets privilege has been around for a while. In *Totten v. United States*, 92 U.S. 105, 107 (1875), the U.S. Supreme Court threw out a claim for fees for services rendered at President Lincoln’s request because litigating the claim would “lead to the disclosure” of confidential information.



AFTER RESCINDING ASHCROFT’S FOIA MEMORANDUM, HOLDER STATED, “THE DEPARTMENT OF JUSTICE WILL DEFEND A DENIAL OF A FOIA REQUEST ONLY IF (1) THE AGENCY REASONABLY FORESEES THAT DISCLOSURE WOULD HARM AN INTEREST PROTECTED BY ONE OF THE STATUTORY EXEMPTIONS, OR (2) DISCLOSURE IS PROHIBITED BY LAW.”

The Court first recognized the state secrets privilege, as such, in *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953), although the *Reynolds* Court claimed that the privilege predated the case. At least one lower court has subsequently argued that “FISA’s section 1806(f) applies to preempt, in part, the protocol described in *Reynolds*. *In re NSA Telecoms. Records Litig*, 564 F. Supp. 2d 1109 (2008).

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Culture (continued from page 4)



In the 1920s, Lee De Forest incorporated Phonofilm Corporation. Phonofilm produced and marketed numerous talking movies, some featuring the famous Al Jolson, but the venture ultimately failed. The idea of talking films, however, did not die. The Western Electric division of AT&T had been working secretly on a sound-on-disk method for synchronizing sound. When it looked like the invention would flop financially, Western Electric sold the technology to four brothers from Pennsylvania named Warner. They saw the new technology's value, but initially only for producing music. Another producer, William Fox, had opposed talking films at first, but later saw the technology's potential for cutting costs. He obtained a sublicense from the Warner Brother's company, Vitaphone, and began making talkies himself. Then, in 1927, Vitaphone helped finance "The Jazz Singer," a film starring Al Jolson. Although this film was in reality "a silent film accompanied by phonograph recordings" Sanjek, *American Popular Music and Its Business: the First Four Hundred Years*, Vol. III, 52 (Oxford University Press, 1988), it sparked wide interest in the concept of synchronized sound. One person whose interest was sparked was Walt Disney. Soon thereafter, Disney used synchronized sound in his movie Steamboat Willie.

To learn more, check out Russell Sanjek, *American Popular Music and Its Business the First Four Hundred Years, Vol. III* (Oxford University Press, 1988). See also, Lawrence Lessig, *Free Culture*. Retrieved on April 22, 2009, from <http://www.sslug.dk/~chlor/lessig/freeculture/c-piracy.html>.

as ten years ago are now widely available for use by persons ranging from school children to employees at cash-strapped non-profits.

The ushering in of this new digital age has had wide-ranging consequences for how culture is created and transmitted in our society. These consequences provide the focus for *Free Culture*: "[t]his book is about an effect of the Internet beyond the Internet itself: an effect on how culture is made." *Id.* at 7. By culture, Lessig is referring to the creative products of our society, namely books, music, stories, plays, and film.

Lessig divides culture into two categories, commercial and non-commercial. Commercial culture is "that which is produced and sold, or produced to be sold." *Id.* Non-commercial culture is all the rest. "When old men sat around parks or on street corners telling stories that kids and others consumed, that was non-commercial culture. When Noah Webster published his "Reader", or Joel Barlow his poetry, that was commercial culture." *Id.* at 8.

For the majority of our nation's history, government regulation of culture has focused almost entirely on commercial culture. Copyright law is an example of this type of regulation. Under copyright, the government provides to authors market based incentives to create by granting them a time-limited monopoly on certain rights associated with creative works. In contrast, although sometimes entitled or subject to copyright protections, non-commercial culture generally has progressed under the government's radar screen—unless there was another basis for regulation (think noise ordinances or obscenity).

