Copyright and New Technologies

Workshop sponsored by the British
Arts and Humanities Research Council (AHRC) Copyright Research Network
in conjuction with the
Case Center for Law, Technology and the Arts

Thursday, April 20, 2006

Case Western Reserve University, Cleveland, Ohio

The workshop will take place in the Glidden House Inn's Magnolia and Bellflower rooms, 1901 Ford Drive, just across the street from the Law School on the Case campus.

9:00 – 10:00
"Revisiting the 'Economic Rationales' Underpinning Copyright Law In the Light of the New Economy"-- Birgitte Andersen, Birkbeck, University of London

The technological revolution in information and communication (ICT) technologies, including the emergence of a digital technological paradigm, has undoubtedly changed the social and economic effects of copyrights. This paper will review such changes in relation to the "economic rationales" underpinning copyright law. Rationales to be examined include: (i) copyrights as market facilitators for commercial exploitation; (ii) copyrights as industry facilitators for sustainable development, (iii) copyrights as incentive systems and facilitators for innovation-based competition, and (iv) copyrights to protect the inventors of creative expressions.

10:00 – 11:00
"Fertile Ground: Law, Innovation, and Creative Technologies" – Kathy Bowrey, University of New South Wales

The notion that innovation creates value underpins much conventional copyright discourse. Many of the technologies at issue involve reproduction and dissemination, suggesting that value is inherent in the technology itself. The idea that innovation is threatened by copyright law is also of currency. This paper explores the usefulness of both these concepts. What is the connection between economic, social and legal value? In what sense does new technology create value(s)? Under what circumstances can law disrupt innovation or value? These questions are viewed from various perspectives: the history of copyright, critiques of consumption, network theory, and Lessig's *Free Culture* advocacy.

11:00 – 12:00
"120 Years Earlier: The Global Information Infrastructure and Property in Information" -- Lionel Bently, Cambridge University

The last decade has seen a transformation of national, regional, and international legal rules governing the ownership of information products in response to the new modes of creation and dissemination associated with digitization. In Europe, for example, the 'database right' has been introduced to protect investment in the creation of information products that might previously have fallen outside the scope of copyright. At an international level, the WIPO Treaties of 1996 required signatories to introduce a new 'making available'

right, so that the owners of copyright and related rights have protection in relation to digital dissemination over the Internet. This paper examines legal responses to (what Tom Standage) called the 'Victorian Internet': the development over 120 years earlier of a global network of electronic communication through telegraphy. In this period, claims emerged for the protection of information products disseminated by the new technology, in particular 'news'. In response to some such claims, in the 1870s a few Australian states adopted laws conferring proprietary rights over such 'news', and these laws spread widely through the British Empire (being adapted where necessary to suit local needs). However, the UK and US never adopted such laws themselves, and they never became part of the multilateral system of protection that emerged after 1886. What were the political, economic and cultural influences that account for the patchy operation of these laws? Why were they adopted in Australia but not Canada? Why in Ceylon but not India? Why did new global technologies of distribution 120 years ago not produce global laws?

12:00 – 1:00 Lunch (for reservations, contact Dawn Richards by April 17 at dar29@case.edu or 216 368-5135)

1:00 – 2:00
"Tracing the Copyright Stakeholders: *From the Renaissance to Radio Goo Gle"* – Uma Suthersanen, Queen Mary, University of London

Copyright law confers an artificial, quasi-monopoly on a vast range of creative works ranging from works of high authorship such as literature and symphonies to banal works such as shopping catalogues and advertising jingles. Many theoretical and (so-called) empirical reasons are offered as to why there is a need for such a wide umbrella of protection. The following are a sample of the nature of those justifications: natural and/or human rights of authors; incentives and rewards for authors and producers; prevention of theft of property; regulation and promotion of a competitive market for knowledge goods; and prevention of market failure by non-production

Irrespective of the various theoretical justifications, copyright law, especially with the advent of digital copyright law, has not been particularly kind to authors. Nevertheless, a fundamental role of copyright law has always been ostensibly to balance the competing interests of the 3 main stakeholders that each new technology inevitably disrupts and then recalibrates: the author, the investor and the consumer.

