Directions on the Road to Copyright Reform?:
An Overview of the Copyright Principles Project

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An Overview of The Copyright Principles Project Report

The Copyright Principles Project (CPP) was formed in 2007 and is made up of 20 members who share the belief that while copyright law works “reasonably well” in some areas, it can and should be improved in light of the “dramatic technological advances” over the last 40 years. These advances – including the rise of user generated content, the increase of peer-to-peer file sharing technologies, and the transformation of how we access information via the Internet and World Wide Web – have posed significant questions that Congress “did not and could not have anticipated in the mid-1970s when the last copyright effort reached fruition” (Samuelson et al. 1). As a result, current copyright law is a law of “shreds and patches”: a web of amendments that tend to obfuscate rather than clarify the “normative principles that ought to illuminate how [the law] should be applied in particular instances” (Samuelson et al. 3). In a world where copyright issues affect both amateur and professional alike, and where copyright rules implicate (and, at times, unduly criminalize) the activities of ordinary people, it is more important than ever to clarify the scope, purpose, and application of copyright law in the digital age. To this end, the CPP members, led by Berkeley Law Distinguished Professor Pamela Samuelson, released “The Copyright Principles Project: Directions for Reform” on September 28, 2010 that explores the possibilities for meaningful reforms to the U.S. copyright system. The project is the result of three years of work and certainly looks the part: it is thorough (approximately 70 pages long) and thoughtfully rendered. Marybeth Peters, the outgoing head of the U.S. copyright office and informal contributor to the project, said that “the report intelligently informs the copyright debate, and the identification and discussion of issues is well-done and important....[the] entire project significantly reinvigorates efforts to bring copyright law up-to-date, either incrementally or as a major revision” (qtd in Gluss 1). The project’s members would agree with Peters’ assessment, noting that “some changes recommended in this Report can only be brought about by legislative action, while others can be accomplished through common law evolution” (Samuelson et al. 4). Regardless of how these changes are addressed, one thing is clear: change is going to take time.

Even the CPP members are hesitant about claiming how much change they can really agree upon. The members are a rich mix of academics, practicing lawyers, and industry representatives and have an equally rich mix of expertise and experience with copyright law and policy. They can agree in principle that copyright law is important for education, culture, and democracy and that there needs to be balance between the interests of copyright owners and the public to
“enable the formation of well-functioning markets...that yield benefits for all stakeholders” (Samuelson et al. 1). What they cannot agree upon is exactly how to get there, on the “directions for reform” around which the entire report is centered. “Disagreements,” they write, “tend to arise over how to implement these goals in statutory language and actual practice....We are not...in a position to offer a comprehensive and detailed set of reform proposals” (1, 3).

Approximately one half of the preamble to the CPP report is spent delineating the limits of its findings (e.g. they met only 9 times in three years) and carefully articulating a disclaimer for how to interpret these findings:

The views expressed in this Report are, however, those of the individuals involved; they should not be ascribed to the members’ institutions, organizations, clients, or employers. Individual participation in this project should, moreover, not be interpreted as an endorsement of each and every proposal discussed in this document. In fact, various members of the group maintain reservations and even objections to some proposals described as recommendations in this Report....we do not intend affirmative statements or the use of phrases such as ‘we recommend’ or ‘we believe,’ to suggest that the group as a whole was uniformly in support of each view stated. (Samuelson et al. 4)

Regardless of these disagreements and disclaimers, what is made abundantly clear in the CPP report is that all of its members “came away with believing that a better copyright law is possible” (4). Considering the diverse makeup of the CPP (distinguished academics from Berkeley and Michigan Law as well as corporate attorneys from Walt Disney Co., Microsoft, and Warner Bros. Entertainment), it is truly a tribute to the members involved that there was enough agreement to set forth recommendations at all.

Report Overview

The 70 page CPP report is broken into five main sections: The Preamble (pp. 1-5); Part I: Guiding Principles (pp. 6-7); Part II: How Consistent With Good Copyright Principles is U.S. Copyright Law Today? (pp. 8-21); Part III: Copyright Reform Proposals (pp. 22-68); and Part IV: Conclusion (68). The bulk of the report is dedicated to articulating 25 Copyright Reform Proposals (Part III) and this overview will highlight a few of the more important recommendations as touches our work as teachers and scholars.

Recommendation #1: Copyright law should encourage copyright owners to register their works so that better information will be available as to who claims copyright ownership in which works.

This recommendation implicitly addresses the problem of instant, “one-size-fits-all” copyright protection as well as the attendant problem of “the overlong duration of copyright” which hampers creativity in both the short- and long-
term: once a work is fixed in a tangible medium it is automatically copyrighted (so very few copyright holders register their works at all), and those who want to license an older work often cannot locate the copyright owner (contribution to the growing “orphan works” problem). While there was no consensus about shortening the current term of copyright, there was consensus on “duration related issues” (Samuelson et al. 10). The members supported a more transparent and organized method of registering copyrighted works so that “members of the public can have better information about the works currently protected by copyright and about those works’ respective owners” (Samuelson et al. 24). The U.S. Copyright Office would not be solely responsible for all of the registration responsibilities; instead, “industry participants could compete for business from copyright owners” as in the current domain-name system, and existing groups like Creative Commons could become such a registry. By revising and streamlining the registration system, the members envision a clearer way to “tailor” copyright by distinguishing “those rights holders who place significant value on their works and who wish to obtain the widest range of protections” from those who create “for fun” kinds of works that are not of commercial value (Samuelson et al. 26, 37).

