

PROLOGUE

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In an astonishingly short time, the IPIL/HOUSTON SANTA FE CONFERENCE has become a premier forum for the exploration of critical issues in the past, present, and future of the fascinating body of law that encompasses patent, trademark, trade secret, copyright, and information law. In this 2003 SYMPOSIUM issue, the Houston Law Review continues its highly productive collaboration with the University of Houston's Institute for Intellectual Property & Information Law (IPIL) by publishing the fruits of the 2003 Conference, held on June 5–8, 2003, in Santa Fe, New Mexico.

In *Considering Copyright*, readers will find an Introduction and Essays by seven of the leading figures in copyright law today:

- Jon O. Newman and Richard A. Posner, of the United States Courts of Appeals for the Second and Seventh Circuits respectively, two of the most prolific and insightful authors of critical copyright-related opinions by the federal courts;
- Professors Laura N. Gasaway of North Carolina, Eugene Volokh of UCLA, and Alfred C. Yen of Boston College, each among the very best and brightest minds on the subject in legal academia;
- Alan Story of the University of Kent, U.K., the preeminent scholar on the impact of developed world intellectual property regimes on the cultures of economically less developed nations around the globe; and

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- William F. Patry, prolific scholar of copyright whose wide experience includes service as Policy Planning Advisor to the Register of Copyrights, copyright counsel to the United States House of Representatives, teaching, and private practice.

The importance of bringing such expertise to bear on the subject of modern copyright law and its challenges scarcely can be doubted. From its modest beginnings as a private monopoly among the booksellers of sixteenth century London, its embrace by the Crown as a means of controlling sedition and heresy, its transformation into a comprehensive regulatory system based on statutory grants to authors in 1710, and its adoption and adaptation to the American schema of commerce and free speech in the pre-constitutional state copyright statutes, the Copyright Clause of the United States Constitution, the first federal copyright act in 1790, and the First Amendment,¹ to the enactment on successive days of the Sonny Bono Copyright Term Extension Act² and the Digital Millennium Copyright Act in 1998³ and now into a new century, the law of “copyright” has protected the exclusive rights of authors and other creators to reproduce, disseminate, adapt, and otherwise benefit from the exploitation of the fruits of their minds.

In the twenty-first century, the information industries are critically important to the American economy in its post-industrial state.⁴ In 2001, the latest year for which complete data is available, the core copyright industries (including pre-recorded music, TV programs, motion pictures, home videos, books, periodicals, newspapers, and computer software) accounted for 5.24% of the U.S. Gross Domestic Product, or \$535.1 billion. Between 1977 and 2001, the core copyright industries grew more than twice as fast as the rest of the U.S. economy (7.0% to 3.0%), and created new jobs more than three times as fast as the economy as a whole (4.93% to 1.50%). The increase in their share of American trade has been similarly dramatic. In 2001, the U.S. core copyright industries achieved estimated foreign sales and

1. See L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L. J. 909 (2003).

2. Pub. L. No. 105-298, §§ 101–106, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 108, 203, 301–04 (2000)). This act was upheld in *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

3. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections in 5, 17, 28, and 35 U.S.C.).

4. For the following data, see Stephen Siwek, *Copyright Industries in the U.S. Economy: The 2002 Report* (2002) (prepared for the International Intellectual Property Alliance).

exports of \$88.97 billion, again leading all major industry sectors, including chemicals and allied products, motor vehicles, equipment and parts, aircraft and aircraft parts, and the agricultural sector. Today, U.S.-produced software alone constitutes more than half of the world market.

These figures will only grow in coming years. Indeed, the transfer of information now has become the centerpiece of U.S. competitiveness. Unlike other sectors of its economy, in the area of intellectual property the United States is a net exporter, and the world's largest exporter by far. Whether old media (motion pictures, music, and the like) or new (computer software, for example), this nation is preeminent in the production and distribution of copyrighted works—for better or for worse, for ourselves and for the other nations of a world increasingly interconnected in commerce and politics.

Quite apart from this practical interest, however, copyright law remains, as it always has been, a challenging and theoretically intricate subject. As Justice Story put it, copyright law (along with patent law) “approach[es], nearer than any other class of cases . . . to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subt[ile] and refined, and, sometimes, almost evanescent.”⁵ Marked by both historical peculiarities and difficult policy dilemmas, copyright law not only drives GDP but also impacts profoundly our cultural, artistic, and moral sensibilities.

No single collection of essays could do justice to this broad canvas of complexities and concerns. In *Considering Copyright*, however, IPIL/HOUSTON has brought together an intriguing array of viewpoints. The contributors discuss topics ranging from whether misappropriation law's traditional determination to punish those who “reap where they have not sown” should be discarded summarily to the vexed question of how to preserve the nation's (and the world's) cultural heritage in the midst of rapidly changing technologies for its creation, dissemination, and storage for future generations; from the degree to which aggressive claims to copyright protection may, in some instances, overbalance the advancement of copyright's built-in free speech values to a consideration of recent case law developments at that critical intersection of private profit and public benefit; and from the interaction of international copyright norms with this nation's perceived vital interests to a plea, in the interests of those whose copyright law and cultural heritage is more fragile than our own, that the leading international convention in the

5. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

field, the Berne Convention for the Protection of Literary and Artistic Works, be modified drastically or repealed outright.

For a detailed and thoughtful Introduction to all of the foregoing issues by one of copyright law's most perceptive and influential observers and participants, read on!