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Intellectual Property, Social Justice, and Civil Rights: Issues for the Digital Information Age

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Introduction

Developments in digital information technology offer revolutionary opportunities for the development, dissemination, and exploitation of information and ideas and individual creative expression. Accordingly, the objectives and boundaries of intellectual property protection must be reconsidered in the context of promoting social progress, such that they accommodate the benefits that can be derived from digital advances, and otherwise assure that technological options and opportunities are not stunted by legal canons which may (initially) appear inhospitable to these new uses of intellectual property.

The advent of commercially viable digitizing of text for mass distribution places new demands on intellectual property laws, particularly in so far as authors' rights are concerned. While the full impact of these developments is still to be fully appreciated, digitizing in other fields, such as music, video, and photography has demonstrated that there are many beneficial social effects which arise from digitization, including the creation of new methods and channels for the distribution of creative works. An often undervalued impact is how digitization of preexisting works provides new raw material that can be used to create more new works.[iii] *See generally* Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*

(2008); Jessica Litman, *Digital Copyright* (2006); William Patry, *Moral Panics and Copyright Wars* (2009). Randall Stross, Will Books Be Napsterized?, (The New York Times) http://www.nytimes.com/2009/10/04/business/04digi.html?_r=1 (Oct. 4, 2009). Music and videos made by remixing are perhaps the most prevalent examples of these kinds of works.[iv]

As new methods for harvesting from preexisting copyrighted material become available the inevitable complaints and concerns regarding attendant modes of infringement are raised. While these concerns can be legitimate, the impact of new technological uses such digitizing textual works must also be evaluated from the broader perspective of copyright social utility and social justice, and not merely from a myopic view of copyright property rights incentives.[v] The constitutional mandate that copyright law serve societal progress requires more than maximizing the commoditization interests of those responsible for the generation of original works- there are other obligations of social utility and social justice that must also be satisfied, including the broad dissemination of copyrighted works and furthering the opportunities for others to build from upon those earlier works. Consequently care must be taken to optimize the law so as to promote cultural progress, and not simply protect the pecuniary aspects of the authors' incentive mechanism.

Copyright should be an engine of progress in the creation and dissemination of information, not a brake on it, and new technological applications for copyrighted works should be approached with these principles in mind. This outline considers the Google Books Project and the Google Settlement Agreement as an important initiative within the evolving copyright landscape, and attempts to fit this initiative within that terrain, by exploring the way it serves the central purpose of copyright to advance knowledge and culture; discussing how it furthers

copyright social utility and justice through inclusion of those who have been excluded; and by analyzing the way it uses a court-supervised settlement to address novel and other important copyright problems.

Copyright Social Justice and Civil Rights in the Digital Information Age

Serving social justice is an integral aspect of copyright law. In drafting the Intellectual Property Clause, the Constitution's Framers penned a broad directive of social utility: "Congress shall have the power . . . to promote the progress of science and useful arts by securing for limited times to authors . . . the exclusive right to their writings . . .."[vi] Thus the Constitution empowers Congress to adopt and revise laws providing for copyright protection[vii] as a social engineering mechanism for advancing and shaping American culture. *See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)* (" 'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." ' " (quoting *Mazer v. Stein, 347 U.S. 201, 219 (1954)));* Paul Goldstein, Copyright 1.14 (2d ed. 2002); 3-10 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright,* 8.01[A](2002); Justin Hughes, *The Philosophy of Intellectual Property,* 77 Geo. L.J. 287, 299, 291 (1988) ("Intellectual property is often the propertization of what we call 'talent.' "). [viii]

Under the copyright law, certain property rights are granted to authors as a means by which to encourage artistic endeavor.[ix] At the same time, corollary rights and privileges to make use of copyrighted material are reserved to members of the general public, be they passive

readers and listeners or active creators using ideas and elements from prior works.[x] *See Kelly v. Arriba Soft Corporation*, 336 F.3d 811, 817 (9th Cir. 2003) ("A claim of copyright infringement is subject to certain statutory exceptions, including the fair use exception.") Together, the recognized rights and interests of authors and of the public are intended to form a synergistic framework to effectuate the social utility objectives of the copyright law.[xi]

Indeed, the first American copyright law, enacted by the First Congress as the 1790 Copyright Act, was entitled "An act for the encouragement of learning."[xii] In keeping with the constitutional mandate, both Congress and the courts have determined that unlike natural law intellectual property regimes, the primary objective underlying American copyright law is to engender the broadest possible production and dissemination of creative works to society's benefit. Widespread production and dissemination of creative works benefits the initial recipients such work as they are exposed to and make use of the ideas expressed therein. Such widespread production and dissemination of original works also benefits society, however, as the initial recipients build upon these ideas to create new works in turn. Thus the production of additional works by the first order recipients not only spurs their creative talents, but ultimately also those of the next order of recipients who continue the cycle, igniting and perpetuating a chain reaction of cultural advancement and ultimately advancing society as a whole.