Of course, the idealism of this recommendation meets a harsh reality in Recommendation #2, as the Copyright Office is designated as the one to “set standards for acceptable private registries – i.e. both technical standards and also specifications determining what kinds of copyright information a compliant registry must and may ask for from users and place into its database” (Samuelson et al. 28). Once these standards are established, the Copyright Office would “accept applications from firms seeking to operate as private registries and would certify that private registries (of many different types) meet and continue to adhere to the registry standards” (28). Ultimately, the goal in these recommendations is to provide a kind of “search once, search everywhere” system – the kind of system we have become used to in conducting online Web searches, but we’ve miles of bureaucracy to go before we sleep.

Recommendation #3: The Copyright Office should develop additional policy expertise and research capability, particularly in the areas of economics and technology.

If the work of the CCCC-IP Caucus and Committee shows us anything, it is that issues of copyright need to be explored through the original spirit of copyright (as an act to “promote learning”) and not just through the letter of the law. What is exciting about this recommendation is that the CPP members understand copyright to be just such a “sensitive balance” between “public and private interests” (Samuelson et al. 30). “Copyright policy,” they assert, “cannot and should not be made based solely on the interactions of lawyers, legislators, and interested parties” (30). To that end, they recommend that two new positions be created in the Copyright Office: Chief Economist, and Chief Technologist (30). These positions would not be permanent ones; in fact, they
would be filled by a new person every 2-3 years “to ensure a regular infusion of fresh thinking” (30). These individuals will be recruited from academia, other government agencies (such as the FTC or FCC) and the private sector. In addition, the report goes on to recommend that the Copyright Office “consult with experts in other fields related to the production of copyrighted works, such as individuals with experience in media studies and other disciplines related to the creation and dissemination of culture” (30). This recommendation reinforces the notion that copyright needs to be re-visioned as something new (not just as a rearranging of the old) and that this vision has to be informed by the public.

Recommendation #4: The Copyright Office should give serious consideration to developing some mechanism(s) through which users could receive guidance on “fair use.”

One of the more troubling trends of U.S. copyright law is how the focus is often on enforcement rather than on engagement; that is, articulating what you can’t use, rather than on what you can. This recommendation focuses on “reconciling copyright law with the First Amendment” by “ensuring that copyright’s exclusive rights do not impose significant restrictions on expression” and by “freeing up a range of uses that do not threaten rights holders’ ability to obtain an adequate return from their works” (Samuelson et al. 30). This can be accomplished by “providing the public with more guidance about what constitutes ‘fair use’ and what does not” (Samuelson et al. 31). In the March 24, 2010 Letter from CCCC to the US Copyright Enforcement Coordinator, we expressed a similar desire:

We ask that, as you consider others’ comments regarding "public education and awareness programs for consumers," you not exclusively focus on anti infringement. We urge you also to provide educational materials that inform users what rights they have under fair use, through licensing and shareable materials such as those provided through creative commons, and through legal protections and rights afforded by using materials in the public domain (2).

Later, in Recommendation #17 (“Copyright law should recognize that there are more fair use purposes than is recognized in the current statute”), the CPP members recommend that the current fair use provision be revised to “more accurately reflect the range of social policy purposes for which fair use is often used in practice” (Samuelson et al. 52).

Recommendation #14: Once information resources become part of copyright’s public domain, they must remain in the public domain.
While “public domain resources are generally available for free by all” contract law “can sometimes be used to control access and use of these resources, subject to copyright law’s preemption doctrine” (Samuelson et al. 51). Ultimately, this recommendation makes clear that there needs to be more access and less retroactive control in this area.

**Recommendation #15:** Copyright law should make it easy for copyright owners to dedicate their work to the public domain.

The current Copyright Act does not provide for Public Domain Dedication; unlike Creative Commons, which provides for such a designation as a way to provide alternatives to the “all rights reserved paradigm of traditional copyright.” This recommendation recommends that there be a provision making it easy for copyright owners to dedicate their work to the public domain.

**Recommendation #19:** Copyright exceptions for libraries, archives, and museums should be updated to better enable preservation and other legitimate uses in light of ongoing technological change.

As cultural institutions preserving the cultural record, libraries, archives, and museums should be helped (not hindered) by copyright law to perform these critical functions. If this recommendation were implemented, these institutions could legally convert such things as old films and documentaries to digital format, and not be subject to the “Orphan Works” problem (where the original copyright holder is unknown or, if known, long since gone).

**Conclusion**

The CPP report admits that the last few decades have brought “dramatic changes in the copyright landscape” (Samuelson et al. 68). “Copyright law touches us all on a daily basis” says Pamela Samuelson, “and now millions of people who create user-generated content have become copyright stakeholders” (qtd in Gluss, 2). As such, “copyright law needs to be simpler, understandable, and more flexible to change with the times” (qtd in Gluss, 2). The CPP report addresses this problem directly, making it clear that current copyright law no longer “serves well the interests of those it affects” (Samuelson et al. 68).

The goal of reform is a much needed one, but one that is not going to come easily or quickly. “Too much discourse about copyright law...has been burdened by rhetorical excesses and an unwillingness to engage in rational discourse with those having differing perspectives” (Samuelson et al. 68). What the members of the CPP have shown us, however, is that “it is possible for persons of good will with diverse viewpoints and economic interests to engage in thoughtful civil discourse on even the toughest and most controversial copyright issues” and emerge from it believing that a better copyright law is
possible (Samuelson et al. 4).

Works Cited