According to Lessig, the line that once clearly divided commercial from non-commercial, and informed the respective regulation of each, has been eroded. This erosion is an effect of steady efforts to offer greater protection and control for producers and owners of commercial culture. The im-

Walt Disney was often inspired by other people's works. The long list of Disney works the works of others includes: Snow White (1937); a traditional fairy tale retold by many, including the Brothers Grimm Fantasia (1940); drew from many sources, including classical music pieces such as the Rites of Spring and the Nutcracker, and Goethe's poem Der Zauberlehrling Pinocchio (1940); The Adventures of Pinocchio by Carlo Collodi Dumbo (1941); Dumbo by Helen Aberson Bambi (1942); Bambi, A Life in the Woods by Austrian author Felix Salten. Song of the South (1946); the Uncle Remus stories by Joel Chandler Harris. Cinderella (1950); a classic folk tale Alice in Wonderland (1951); Lewis Carroll's work by the same name, and Through the Looking Glass Robin Hood (1952); an English folk hero Peter Pan (1953); by J.M. Barrie Lady and the Tramp (1955); inspired by Happy Dan, The Whistling Dog by Ward Greene Mulan (1998); the Chinese legend of Hua Mulan Sleeping Beauty (1959); a traditional tale, published by Charles Perrault in 1697 101 Dalmatians (1961); The Hundred and One Dalmatians by Dodie Smith. The Sword n the Stone (1963), myth and T.H. White; and The Jungle Book (1967); by Rudyard Kipling



petus for greater protection is found, at least in part, in the rise of the Internet. As noted previously, the Internet fundamentally changed how culture is created and shared. In the late 1990s, Napster hit the Internet scene, and Industry groups, such as RIAA and MPAA, quickly realized that widespread use of peer-to-peer file sharing would threaten the viability of their conventional business model. In response, the industry groups began an epic litigation and lobbying campaign against Napster and the like. Because of their media access and deep pockets, they were able to frame the debate as an either-or proposition: either you support property rights, or you support piracy and outright theft. Because they left no middle ground, or room for compromise, many judges and politicians adopted the industry's position by default.

Lessig supports property rights, and in fact argues that a system without property rights would be anarchy. He does not believe, however, that this debate must or should be framed by the extremes because there is

21st Century Pirates

As old fashioned pirating on the high seas makes a come back, modern, more tech-savvy, pirates have learned recently that they too can go to jail.

On April 17th, four anti-intellectual property crusaders and founders of the notorious BitTorrent tracker site The Pirate Bay were sentenced to more than \$3 million in fines and a year in jail for contributory copyright infringement. The bottom line, the Swedish information pirates knew the

material they were file sharing was copyright protected, but continued providing their service regardless.

Wherever you stand on the current copyright-open access debate, these fellows had it coming. Their site was the largest of its kind, and they profited from and flaunted their activities. But their activities are not new (although the medium is). And, although the Pirate Bay Four are Swedish, the United States has hosted its fair share of intellectual property thieves

or freedom fighters (depending on your perspective).

Before achieving independence, the colonies lured skilled tradesmen, along with the industrial knowledge they possessed, to America. Doron Ben-Atar, *Trade Secrets: Intellectual Piracy and the Origins of American Industrial Power* 18-24 (Yale, 2004). Not surprisingly, England passed laws (the Navigation Acts) to protect its own manufacturers. Among other things, these laws prohibited artisans from migrating to the new world. *Id.* at 24. But English efforts to stem the flow of information across the Atlantic failed.

In order to preserve the flow of skilled workers, along with their technical knowledge, immigrating to the New World, the colonies began issuing patents to persons who were the first to introduce technology to the U.S. from overseas. *Id.* at 32. As events unfolded, culminating with the American Revolution, colonists began openly misappropriating English trade secrets. *Id.* at 42-43.

After the war, some men took it even further. One such instance involved Joseph Hague. Mr. Hague dismantled British machines, smuggled them across the Atlantic, and then reassembled them on American soil. *Id.* at 80. Hague's criminal ingenuity in smuggling a cotton carding machine earned him a \$100 award from the Pennsylvania legislature. *Id.*

American intellectual property pirates did not limit themselves to foreign booty. In the early



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“Pirates.”*

To Learn More About Intellectual Property Law...