Some legal scholars have questioned whether the copyright law can truly be said to fulfill its function of social utility, however, if in advancing the societal culture, it fails to also achieve an adequate measure of social justice.[xiii] In other words, can a civilization or culture truly progress if significant segments of its populace remain bereft of the benefits of societal progress and achievements?

The answer is that social justice is part of the progress intended to be furthered by copyright. Social justice includes the aspirational ideal of substantive equality as well as functional features of procedural equality.[xiv] Social justice includes not only access to, but also inclusion in the social, cultural, and economic life of society. Everyone must have a meaningful opportunity to participate in and *contribute to* the copyright bounty.

The obligation to preserve the social justice objectives copyright law is especially vibrant in extends to the digital information environment. Digital information technology has provided extraordinary opportunities for the development, dissemination, and exploitation of individual creative expression.[xv] These technological advances provide unprecedented access to copyrighted material, and also enable copyright end-users to engage in new forms of creative expression, including (but certainly not limited to) the reuse or "re-mix" of pre-existing material.[xvi]

At the same time, digital information technological advancements have also exposed deficiencies in the contemporary copyright social justice infrastructure. Perhaps foremost among the deleterious effects is the Digital Divide. While many Americans now enjoy greater access to the national (and multi-national) store of copyrighted works, other citizens remain isolated from such benefits. In fact in some cases, access by some to copyrighted works has actually *diminished* as digital formats have become the dominant medium for creative expression. In an increasingly digital world, limited access to technology is a sentence of cyber-apartheid.[xvii]

Consistent with the constitutional mandate of the Intellectual Property Clause and the specific social utility and social justice objectives of the copyright law, the Digital Divide can and should be addressed as something other than an issue of limited social resources. These

problems can be seen instead as matters of constitutional stature within the mandate to promote the progress of the arts and sciences. In short, the principles of justice, progress, equality, and liberty are directly applicable when they arise in the intellectual property context: everyone is to be included; none should be excluded. The individual author should be able to benefit from her own creation, but the common welfare and progress are the foci and societal advance is the paramount goal.

The Role of the Courts in Furthering Copyright Social Justice and Civil Rights

Whereas Congress has the responsibility for enacting and amending appropriate copyright law, it is the role of the courts to assure its proper interpretation and application. The courts have an independent responsibility to ensure that the copyright law serves to promote the development, use, and exploitation of artistic expression, and to thereby satisfy the copyright social engineering directive set forth in the Constitution. *See.* Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. Copyright Soc'y U.S.A. 317, 319 (2000) ("Elements of the [Supreme C]ourt's ... interpretation of the Copyright Clause ... include an emphasis on the public good that forces author's rights to be conditioned by the public... . From the first case, through the present, the Court has treated copyright law as positive law, the parameters of which are determined by Congress ([as] limited by the Constitution's strictures).")

To this end, courts have developed a variety of doctrines that limit the reach of a copyright owner's lawful monopoly. [xviii] The most prominent example is the judicially created doctrine of fair use.[xix] *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990) ("Not long after the creation of the copyright law by the Statute of Anne of 1709,

courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as "fair abridgment,' later "fair use,' would not infringe the author's rights.") Over the years, the courts recognized an inherent public privilege to make “fair use” of copyrighted works, and thus to intrude upon a copyright owner’s exclusive property rights for the purpose of educational and literary discourse and comment.[xx] Fair use developed into an “equitable doctrine [which] permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes.”[xxi]

Fair use ensures that the author property incentive mechanism does not overwhelm other important social utility needs of society as a whole.[xxii] It enables the copyright law to account for situations, in which a specific unauthorized use of copyrighted material will have little to no impact upon the author’s overall incentive/compensation interests, and the social utilities to be achieved in permitting the use warrants a limited intrusion upon the copyright holder's exclusive rights. *See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997) (“[The fair use doctrine] permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”) [xxiii]