Since the 15th century, copyright law has attempted to strike a precarious balance between market regulation of technologies (the Venetian statutes), competition and market entry (Statute of Anne 1709-1710), rights of authors (and their heirs) to monetary remuneration (Talfourd Act 1814), rights of authors to non-monetary benefits (Article 6*bis*, Berne Convention), noble societal aims (preamble to the Statute of Anne, and Article 1.8, US Constitution) and specific consumer rights (private, educational, research and other uses found in national laws). In relation to the publishing industry, for instance, the author, the investor (stationer/printer/publisher) and the consuming society have both lost and gained with the introduction of every new technological advance such as paper, printing, typography, reprography and finally digital technology. The same is true in the entertainment industry where copyright law has been press-ganged to play the mediator in a ménage a trois involving the Artiste, the Entertainment Industry and the Consumer. This relationship, represented often by the equation of "*copyright* goods in exchange for money," is only possible today with copyright law. The law begets the property.

Every technology creates a new set of conflicting stakeholders. Technology simultaneously disrupts but also restores some kind of balance between these parties. So, while technological revolutions have invariably been greeted by howls of hysteria from the copyright owners, time and reason restore the equation of "copyright goods in exchange for money." A mapping of copyright law shows the different times in which different technologies have interrupted the status quo between these three groups of stakeholders. Indeed, copyright law is merely the accepted conduit by which the author, investor-producer and consumer negotiate access and pricing of goods.

2:00 – 3:00
"The Form and the Matter: Origins and Fate of the Idea/Expression Dichotomy in the Copyright System" – Maurizio Borghi, Bocconi University, Milan

A cornerstone of copyright law is the so-called "Idea/Expression Dichotomy" according to which copyright is not a property in ideas but only a (temporary) protection of their expression. This dichotomy, which nowadays takes fairly standard shape in every legal system, has quite different rationales in common law and in civil law countries. In the latter it is grounded in the Romantic and Idealistic notion of the creative work as a joining of "form" and "matter" – a notion that profoundly influenced early *droit d'auteur* laws and doctrines in Germany, France, and Italy. In Anglo-American copyright, beginning with *Baker v. Selden* (1879), the dichotomy appears instead to have a pragmatic justification – specifically, that of "balancing" authors' private interest (in claiming property in their work) and the public interest (in being free to build upon that work). Although the conclusions are the same, the underlying principles are different: natural-law in the former, utilitarian in the latter. Yet, whichever its rationale, this traditional dichotomy is becoming blurred in the digital environment where all matter, or content, is a disembodied sequence of information controlled by code. It has thus become essential to reconsider the rationale of such a dichotomy. What legitimates the principle of non-copyrightabilty of ideas, facts, discoveries, and the like in a digital world? Is the "utilitarian" rationale sufficient? What would a copyright system living out the form and the matter look like?

Notes on Participants

<u>Presenters</u>:

Dr. Birgitte Andersen is a Reader in the Economics and Management of Innovation in the School of Management and Organizational Psychology, Birkbeck College, University of London. She writes and consults widely in evolutionary economics and industrial dynamics, especially as related to innovation, in service dynamics and productivity, and in the economics and management of intellectual property rights. She is the author of *Technological Change and The Evolution of Corporate Innovation: The Structure of Patenting 1890-1990* (Edward Elgar, 2001); co-author (with J. Howells, R. Hull, I. Miles, and J. Roberts) of *Knowledge and Innovation in the New Service Economy* (Edward Elgar, 2000); and editor of *Intellectual Property Rights: Innovation, Governance and the Institutional Environment* (Edward Elgar, 2006).

Dr. Lionel Bently has been the Herchel Smith Professor of Intellectual Property Law and Director of the Centre for Intellectual Property and Information Law at the University of Cambridge since October 2004. He is also a Professorial Fellow of Emmanuel College, Cambridge. He is co-author (both with Brad Sherman) of *Intellectual Property Law* (Oxford University Press, 2001; 2nd ed, 2004) and *The Making of Modern Intellectual Property Law - The British Experience, 1760-1911* (Cambridge University Press, 1999). He is also the author *of Between a Rock and a Hard Place: The Problems Facing Freelance Creators in the UK Media Market-Place* (Institute of Employment Rights, 2002) and co-editor (with David Vaver) *of Intellectual Property in the New Millennium: Essays in Honour of Professor William Cornish* (Cambridge University Press, 2004). With Martin Kretschmer, he is co-director of an AHRC funded resource enhancement project developing a digitial resource of primary documents relating to copyright history from five jurisdictions (the US, UK, France, Germany and Italy).

