Art, Culture & the National Agenda

COPYRIGHT AS CULTURAL POLICY

CENTER FOR ARTS AND CULTURE

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The Center for Arts and Culture is an independent not-for-profit organization dedicated to examining critical issues in cultural policy. The Center initiated, in the Spring of 2000, a project called *Art, Culture and the National Agenda*. With generous support from a number of foundations, the Center solicited background papers on arts and cultural issues from dozens of scholars and practitioners over an 18-month period. The aim of *Art, Culture and the National Agenda* is to explore a roster of cultural issues that affect the nation's well-being -- issues that should be on the horizon of policymakers, public and private, and at national, state and local levels.

This issue paper, *Copyright as Cultural Policy*, is the first in the Art, Culture and the National Agenda series. Written by Michael S. Shapiro, former general counsel at the National Endowment for the Humanities and a consultant on culture and intellectual property, *Copyright as Cultural Policy* provides an overview, historical anaylsis and legal implications of copyright law for the creative sector and cultural organizations in the United States. This issue paper, like others in the series, reflects the

opinions and research of its author, who was informed by commissioned background papers and the assistance of the Center's Research Task Force. The paper does not necessarily represent the views of all those associated with the Center.

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We would welcome commentary on this issue paper -- on our listerv or by mail (Suite 334, 401 F St. NW, Washington, DC 20001). Our hope is that the paper will become part of the informed dialogue on the role of culture and copyright. To join the listserv or find additional information about the Center, go to our web site at www.culturalpolicy.org.

Gigi Bradford
Executive Director

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EXECUTIVE SUMMARY

Artists, authors, and composers voice concern that the copyright system may no longer be capable of ensuring their livelihood. Record companies, movie studios, and book publishers, fearful that copyright law may not be robust enough to ensure a return on their investment, are turning toward contractual and technological controls to protect their works. Creative artists and scholars in the humanities worry that creative production may be seriously constrained if copyright laws in effect place creative works under technological lock and key.

While much recent media attention has focused on the impacts on copyright enforceability of digital technologies and the Internet, the contemporary public policy discussion has often lost sight of the legal foundation of the U.S. copyright system. The Copyright Clause, enshrined in Article I of the Constitution, is the cornerstone of that system. The Copyright Clause provides Congress with the power to grant to authors and inventors for limited times the exclusive right in their writings and inventions to "promote the progress of science and useful arts."

From the beginning of the Republic, the Copyright Clause has been interpreted repeatedly by Congress and the courts, establishing a body of law and principles that constitutes an important component of U.S. cultural policy. Today the words "writings" and "authors" encompass all manner of creative individuals and their works, the "exclusive right" has burgeoned into a bundle of rights, and the duration of copyright has increased steadily. U.S. copyright law also has responded successfully to rapid changes in technology, opening new markets for American creative works at home and abroad.

Nonetheless, each technological advance has forced successive Congresses and federal courts to wrestle with unresolved questions embodied in the Copyright Clause. Is copyright an author's right, entitling the original creator to capture the full economic benefit when technology creates new markets for creative works? Is copyright essentially a private property interest, allowing subsequent copyright owners to appropriate a significant share of the value embodied in creative works? Or is copyright a user's right, making the public at large the primary beneficiary of technological change through increased availability of cultural products and services? To establish a common vocabulary to discuss these questions, this issue paper begins by identifying the historic rationales for copyright in the United States.

The Copyright Clause, which sets forth the Framers' scheme for the production and use of original creative works, remains a critical component of U.S. cultural policy after more than two centuries. The Supreme Court put it this way: "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the arts." Regrettably, the balancing of private rewards and public benefits is too often overlooked in the contemporary public debate over copyright. To enrich and advance this national dialogue, this paper attempts to return the copyright discourse to first principles, focusing on the following three critical areas.

Copyright and Creative Freedom

Historically, the Copyright Clause's invitation to creativity has accommodated the First Amendment's guarantee of freedom of expression. Drawing on seminal copyright cases, this paper shows how judges and other government officials have declined over the years to constitute themselves as arbiters of the public taste. The courts also have consistently rejected content-based defenses to copyright infringement, affirming instead the principle that "the best way to promote creativity is not to impose any government restrictions on the subject matter." *Although the law is well settled in this area, this paper suggests monitoring regulatory and legal developments to ensure that*

content preferences or restrictions are not added to copyright law, thereby eroding long-standing doctrines that have served the creative sector well.[1]

Today the accommodation of copyright's encouragement of expressive activities with First Amendment freedoms faces new challenges. In 1998, for example, Congress enacted the Digital Millennium Copyright Act (DMCA) to make available through the Internet "the movies, music, software, and literary works that are the fruit of American creative genius." To achieve this goal, the DMCA, among other things, prohibits the circumvention of certain technologies employed by copyright owners to prevent access to, or copying of, protected works.