The fair use doctrine can be pivotal in maintaining the copyright social utility balance in the context of new technological uses for copyrighted works. When a new technological use for copyrighted material is introduced, it can obscure the boundary between authors’ exclusive rights and the rights and privileges reserved to the public.[xxiv] This blurring sometimes arises because the relationship of the new technological use to the enumerated exclusive rights is unclear, e.g., is posting content on a website on the Internet a transmission, a distribution, a publication, a public performance, or something qualitatively different?[xxv] Even where the new technological

use clearly constitutes engagement in an established exclusive right, however, the overarching social utilities which underlie copyright protection may warrant a public privilege to participate in the new use free of permission constraints.[xxvi]

In many copyright disputes arising from new technological uses, the courts are called upon to clarify or delineate the contours of the copyright owner's property rights, or otherwise to balance the competing social utilities before Congress has had occasion to consider the pertinent issues and their full social potential. In these situations, courts often rely upon the fair use doctrine to realign the respective rights and expectations of authors and the public in connection with a particular new use for copyrighted material.[xxvii]

Sony Corporation of America v. Universal Studios[xxviii] involved a classic copyright challenge from a new technology. In *Sony* the movie industry sought to bar all video cassette recorders from the market place because VCRs could be used to make copies of copyrighted works directly from the television broadcasts. From the perspective of the copyright holders, by producing and selling VCRs, Sony became a contributory copyright infringer. *See e.g. Playboy v. Russ Hardenburgh, supra,* 982 F. Supp. at 514 (finding contributory infringement where defendants "clearly induced, caused, and materially contributed to any infringing activity which took place on their [bulletin board]"); *Faulkner v. National Geographic Society,* 211 F. Supp. 2d 450, 472-74 (S.D.N.Y. 2002). (holding that copyright *vicarious* liability requires a factual determination that the defendant (i) had the right and ability to control the infringing activity and (ii) received a direct financial benefit from the infringement.)

Sony argued "time-shifting", that is, copying the broadcasts for later viewing should be regarded as a fair use. In a typical fair use case, a finding that an authorized use qualifies as a fair

use applies only to the parties and activity specifically before the court. Subsequent users can invoke the court's prior decision as precedent, but given the fact-sensitive nature of most fair use decisions, precedent can be of limited value. In *Sony*, however, the court was effectively asked to categorize generally time shifting as a fair use *activity*. Considering the social utilities which undergird copyright protect, the limited impact that such use would have on the copyright holders' commercial interests, and the social significance of time shifting to exposure to expressive works, the court categorized time shifting as a fair use. *See also Religious Technology Center v. Netcom On-Line Comm.*, 907 F. Supp. 1361, 1369-70 (N.D. Cal. 1995) (holding that providing ISP service to end-user infringers does not constitute contributory infringement); *Parker v. Google, Inc*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006) ("When an ISP automatically and temporarily stores data without human intervention so that the system can operate and transmit data to its users, the necessary element of volition [for direct infringement] is missing…. It is clear that… automatic archiving…and [caching] of websites in [response] to users' search queries do not include the necessary volitional element to constitute direct copyright infringement.")

In short, copyright social utility and social justice, in both their procedural forms (a seat at the table as copyright rights and limits are determined) and their substantive forms (access to copyrighted works and inclusion/empowerment through the creation and exploitation of works) can and should be furthered by the courts as well as by Congress.[xxix] Through social utility sensitive judicial interpretation and application of the copyright law to specific disputes and controversies, the courts clarify the legal rights and interests created under the Copyright Act and help adapt the law to contemporary challenges.[xxx] The copyright social utility/social justice

obligations remain paramount in the digital information age, and the responsibility to satisfy them is heighted by the availability of new methods through which to achieve them. Innovative applications of digital information technology which serve these goals, should be encouraged by the courts (and by practitioners) as caretakers of the copyright regime.

The Google Books Project: A Copyright Digital Information Social Justice Initiative

Notwithstanding the revolutionary advances in digital information technology (not to mention the constitutional mandates of the copyright law) limited physical access remains a barrier to the use of many books for millions of Americans (and for most people throughout the world). Most books are directly available only to those who are privileged to attend or to be employed by a major research institution, where hard copy volumes are physically housed. Moreover, the problem of limited physical access is compounded by legal and practical difficulties stemming from the copyright law, particularly in relation to licensing works that are out-of-print but still in copyright, as well as with respect to "orphan works" for which comprehensive ownership rights are difficult or expensive to ascertain. Even in those instances where the author and publisher of a work can be found, the transaction costs of finding them and of licensing the work may exceed the expected current and future commercial market value of the work.

