ABSTRACT

Multiple Authors, Conversations with Renowned Professors on the Future of Copyright

JTIP had the wonderful opportunity to attend the lectures in “The Future of Copyright” Speaker Series and to interview the speakers while they were at Tulane University School of Law. This Article is a product of the hard work of Professor Townsend Gard, Professor Lunney, the speakers, and the JTIP members. It provides a study of the foremost scholars’ views on the future of copyright. Collectively, this Article provides a comprehensive view of the future of copyright.

The following presents a brief summary of the speakers’ views on the future of copyright that was presented during their lectures and interviews. Professor Peter Jaszi of American University Washington College of Law discussed the future of fair use. Jaszi believes that courts have moved from a modern perspective and have begun to embrace a postmodern perspective where individualism is discredited and value judgments are suspect. Jaszi thinks that copyright can now be a cultural leveler because the courts can refuse to distinguish works of high and low authorship. This shift in copyright is a change from a fixed modernist view to a more flexible postmodern view.

Professor Graeme Dinwoodie, the Chair of Intellectual Property and Information Technology Law at Oxford University, discussed the international aspects of copyright law. Dinwoodie believes that treaties are important to the future of copyright because they affect national laws, which are changed in response to international pressure. International law sets boundaries allowing countries to create laws to balance users’ and authors’ rights. Dinwoodie, however, believes that the balance is far more complicated than we assume.

Professor Diane Zimmerman of New York University School of Law explained why traditional rules of copyright do not and will not work on the Internet. She believes that copyright is impractical on the Internet because it is inexpensive and easy to copy works on the Internet, but hard to track and find the infringers. There is also a cultural difference between the public’s perceptions toward analog and Internet material. People have a different sense of what they can do with a work they have acquired than what the law permits. The average person does not think there is anything
wrong with giving a copyrighted work to their friends.\textsuperscript{13} Zimmerman believes copyright on the Internet will look different in the future.\textsuperscript{14}

Zimmerman also believes that there is a move toward realism in copyright where the notion that copyright owners could and should control every instance of copying is eroding.\textsuperscript{15} Instead, copyright owners are ceding that right in the face of impossibility.\textsuperscript{16} Thus she believes that in the future copyright practices will be brought into line with the ways in which users interact with works.\textsuperscript{17}

Mark Rose, an Emeritus English Professor at the University of California at Santa Barbara, explained the relevance of the history of copyright law.\textsuperscript{18} Looking back at the early history of copyright, Rose believes that the end of perpetual licensing created a positive feedback loop that caused further growth.\textsuperscript{19} He thinks, however, that there has been an increase in the proprietary element of copyright, and that the decision in \textit{Eldred v. Ashcroft}, which affirmed the constitutionality of The Copyright Term Extension Act’s extended protection for life plus seventy years, has effectively established a perpetual copyright.\textsuperscript{20}

Furthermore, Rose believes that the modern conception of authorship does not work with copyright.\textsuperscript{21} The concept of authorship is deeply embedded in our culture and it allows us to preserve the illusion that we have definable and durable selves.\textsuperscript{22} While he is aware of the many people who have contributed to everything he has ever written or thought, Rose views the notion of the “self” as a necessary fiction.\textsuperscript{23}

Professor Pamela Samuelson of the University of California at Berkeley Law School presented a plan for how copyright reform can be implemented.\textsuperscript{24} Samuelson developed a list of ten possible ways to institute copyright reform.\textsuperscript{25}

Samuelson listed a series of ideas that could change copyright, but she felt that they would probably not work. Samuelson noted that Congress could legislate copyright reform.\textsuperscript{26} She feels, however, that there are political economy problems and that Congress is not receptive to changes in copyright legislation now as lawmakers are dealing with more pressing financial and military issues.\textsuperscript{27} Samuelson also suggested that the intellectual property czar could push reform.\textsuperscript{28} However, because the czar’s job concerns enforcement, she believes that the czar should not be in charge of reform.\textsuperscript{29} Another option she volunteered was to recreate the office of technology assessment, which

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item Interview with Mark Rose, Professor, Univ. of Cal. at Santa Barbara, in New Orleans, La. (Apr. 6, 2009).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item Lecture by Pamela Samuelson, Professor, Univ. of Cal. at Berkeley Sch. of Law, in New Orleans, La. (Apr. 13, 2009).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
could write a report at the request of Congress when complicated new technology is introduced.\(^{30}\) Samuelson, however, believes that these methods were not feasible even though they are often suggested.\(^{31}\)

Samuelson is far more optimistic about the following ideas to alter copyright law.\(^{32}\) She believes that courts can reform copyright through judicial interpretation.\(^{33}\) Reform is often more easily obtained in the courts than in Congress due to the lack of lobbyists.\(^{34}\) Furthermore, she thinks that the Copyright Office is another option for implementing copyright reform.\(^{35}\) She believes there should be further discussion to determine what could be done to make the Copyright Office more meaningful and forward-looking.\(^{36}\) Samuelson also notes that scholarship and treatises can further copyright reform.\(^{37}\) While she thinks scholars’ works typically do not matter outside of amicus briefs, she believes that treatises are so powerful that they can in practice overrule the statute.\(^{38}\)

Moreover, Samuelson believes that private ordering, a response to lack of public ordering about copyright, could be another way to implement copyright reform.\(^{39}\) She also advocates for social norms and practices to change copyright.\(^{40}\) She favors a Darwinian approach and believes that those who are best adapted to the environment are the ones who will survive.\(^{41}\) Lastly, Samuelson believes that international bodies such as the World Intellectual Property Organization (WIPO) can reform copyright.\(^{42}\)

Professor James Boyle of Duke University Law School provided insight into the future of authorship and the role of the public domain in fostering creativity.

JTIP has also included Blake Mogabgab’s winning exam for Professor Townsend Gard’s Copyright class. Mogabgab wrote his essay on user-generated content, which incorporates all of the speakers’ views on the future of copyright. The interviews with Professors Jaszi, Dinwoodie, Zimmerman, Rose, Boyle, and the winning exam by Blake Mogabgab are included in this Article. JTIP hopes this Article will provide greater insight into the different perspectives on the future of copyright.

Please go to Westlaw, LexisNexis, or HeinOnline for the remainder of this article.

\(^{30}\) Id.
\(^{31}\) Id.
\(^{32}\) Id.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Id.
\(^{36}\) Id.
\(^{37}\) Id.
\(^{38}\) Id.
\(^{39}\) Id.
\(^{40}\) Id.
\(^{41}\) Id.
\(^{42}\) Id. After Professor Samuelson visited us, she went to give a talk at UNC, after which a good deal of her writing time became focused on the proposed Google Book settlement. We have included a piece that memorializes these efforts, and it is included in this volume as a substitute for the transcription of her interview, which in part also focused on this important topic. See Pamela Samuelson, Pamela Samuelson’s Letters to the Court: Concerns on the Proposed Google Book Settlement, 12 TUL. J. TECH. & INTELL. PROP. 185 (2009).