Dr. Maurizio Borghi is an economic and social historian at Bocconi University of Milan where he teaches cultural history and philosophy. He is currently a Visiting Scholar at the Center for the Study of Law and Society at the UC Berkeley School of Law. His recent research focuses on intellectual property rights in historical and philosophical perspective. He is the author of a book on the history of copyright and the book trade in Italy, *La manifattura del pensiero: Diritti d'autore e mercato delle lettere in Italia, 1801-1865* (Milan: Franco Angeli, 2003), and articles and papers on related topics.

Dr. Kathy Bowrey is an Associate Professor in the Faculty of Law, University of New South Wales, Sydney, Australia. Her work is primarily related to intellectual property and information technology law. It is generally quite political and multi-disciplinary in focus, drawing upon literary theory, legal theory, political theory, sociology, feminism, critical race theory, cultural studies and techno-literature. Her most recent book is *Law and Internet Cultures* (Cambridge University Press, 2005).

Uma Suthersanen has worked as a consultant for WIPO, EPO, UNCTAD, the Singapore I.P. Academy and the Government of Israel (Patent Office). She has held visiting professorships and lectureships at several institutions including the University of Western Ontario, Verona Intellectual Property Centre, Université Robert Schuman, and Southampton University. She serves on the executive committee of the Association Litteraire et Artistique Internationale (ALAI), and currently chairs its British arm, the British Literary and Artistic Copyright Association (BLACA). She is also on the Legal Advisory Committee of the British Computer Society, and on the Legal Advisory Board of the Creative Commons for England & Wales. She is a joint general editor, along with Graham Dutfield and Ilanah Simon, of the Queen Mary Studies in Intellectual Property series, and assistant editor of the *European Copyright and Design Reports* (Sweet and Maxwell). At present she is co-authoring a book, *Global Intellectual Property Law*, with Graham Dutfield.

Commentators:

Peter Jaszi is faculty director of the Glushko-Samuelson Intellectual Property Law Clinic and Professor of Law at American University. An experienced litigator in copyright, he also lectures widely in the U.S. and abroad, and is frequently called upon as an expert witness. He has served as a Trustee of the Copyright Society of the U.S.A. and as a member of the executive committee of the Educator's Ad Hoc Committee on Copyright. In 1994 he was a member of the Librarian of Congress' Advisory Commission on Copyright Registration and Deposit, and in 1995 he helped to organize the Digital Future Coalition, which advocates public interest positions on copyright issues before the U.S. Congress and international organizations. He is coauthor (with Craig Joyce, William Patry, and Marshall Leaffer) of *Copyright Law*, a standard text now it its sixth edition (LEXIS Publishing); and coeditor (with Martha Woodmansee) of *Intellectual Property and the Construction of Authorship*, published as a special issue of the *Cardozo Arts & Entertainment Law Journal* in 1992 and reissued under the title *The Construction of Authorship: Textual Appropriation in Law and Literature* by Duke UP in 1994. His many other publications include the influential "Towards a Theory of Copyright: The Metamorphosis of 'Authorship'" (*Duke Law Journal*, 1991).

Peter K. Yu is Associate Professor of Law and founding director of the Intellectual Property & Communications Law Program at Michigan State University College of Law. He holds appointments in the Asian Studies Center and the Department of Telecommunication, Information Studies and Media at Michigan State University. He is also a research fellow of the Center for Studies of Intellectual Property Rights at Zhongnan University of Economics and Law in Wuhan, China. Born and raised in Hong Kong, Professor Yu is a leading expert in international intellectual property and communications law. He is currently working on a book entitled *Paranoid Pirates and Schizophrenic Swashbucklers: Protecting Intellectual Property in Post-WTO China*. His publications are available on his web site at www.peteryu.com.

Organizer:

Martha Woodmansee is Professor of English and Law at Case Western Reserve University where she also directs the Society for Critical Exchange, a national organization devoted to collaborative interdisciplinary research in theory. She has published widely at the intersection of aesthetics, economics, and the law. Her books include *The Author, Art, and the Market* (Columbia UP 1994); a collection of essays coedited with Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke UP 1994); and the collection, *The New Economic Criticism: Studies at the Intersection of Literature and Economics* (Routledge 1999).