For students interested in Intellectual property (“IP”) law, the law library offers a variety of text and database resources.

Library Holdings

The Law of Copyright, a two volume set written by the law school’s own Howard Abrams, is available on reserve, and in the stacks [KF2994.A72 1991]. Or students can peruse *Nimmer on Copyright* [KF2991.5.N5 1978] or *Understanding Copyright Law* [KF2994.L43 2005]. Other titles include, inter alia, *Understanding Intellectual Property Law* [KF2979.C478 1996], *Rembrandts in the Attic: Unlocking the Hidden Value of Patents* [T211.R58 2000], *Epstein on Intellectual Property* [KF2979.E67 1999], and *Intellectual Property: Patents, Trademarks, and Copyright in a Nutshell* [KF2980.M52 2007]. But remember, although most loose leaves are updated regularly, other texts are not, and some statutes have changed re-

cently.

Library Databases

The library also has several databases that are useful for conducting IP research. Lexis compiles all of its available resources on copyright, trademark, and patent law, each on its own page. TotalPatent, for example, provides links to statutory, regulatory, and case law. It also contains links to the *Patent Office Rules and Practice* and domestic, and some international and foreign, agency decisions. It tracks emerging patent law issues. And it allows users to search U.S., European, and Japanese patents (although certain types of searches will locate abstracts only). Westlaw provides a comparable service under topical practice areas, intellectual property.

In addition to Lexis and Westlaw, CCH Internet Research NetWork provides a research

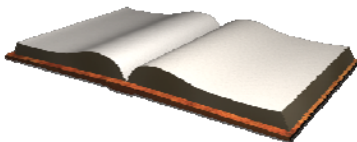
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Culture (continued from page 6)



AS IT STANDS,
AMERICAN
COPYRIGHT LAW
DOES NOT
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BALANCED
MIDDLE
GROUND.



middle ground. The middle ground ensures that artists get paid for and maintain some degree of control over their creations. But the middle ground serves the public at large as well, by making sure that creative works that are no longer commercially profitable pass into the public domain so that they might be used by new artists to create new works—the purpose of IP law, including copyright, after all, is to “[t]o promote the progress of science and useful arts.” U.S. Const. art. I, section 8.

As it stands, American copyright law does not embrace a balanced middle ground. Because of industry groups’ success both in litigation and lobbying, lawmakers have repeatedly passed legislation that tips the balance further towards favoring established content industries. This favoritism does not reflect a concern for artists or a respect for property rights per se. By design, it eliminates competition against a powerful lobby and preserves a business model that refuses to embrace the changing digital environment.

In his book, Lessig proposes a number of changes to American copyright law that he believes will help to bring balance back to the system. These changes would benefit both artists and consumers, and would not impinge unfairly on the content establishment.

First, Lessig argues that the

copyright term should be shortened. “The term should be as long as necessary to give incentives to create, but not longer.” Lessig, *supra*, at 292. As it stands right now, the overwhelming majority of copyrighted works lose their commercial viability long before the term expires. In shortening the term, lawmakers should analyze the average commercial viability of a work and set a term that is just long enough to ensure that an artist will benefit from his or her creation throughout the commercial life of his or her work.

Second, rights-holders should be required to renew periodically their copyrights. “The copyright owner should be required to signal periodically that he wants the protection continued.” *Id.* at 293. A renewal system would eliminate the uncertainty individuals currently face if interested in creating a derivative work. Assuming that the renewals will be handled by a central database, a renewal requirement would reduce problems associated with tracking down copyright owners to clear uses, and, in some cases, eliminate the need to do so at all.

Lessig includes several other changes that he would like to see, but the two changes detailed above would ostensibly go farthest towards bringing balance back to copyright law. These changes would ensure that the artists are paid for their creations, while also making it easier for new art-

ists to create derivative works. Additionally, the shorter term and the renewal requirement would likely expand the public domain, and help to protect our tradition of free culture.