When there is no longer a viable commercial market for certain books, the segment of the public still interested in these works is underserved by the limited or non-existent access to them, and the central purpose of copyright law, the advancement of knowledge and culture, is frustrated. Moreover, many of the authors of such works *want* their works to be widely

accessible once again. Authors write books to have their voices heard, not stifled by physical and legal impediments. In the absence of distribution methods that solve physical access problems and copyright legal difficulties, the expressive goals of many authors are unfulfilled.

Unlike some other copyright regimes, American copyright is not based upon natural law but rather is positive social law, and as such, favors neither the author nor the individual user of aesthetic works, but rather holds paramount the interests of society in developing a thriving, vibrant culture. Consequently both Congress and the courts have repeatedly sanctioned public intrusion upon the author's exclusive rights in the cause of overarching copyright social utility. Resort to that option is critical in the digital information environment.

Indeed, the problem of mass-digitization of so-called "orphan works" presents a nigh-pristine opportunity for the application of paradigmatic copyright social utility. Virtually all copyright scholars, commentators, and activists agree that mass digitization of the world's books is the answer to this and many other long-standing copyright social utility challenges.[xxxi] Collecting and compiling the world's store of printed knowledge into exhaustive digital libraries available to everyone who can access the Internet is an undeniable step toward unparalleled scholarly cross-fertilization and artistic and utilitarian exchange, not to mention the leveling of the world's educational and informational playing fields. Vast numbers of public domain and out-of-print and hard-to-find books will become available online to essentially everyone with Internet access. Google Books is thus an exemplar of copyright social justice which furthers the inclusion and empowerment aspects of the copyright law.

On the other hand, if the copyright law continues to be misapplied so as to impede mass-digitization initiatives, the public will continued to be denied access to millions of works, and not

because the copyright holders have objected to their digital distribution, but because of an irrational presumption that these authors works would prefer that their ideas not be disseminated, nor any remuneration be paid to them or their successors and assigns until it can be positively confirmed that this is their preference. Even if this could somehow be construed as a rational presumption of copyright behavior, to encourage it would be the copyright policy choice that turns American copyright on its head.

Courts can and have effectively addressed this kind of "new technological use opportunity" in the past. Indeed, it has often been the benefit of judicial interpretation and application of the law in the face of new technological developments that has provided a guide for eventual legislative action, giving the legislature sufficient time to observe the long term and social potential such advances.

Indeed, the Google Books Project[xxxii] is a mechanism that can fill the vacuum of institutional inaction in response to the copyright social utility deficiencies and injustices of the digital information age. Google Books can be a boon to those who heretofore had little or no access to many preexisting and "digital-born" works. Books would become be available not only to those who enjoy the privilege of access to elite libraries, but to anyone with access to a computer and the Internet. Many people will have access through public libraries in their communities while others will gain access through schools and through outreach by various organizations that seek to aid particular historically and currently marginalized groups.[xxxiii] Furthermore, the blind and visually impaired will have dramatically expanded access to books, through technologies that can vocalize digital text and expand the font size to more easily readable sizes. And as better automated translation is developed, even more material will

become available in languages other than that in which a work was originally expressed. In short, mass-digitization of text can be the technological bridge that traverses the Digital Divide.

Finally, in addition to these formidable copyright social justice benefits, the Google Books Project can also further the more general goals of copyright social utility. Mass-digitization can help to serve the copyright public interest simply by making it easier for everyone to acquire books that are still under copyright but that are out-of-print or otherwise unavailable.[xxxiv] Most important is the opportunity to eradicate the orphan works problem, by providing mechanisms through which to make these works available and avoiding the legal limbo to which such works have been condemned.[xxxv]

Conclusion

Google Books[xxxvi] and the Google Books Settlement Agreement offer a way to promote the copyright social justice interests of the public while preserving and even enhancing the proprietary interests of copyright holders in digitized text. Rather than permitting digital information technology to serve as the source of a Digital Divide in American society, the Google Books Project provides the most important opportunity to date through which to close existing social gaps and enable this technology to fulfill its ultimate copyright potential. To forego or even delay this achievement, would be an affront to the social utility goals which underlie copyright as an engine for learning and the advancement of culture in American society.

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[iii] Of course these changes concern the traditional publishing houses. Randall Stross, Will Books Be Napsterized?, (The New York Times) http://www.nytimes.com/2009/10/04/business/04digi.html?_r=1 (Oct. 4, 2009).

[iv] Copyright Criminals, Independent Lens, Benjamin Franzen and Kembrew McLeod, Community Cinema, 2009, http://www.pbs.org/independentlens/copyright-criminals/ .