Copyright owners insist that without the DMCA's anti-circumvention controls, they would have little economic incentive to make the investments necessary to create and distribute cultural products and services. But representatives of cultural institutions argue that the DMCA dangerously tilts copyright's balance in favor of copyright proprietors – casting aside free speech values, the promotion of learning, and the protection of the public domain. Is the DMCA on a collision course with the First Amendment? To illuminate this issue, this paper analyzes a hypothetical example that sets forth some of the concerns of the cultural community. *Although only a hypothetical, this example suggests the need of the cultural sector*

to remain alert to legal and technological developments that could undermine individual creative freedom, thereby defeating the purposes of copyright.

Defining the Boundary: Private Property and Public Welfare

Copyright duration establishes the boundary between private property and the public welfare. On one side, copyright's grant of a limited term monopoly operates as an effective incentive system for the production and distribution of creative works. On the other side, there is an intellectual commons. Without a rich and robust intellectual commons, the resources available for future work are diminished. The Supreme Court has recognized that defining the boundary between copyright owners and the commons is among the most difficult tasks that Congress faces in enacting copyright legislation.

Congress has used its authority under the Copyright Clause steadily to expand copyright term from a fixed term of 28 years in 1790 to the current term of life of the author plus 70 years. The most recent extension, the Copyright Term Extension Act of 1998 (CTEA), effectively "freezes" the public domain for 20 years. One legal scholar argued that CTEA's retroactive term extensions flunks the Constitution's "incentive requirement"

because “you can't give an incentive to a corpse.” Did Congress overstep its constitutional authority when it enacted CTEA? Do repeated extensions of copyright term, what one commentator called “perpetual copyright on the installment plan,” violate the “limited times” provision of the Copyright Clause?

In a case closely watched by the creative sector, an appeals court recently concluded that Congress acted within its constitutional authority in passing CTEA. Nonetheless, given the economic interests of authors and copyright owners and the concerns of users and other creators, the 200-year old debate over the appropriate length of copyright is likely to continue for the foreseeable future. *To better inform copyright lawmaking in this area, this paper suggests that the cultural community undertake legal, economic, and public policy research on the effects of copyright term extension on individual creators, creative enterprises and the user community.*

Striking the Balance: Rights and Limitations

To secure the ultimate benefits of creativity, copyright law attempts to strike a balance between the competing interests of creators and owners of copyrightable work and the public welfare inherent in it (including the interests of the users of creative works). Congress grants

exclusive rights to creators, which are subject to statutory limitations. Artists, authors, and scholars in the humanities are economically rewarded for their efforts, but others may build on their accomplishments through the fair use of protected works. Creative expression is protected, but ideas and facts are excluded from protection.

Today copyright's balance may be upset by changes in law, technology, and business practices. Increasingly, the lines between these areas are blurred. In 1998, as noted above, Congress enacted the DMCA which, among other things, prohibits the circumvention of certain technologies employed by copyright owners to prevent access to or copying of protected works. During the legislative process leading up to the enactment of DMCA, representatives of educational and cultural institutions argued that the legal protection of such technological measures could be used, in effect, to abrogate longstanding privileges of users under U.S. copyright law. Under the fair use doctrine, for example, a judge may excuse an infringement where the use is for critical, scholarly or educational purposes.

To evaluate the potential adverse affect of the law on such uses of creative works, the DMCA mandated the Library of Congress and the U.S. Copyright Office to conduct an ongoing rulemaking to determine the classes of works, if any, that should be exempted from the pro-

hibition. Representatives of the educational and cultural community participated in the first rulemaking, which was completed in October 2000 (and will remain in effect for three years). Nonetheless, on the basis of the administrative record before it, the Copyright Office declined to intervene on behalf of the cultural community. What was lacking in the petitions, the Register of Copyrights concluded, was a clear showing of "adverse impacts on the ability of users to make non-infringing uses" of protected works.

The Register of Copyright's conclusions should be the point of departure as the cultural community prepares for its ongoing participation in this administrative proceeding. *More specifically, data collection is needed to document specific instances of adverse effects of the DMCA's anti-circumvention prohibitions on the user community. Legal research should be undertaken to delineate carefully what classes of works, if any, should be exempted from the prohibitions. More broadly, legal and policy research is required to evaluate whether the fair use doctrine is being adequately accommodated to the digital environment.*