Free Culture is interesting and provocative. It will likely appeal most to people who are supportive of copyright reform. Lessig’s arguments are thought provoking, and he provides good insight into how change could be implemented. Individuals who support more expansive IP rights, however, may take issue with some of Lessig’s theories. For example, Lessig dedicates more time than he should to rehashing an argument for limiting the term of copyright protection that has already been rejected by the U.S. Supreme Court. But the book contains some nice historical anecdotes about copying and piracy that any reader, regardless of ideology, will enjoy. ❧

Further reading:

Mike Godwin, *CYBER RIGHTS : DEFENDING FREE SPEECH IN THE DIGITAL AGE* (MIT Press, 2003)

Tarleton Gillespie, *WIRED SHUT : COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE* (MIT Press, 2007) [K1447.15 .G55 2007]

Siva Vaidhyanathan, *TITLE-COPYRIGHTS AND COPY-WRONGS : THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (New York : NYU Press, 2001) [Z642 .V35 2001]

tab specifically for IP and Computer and Internet Law. Under this tab patrons will find links to relevant copyright statutes and regulations, commentary, circulars, case law, forms, new developments, and other assorted reference materials.

Free Online Resources

35 U.S.C. §100 *et seq.* lays out the requirements for patentability. The Lanham Act, Title 15, contains federal trademark requirements (don't forget to look at state law). And, in general, 17 U.S.C. § 101 *et seq.* governs U.S. copyright law.

"I knew that a country without a patent office and good patent laws was just a crab, and couldn't travel any way but sideways or backwards."
Mark Twain

But in addition to federal and state statutes and regulations, would-be IP

lawyers must become familiar with specialized search engines and various international agreements. There are different mechanisms for obtaining patent, copyright, trademark, and even trade secret protection. For example, it is beneficial, but not required, to search for prior art inventions before filing a patent application. Although no search is exhaustive, and there are no guarantees, this exercise can provide the applicant with some idea of whether his or her invention has a reasonable probability of being patentable.

Similarly, it can be valuable to search for registered trademarks that may be similar to applicant's own mark, again, providing some information regarding the likelihood of success of registration. In the case of trademarks, such a search may also provide some idea of whether there is a likelihood of confusion between a currently registered trademark and applicant's own mark.

For researching existing patents and trademarks, a good place to start is the United States Patent and Trademark Office ("PTO") Website at www.uspto.gov. You can

also browse recently issued patents online in The Electronic Official Gazette at <http://www.uspto.gov/web/patents/patog/>.

Although copyright protection in the United States inheres automatically when the work is fixed in a tangible medium, there are benefits to registering one's copyright—e.g., the copyright in a work must be registered before the copyright owner can bring suit for infringement.

The Copyright Office of the Library of Congress is charged with administering the Copyright Act. See 17 U.S.C. § 701. This office provides a free searchable database of registered works at <http://www.copyright.gov/records/>. Copyrights also can be registered online at <http://www.unc.edu/~uncnlg/public-d.htm>.

Because individual copyright terms vary depending on when a copyright was granted, it can be difficult to determine when a copyrighted work has moved into the public domain. Fortunately, there are sites that provide charts to help users determine whether a particular copyright has expired, and the work has passed into the public domain. Peter B. Hirtle authored one chart. It is available at http://www.copyright.cornell.edu/public_domain/. It covers works published in and outside the U.S., as well as sound recordings and architectural works. A second chart, authored by Lolly Gasaway, can be accessed at <http://www.unc.edu/~uncnlg/public-d.htm>. This chart covers only U.S. works.

Students interested in IP law should remember that intellectual property laws are territorial. Different countries and regions have different requirements for protection, different levels of protection, and different remedies for the

"Only one thing is impossible for God: to find any sense in any copyright law on the planet..."
Mark Twain

rights holders. Although the trend has been toward international harmonization of IP laws, there are still vast disparities in IP laws throughout the world, and a practitioner should always make the inquiry as to where the particular IP rights are sought.

A research guide prepared by Stefanie Weigmann, of Boston University School of Law, provides valuable information on IP laws, treaties, and other international agreements. It also provides links to the laws of various countries and many of the treaties or agreements referenced in the document. It was published in 2000, however, so users should confirm any information from the guide before relying on it—a good practice when using any free online sites. But the guide, available at <http://www.llrx.com/features/iplaw.htm>, will definitely get users heading in the right direction.