[v] See generally, William Patry, Moral Panics and the Copyright Wars (2009).

[vi] U.S. Const. Article I, 8, cl. 8.

[vii] *See generally* Stacy F. McDonald, Note, *Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright Clause*, 50 How. L. J. 541, 542-43 (2007); Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 Tex. Intell. Prop. L. J. 333, 335-36 (1997).

[viii] *See also* Scott L. Bach, Note, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 Hofstra L. Rev. 379, 383 (1986); Jason S. Rooks, Note, *Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. Intell. Prop. L. 255, 257 (1995).

[ix] *E.g. Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546-47 (1985); *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984). *See also, e.g.*, Paul Goldstein, Copyright 1.14 (2d ed. 2002); cf. 3-10 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, 14.03 (2002) (discussing the copyright owner's remedies with respect to the infringer's profits); Lateef Mtima, *Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?*, 14 Fordham Intell. Prop., Media & Ent. L. J. 369, 396-97 (2004); Michael G. Anderson & Paul F. Brown, *The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*, 24 Loy. U. Chi. L.J. 143, 158-59 (1993).

[x] *See generally*, I. Fred Koenigsberg, *Lines of Defense: An Analytic Framework for the Defense of Copyright Infringement*, Landslide, Vol. 1, No. 5, p. 36, 39-40, May/June 2009.

[xi] See *e.g.*, Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 West Va. L. Rev. 97 (2009) and Steven D. Jamar, *Copyright and the Public Interest from the Perspective of Brown v. Board of Education*, 48 How. L.J. 629, 639 (2005).

[xii] Act of 1790, 1st. Cong., 2d Sess., ch. 15, 1 State 124 (1790). Until the 1988 Berne amendments to the 1976 Copyright Act, publication was required as a condition of obtaining federal copyright protection, including the deposit of copies of the works with the Library of Congress.

[xiii] E.g., Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine For Cyberspace*, 53 Fla. L. Rev. 107 (2001); Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency and Development)*, 40 U.C. Davis L. Rev. 717 2007); Margaret Chon, *Intellectual Property and the Development Divide*, 27 Cardozo L. Rev. 2821, (2006); Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 Pepperdine Law Review 761 2006); Anupam Chander and Madhavi Sunder, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 U. C. Davis L. Rev. 563 (2007); K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 Cardozo Arts & Ent. L. J. 1179 (2008); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. Davis L. Rev. 1151 (2007); Stacy F. McDonald, Note, *Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright Clause*, 50 How. L. J. 541 (2007); Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 West Va. L. Rev. 97 (2009).

[xiv] *See e.g.* Carla D. Pratt; *Way To Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409 (2009).

[xv] *See* Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 Pepperdine Law Review 761, 763-764 2006); Anupam Chander and Madhavi Sunder, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 U. C. Davis L. Rev. 563, 565 (2007); David Cook, *Searching for Answers in a Digital World: How Field v. Google Could Affect Fair Use Analysis in the Internet Age*, 11 SMU SCI. & TECH. L. REV. 77, 83-84 (2007); Margaret Chon, I*ntellectual Property and the Development Divide*, 27 Cardozo L. Rev.

2821, (2006); Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine For Cyberspace,* 53 Fla. L. Rev. 107 (2001). At least equally responsible is the rise of voices raising perspectives that grow out of the civil rights movement . *E.g.*, K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 Cardozo Arts & Ent. L. J. 1179 (2008); Lateef Mtima, *Intellectual Property and Social Justice***,** 48 How. L.J. 571 (2005); Steven D. Jamar, *Copyright and the Public Interest from the Perspective of Brown v. Board of Education*, 48 How. L.J. 629, 639 (2005).

[xvi] Lessig, Remix supra.

[xvii] *See e.g.* Janet Thompson Jackson, *Capitalizing on Digital Entrepreneurship for Low-Income Residents and Communities*, 112 W. V. L. Rev. 187, 189-92 (2009).

[xviii] *See e.g. Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546-47 (1985); *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984); Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. Copyright Soc'y U.S.A. 317, 319 (2000)

[xix] *See Folsom v. Marsh*, 9 F. Cas. 342, 344-45, 348 (C.C.D. Mass. 1841); Sharon Appel, Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers, *6 UCLA Ent. L. Rev. 150, 167 (1999)*.

[xx] WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 52-55 (BNA Books 1995) (1985). *See Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841)* (No. 4,901).

