INTRODUCTION

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Each year, the University of Houston Law Center's Institute for Intellectual Property and Information Law (IPIL) brings together, for the IPIL/Houston National Conference, internationally recognized scholars to explore critical issues in the past, present, and future of the fascinating body of law that encompasses copyright, patent, trademark, trade secret, and information law. In this 2007 Symposium issue, *Copyright in Context*, the *Houston Law Review* continues its highly productive collaboration with IPIL to publish the fruits of the 2007 Conference, held on June 8–10, 2007, in Santa Fe, New Mexico.[1]

Copyright has many contexts. Perhaps its best known contexts today, at least popularly in the United States, are commerce and technology. In a sense, this is an altogether fitting result of the prestatutory origins of Anglo-American "copy-right" as trade regulation arising from the invention of the printing press.[2] From its modest beginnings as a private

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1. In addition to the Conference Presenters whose papers appear here, this year's gathering in Santa Fe benefited greatly from the insightful participation of our three Conference Fellows: Michael W. Carroll, Villanova University School of Law; Christine Haight Farley, American University-Washington College of Law; and Michael J. Madison, University of Pittsburgh School of Law.

2. For detailed discussion of the developments described summarily in the remainder of the paragraph, see Craig Joyce, *"A Curious Chapter in the History of Judicature":*

publishing monopoly among the booksellers of London in 1556, its embrace by the Crown as a means of controlling sedition and heresy, its transformation into a system based on statutory grants to authors in the Statute of Anne, its adoption by and adaptation to the American schema of commerce (and free speech) in the preconstitutional state copyright statutes, the Copyright Clause of the United States Constitution, the first federal copyright act in 1790 and the First Amendment, and its first construction by the Supreme Court of the United States in a suit between rival authors/assignees of reports of the Court's own decisions in 1834, the law of copyright has protected the exclusive rights of authors and other creators to reproduce, disseminate, adapt, and otherwise benefit from the commercial exploitation of the products of their minds.

In the new millennium, the copyright industries are critically important to the American economy in its postindustrial state.[3] In 2005, the latest year for which complete data is available, U.S. Gross Domestic Product (GDP) was $12.5 trillion.[4] The "value added" to U.S. GDP by core copyright industries (including business and entertainment software, recorded music, television and radio broadcasting, motion pictures, home videos, books, periodicals, and newspapers) reached an estimated $819.06 billion, or 6.56% of GDP.[5] The value added by the relevant activities of copyright industries more broadly defined[6] rose to an estimated $1.38 trillion, or 11.12% of U.S. GDP. Between 2002 and 2005, the copyright industries grew more than twice as fast as the rest of the U.S. economy: while the economy as a whole increased by 3.48%, the core and total copyright industries grew by 7.31% and 7.66% respectively.[7] These figures seem likely to increase in coming years.

Wheaton v. Peters *and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325 (2005), and 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).

3. *See* Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2006 Report*, prepared for the International Intellectual Property Alliance (IIPA), Nov. 2006, *available at* http://www.iipa.com/copyrighttrade/pdf/2006_siwek_full.pdf.

4. *Id.* at 2.

5. *Id.*

6. These include: industries in which only a portion of the products created, such as toys and games, fabric, jewelry and furniture, qualify for copyright protection; nondedicated support industries, such as wholesale and retail trade, that distribute both copyright- and noncopyright-protected materials to businesses and consumers; and interdependent industries that produce, manufacture or sell equipment, such as CD players, TV sets and personal computers, whose primary function is to facilitate the creation, production or use of copyright matter.

7. Siwek, *supra* note 3, at 2.

Quite apart from economic and technological developments, however, copyright law remains, as it always has been, a challenging and theoretically intricate subject sounding in many other contexts. 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 subtile and refined, and, sometimes, almost evanescent."[8] 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 *Copyright in Context*, however, IPIL/Houston has brought together an intriguing array of viewpoints.

In Maharam of Padua v. Giustiniani*: The Sixteenth-Century Origins of the Jewish Law of Copyright*,[9] Neil Netanel tells an engaging tale, predating Anglo-American copyright's origins, of conflict between rival Christian publishers of a critically important Jewish rabbinical text in sixteenth century Italy.[10] The resulting decision, by European Jewry's leading juridical authority (far removed in Poland), addressed issues of startling modernity in U.S. as well as Continental European intellectual property law: the nature of copyright as a property right or a limited regulatory prerogative; the scope of particular regimes of protection; the law applicable in disputes between litigants residing under differing regimes; and the enforcement of any selected regime as against actors territorially beyond its reach. Netanel's recitation of the aftermath of the decision provides a surprising, if saddening, conclusion to a remarkable story.

Roberta Kwall's *Originality in Context*[11] examines originality, one of statutory copyright's most historic and central concepts, in an unusual (for Anglo-American law) context: moral rights. Building on her own extensive prior writings on moral rights (an aspect of Continental European "author's rights" law),

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8. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (recognizing what Story first called "justifiable use" and we today call "fair use" in U.S. copyright law).

9. Neil Weinstock Netanel, Maharam of Padua v. Giustiniani*: The Sixteenth-Century Origins of the Jewish Law of Copyright*, 44 HOUS. L. REV. 821 (2007).

10. For those familiar only with English and American copyright law, the case will call to mind two signal, but much later, publishing disputes: *Donaldson v. Beckett*, 98 Eng. Rep. 257 (H.L. 1774), and *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834)—but not vice versa. As Netanel rightly notes, "[c]opyright scholars are almost universally unaware of Jewish copyright law," or were until now. Netanel, *supra* note 9, at 821.

11. Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871 (2007).