Open Access

Just as there are online sites for learning more about IP laws, there are online sites for learning more about the open access ("OA") movement. Creative Commons at <http://creativecommons.org/> is one such site. It provides users with links to news, content from the commons to share or remix, and other information. It also provides users with a tool for licensing their own work for general use, while still retaining the copyright. The Budapest Open Access Initiative at <http://www.soros.org/openaccess/read.shtml> also provides useful information on OA, as does the Open Society Institute Website at <http://www.soros.org/>.

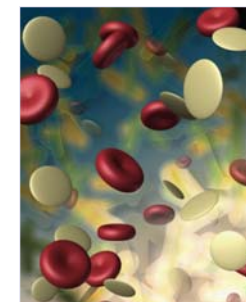
There are also sites, such as the Directory of Open Access Journals at <http://www.doaj.org/>, that make it easier for users to locate open access materials.



"THE PRIMARY OBJECTIVE OF COPYRIGHT IS NOT TO REWARD THE LABOR OF AUTHORS, BUT [T]O PROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS.' TO THIS END, COPYRIGHT ASSURES AUTHORS THE RIGHT TO THEIR ORIGINAL EXPRESSION, BUT ENCOURAGES OTHERS TO BUILD FREELY UPON THE IDEAS AND INFORMATION CONVEYED BY A WORK. THIS RESULT IS NEITHER UNFAIR NOR UNFORTUNATE. IT IS THE MEANS BY WHICH COPYRIGHT ADVANCES THE PROGRESS OF SCIENCE AND ART."

JUSTICE SANDRA DAY O'CONNOR, FEIST PUBLICATIONS V. RURAL TELEPHONE SERVICE CO., 499 US 340, 349 (1991)

Justice O'Connor's great quote notwithstanding, copyright protects science and patent law the useful arts. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003). See also, *In re Comiskey*, 554 F.3d 967 (2009).





Congratulations to graduating 3Ls!
...Everyone else, enjoy your summer.

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Pirates (continued from page 7)

1800s, local planters stole a U.S. government caught up with model of Eli Whitney's cotton gin before he secured his patent. This led to questions about the originality of Whitney's invention, and years of costly litigation. Id. at xiv. See also Whitney v. Carter, 29 F. Cas. 1070; 1810 U.S. App. LEXIS 158 (1810). Whitney never recouped his costs associated with inventing the cotton gin. Ben-Atar, supra, at xiv.

In the 1900s, the nascent U.S. film industry (the same industry that later fought zealously for the Copyright Term Extension Act, aka Mickey Mouse Protection Act, and the expansion of copyright protections) grew out of wholesale piracy. To avoid Thomas Edison's film-making patents, so called independents moved west to California. Lawrence Lessig, Free Culture 54 (Penguin, 2004). By the time the

Indies, Edison's patents had expired. Id. at 55. The Pirate Bay may soon be shut down. But similar sites are still out there, and we always can expect new sites to pop up and fill any remaining void. Given these facts, is eradicating file-sharing sites a realistic goal?

The United State's track record for stamping out piracy is iffy at best. And the world is getting smaller. Like the United States in the early days, third world countries are more interested in becoming competitive than in protecting foreign patents or copyrights.

Everyday, search engines, such as Google, take users across the globe to new file sharing sites at the click of a button. While it appears true that

Google responds promptly to claims of infringement by removing links to offending sites, others may not be as meticulous. Moreover, Google and other search engine providers know that they are linking users to sites that engage in infringing activities. They just maintain ignorance about the specifics until pressed.

If we're serious about protecting artists' rights in their creative works, taking a close look at the companies that make it possible for sites like Pirate Bay to exist and thrive, may be the next logical step. But maybe we should also look at how intellectual property law, copyright in particular, could be reworked to better balance incentivizing authors to create new works, while maintaining a robust intellectual commons in the post-industrial age. ☐



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