[xxi] WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT Law 3-5 (BNA Books 1995) (1985); *Rogers v. Koons, 960 F.2d 301, 308 (1992); Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1117 (D. Nev. 2006); *Campbell v. Acuff-Rose Music, Inc.*, supra n. ; *Sony Corp. of Am. v. Universal City Studios, Inc.*, supra n. 14 at 448-51 (1984); *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001); Pierre N. Leval, *Toward a Fair Use Standard*, *103* Harv. L. Rev. 1105, 1127 (1990); I. Fred Koenigsberg, Copyrights, in Understanding Basic Copyright Law 2002, at 147-48 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. G0-010T, 2002); 3-10 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, 13.05 (2002)

[xxii] *See e.g.* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990).

[xxiii] *See e.g.* Paul Goldstein, Copyright 10.2.1 (2d ed. 2002); 3-10 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, 13.05[A][1] (2002); Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. Intell. Prop. L. 49, 56-57 (1993); Sharon Appel, *Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers*, 6 UCLA Ent. L. Rev. 150, 174-75 (1999).

[xxiv] *See* Steven D. Jamar, *Copyright and the Public Interest from the Perspective of Brown v. Board of Education*, 48 How. L.J. 629, 650-51 (2005)**;** Wendy M. Pollack, Note, *Tuning in: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 Fordham L. Rev. 2445, 2445 (2000).

[xxv] *See e.g. Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398-400 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974) (whether unauthorized cable transmission of copyrighted broadcasts violates the reproduction and distribution rights); *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552, 1556-57 (M.D. Fla. 1993) (discussing unauthorized computer screen display violates the display right); *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993); *Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 927 (N.D. Cal. 1996); *Religious Tech. Ctr. v. Lerma*, 1996 U.S. Dist. LEXIS 15454, 2-5 (E.D. Va. 1996); *Michaels v. Internet Entertainment Group, Inc*., 5 F. Supp. 2d 823, 830-31 (C.D. Ca. 1998); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 717-718 (11th Cir. 2007); *1-800 Contacts, Inc. v. Whenu.com*, 309 F. Supp. 2d 467, 485-86 (S.D.N.Y. 2003); *Advance Magazine Publishers Inc. v. David Leach*, 466 F. Supp. 2d 628, 637 (D. Md. 2006); Lateef Mtima, *Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?* 14 Fordham Intell. Prop. Media & Ent. L. J. 369, 401-415 (2004).

[xxvi] *See e.g. Kelly v. Arriba Soft Corporation*, 336 F.3d 811, 820 (9th Cir. 2003) (discussing the public interest in the development of an effective search engine index for use in locating copyright images on the Internet); Lateef Mtima, *Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?* 14 Fordham Intell. Prop. Media & Ent. L. J. 369, 435 (2004)

[xxvii] Id.

[xxviii] *Sony Corporation of America v. Universal Studios*, supra.

[xxix] The executive branch also plays an important role through its enforcement policies, especially through antitrust actions and internationally through trade agreements and enforcement at the border. We have submitted formal

comments through IIPSJ to the Obama administration on the social justice implications of IP enforcement. Steven D. Jamar and Lateef Mtima, "IIPSJ Comments on IP Enforcement by the Federal Government," submitted on March 24, 2010, in response to the Request of the Intellectual Property Enforcement Coordinator, Victoria A. Espinel, for Public Comments Regarding the Joint Strategic Plan for Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement, as published in the Federal Register, Vo. 75, No. 35, p. 8137-8139 Tuesday, February 23, 2010 (FR Doc. 2010-3539).

[xxx] *See* Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17, 34-35 (2006); Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 888-89 (1999); Michael Spink, *Authors Stripped of Their Electronic Rights in Tasini v. New York Times Co.*, 32 J. MARSHALL L. REV. 409, 420 (1999); Sarah Deutsch, *Fair Use in Copyright Law and the Nonprofit Organization: A Proposal for Reform*, 34 AM. U.L. REV. 1327, 1351 n.170 (1985)

[xxxi] *See e.g.* Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 Pepperdine Law Review 761 (2006)

[xxxii] Rust Consulting, Inc., Google Book Search Class Action Settlement, http://www.googlebooksettlement.com (2010).).

[xxxiii] Id.

[xxxiv] *Authors Guild, Inc., et al. v. Google Inc.*, 2009 WL 4434586 (S.D.N.Y. 2009).

[xxxv] Rust Consulting, Inc., Google Book Search Class Action Settlement, http://www.googlebooksettlement.com (2010).).

[xxxvi] http://books.google.com/books.