Kwall examines postmodern understandings of copyright's protections for the works of "Authors" (a defining consideration in the empowerment of Congress to enact relevant legislation under Article I, Section 8, Clause 8 of the Constitution).[12] Kwall carefully addresses, as a normative matter, whether, and if so how, originality should be applied in a moral rights framework. She concludes that moral rights properly may be accorded to copyrighted works, albeit in fewer than all the categories of works currently subject to copyright protection, under a proposed standard of "heightened originality as manifested by substantial creativity."[13]

In *Misuse*[14] (a title rivaling in brevity Richard A. Posner's *Misappropriation: A Dirge*[15] for the 2003 Symposium), Tom Cotter addresses a doctrine, of lesser antiquity than copyright generally or copyright's predicate originality requirement particularly, borrowed by the courts from another branch of intellectual property law: patent.[16] Misuse, a defense against infringement claims by rights holders, may be defined as an impermissible use of one's copyright or patent with anticompetitive effect. Cotter proposes adoption of a reformed and narrowed version of the misuse doctrine in both copyright and patent law. Successful assertions of misuse, he argues, should be "safe, legal, and rare," with due attention to distinctions between transactional and litigation misuse.[17] The article offers a mind-clarifying reexamination of misuse for consideration by scholars and courts alike.

Keith Aoki's *Balancing Act: Reflections on Justice O'Connor's Intellectual Property Jurisprudence*[18] provides an intriguing example of judicial biography and longitudinal study of jurisprudential developments within an individual court, focused specifically on intellectual property decisions by now retired

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12. As explained by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991), citing its own classic decision in *The Trade-Mark Cases*, 100 U.S. 82 (1879), originality is, constitutionally, "[t]he *sine qua non* of copyright," requiring both that the work be "independently created by the author" and that it possess "at least some minimal degree of creativity."

13. Kwall, *supra* note 11, at 899.

14. Thomas F. Cotter, *Misuse*, 44 HOUS. L. REV. 901 (2007).

15. Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621 (2003).

16. The patent misuse doctrine was first clearly recognized by the Supreme Court barely sixty-five years ago in *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942), and more recently has been imported into copyright law in such court of appeals decisions as *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990).

17. Cotter, *supra* note 14, at 903.

18. Keith Aoki, *Balancing Act: Reflections on Justice O'Connor's Intellectual Property Jurisprudence*, 44 HOUS. L. REV. 965 (2007).

Justice Sandra Day O'Connor and her colleagues on the Supreme Court between her appointment in 1981 and the Court's term ending in June of 2007. Thus, taking its cue from O'Connor's observation that "[c]ontext matters,"[19] the article examines both O'Connor's own IP opinions, from her earliest foray into trademark law[20] through her landmark opinions in patent[21] and copyright law,[22] and the opinions of other Justices whose views she shared or whose views now have been shaped, in part, by hers.[23] Aoki concludes that Justice O'Connor's (how to characterize: trademark? patented? certainly too short a phrase to be copyrightable!) judging style—"pragmatism in service of principle"[24]—applied in intellectual property cases as elsewhere: "[her] opinions in trademark, copyright, and patent engage in a capacious 'balancing act' that is consistent with her approach to other areas of the law" that came before her in twenty-four terms on the High Court.[25]

In the closing article of the Symposium, *Knowledge Accessibility and Preservation Policy for the Digital Age*,[26] Peter Menell returns us fully to contemporary themes of copyright, commerce, technology—and more, including both the history of human knowledge and the difficult task of balancing properly the roles of principal actors, both public and private, as copyright hurtles into the new millennium and beyond. Glancing backwards to the Library of Alexandria and moving forward to modern times, Menell traces the story of societies' attempts to preserve, catalog, and make publicly accessible the knowledge of the ages. *Accessibility and Preservation* focuses on the most conspicuous current example of that effort: the Google Book

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19. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

20. Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 846 (1982).

21. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 143 (1989).

22. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 342 (1991).

23. *See, e.g.*, KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727, 1734 (2007) (Kennedy, J.) (reflecting, Aoki observes, views similar to those of O'Connor, by then retired from the Court, on such matters as U.S. competition/innovation policy and institutional competence, horizontally and vertically, within U.S. federal system); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 949 (2003) (O'Connor joining Justice Stevens, the *Sony* majority opinion's author, in concurrence reiterating their *Sony* views, with both O'Connor and Stevens joining in the Court's unanimous opinion disposing of present case on other grounds); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 419 (1984) (featuring O'Connor as the deciding vote in an early case involving the interface between copyright law and new communications technologies).

24. *See generally* Craig Joyce, *Lazy B and the Nation's Court: Pragmatism in Service of Principle*, 119 HARV. L. REV. 1257 (2006).

25. Aoki, *supra* note 18, at 968.

26. Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013 (2007).

Search Project (GBSP).[27] Surveying the mix of values (democratic, cultural, and economic) implicated by the possibility of an Internet-accessible portal for searching much of already-recorded knowledge, and comparing a range of public and private institutions (governmental agencies, libraries, publishers, and other entrepreneurs) capable of enhancing preservation and accessibility going forward, Menell finds the GBSP to be the optimal prospect for success. That prospect, however, arguably is imperiled by the limitations of current copyright law, including the uncertainties of protracted fair use litigation. Menell offers appropriate corrective recommendations, both to Congress and the courts, for legislation and decision—and the hope that copyright and technology, in encouraging the creation and distribution of knowledge, thereby may continue to "evolve[] symbiotically" as they have throughout human history.[28]

There is, of course, much more to say. But the contributors to this year's Symposium already have said it. For detailed and thoughtful consideration of the foregoing issues, in many of copyright's most challenging contexts, read on!

27. Current information about the GBSP is "preserved and accessible" at http://books.google.com.

28. Menell, *supra* note 26, at 1070.