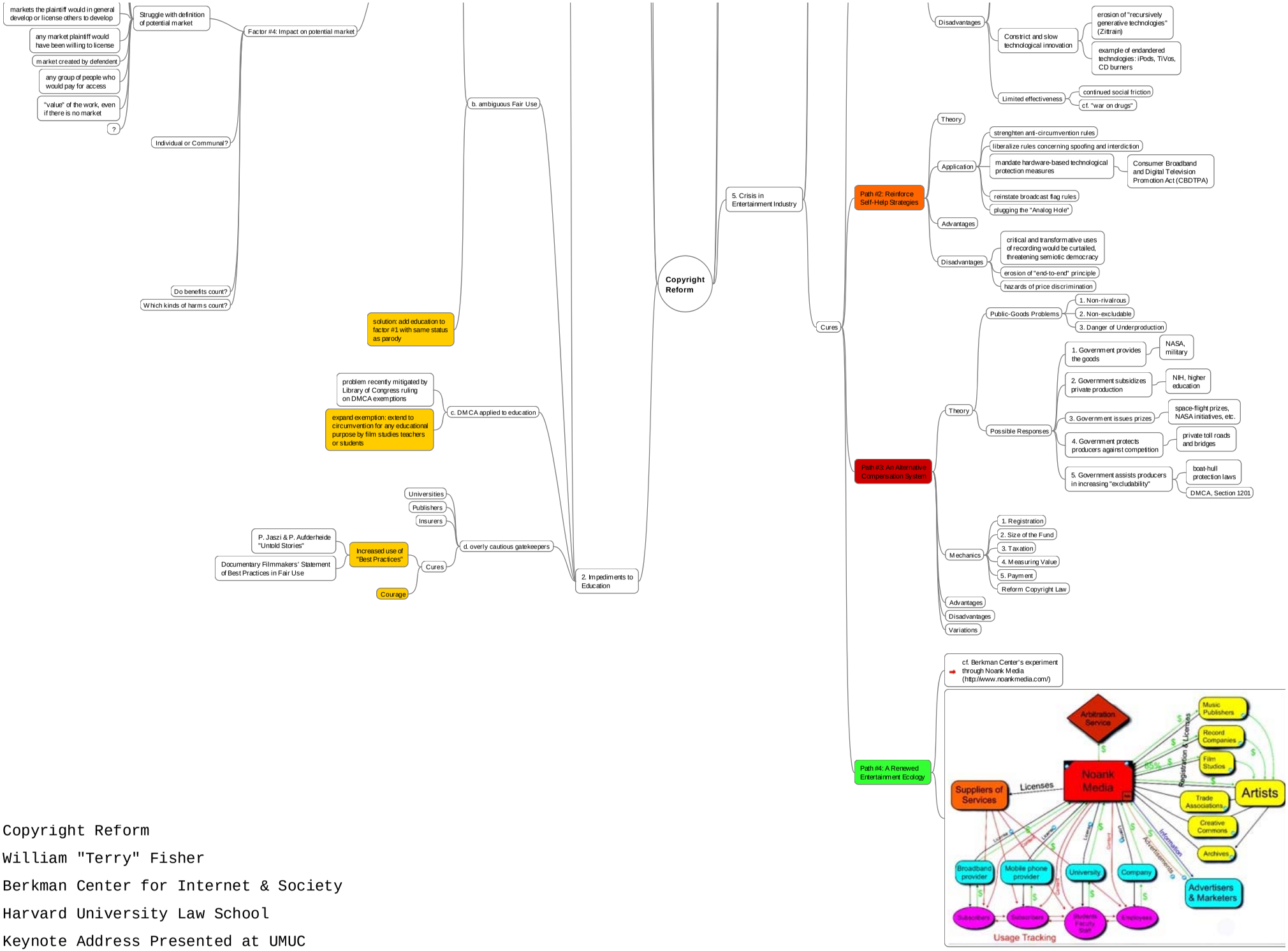
- Copyright Utopia
  - 5 Propositions on Content of Copyright Utopia
    - 1. Creators of intellectual/creative products are fairly compensated
      - Utilitarian theory: necessary to stimulate production of works from which we all benefit
      - Labor-desert/Fairness theory: moral right of creator to compensation for works from which we all benefit
    - 2. Opportunities to engage in creative pursuits should be widespread and works are widely disseminated
      - Semiotic Democracy
    - 3. Cultural diversity in a wide array of creative products
    - 4. All persons should have ready access to ideas, information, entertainment
    - 5. All persons should have access to rich, empowering continuing education
  - Ways to Alleviate Problems
    - 1. Reform Initiatives We Can Take Without Changing the Law at All
    - 2. Reform Initiatives Requiring a Tweak of the Law
    - 3. Reform Initiatives Requiring a Transformation of the Law
    - 4. Reform Initiatives Requiring Abandoning the Current System for an Alternative System
- 1. Proliferation of Protected Unregistered Works
  - Causes
    - 1909 Regime
      - conferred common law copyright protection upon creator from moment of creation to point of publication
      - from moment of publication
        - public domain
        - federal formal copyright protection for 28 years
      - renewal
        - 28 years more
        - public domain
    - Current Regime
      - federal formal copyright protection from point of creation to fixation in tangible medium (exceptions for works-for-hire, anonymous, pseudonymous)
      - from moment of publication
        - public domain
        - life of author + 70 years
  - Cures
    - Creative Commons
      - cf. Lessig
      - limited to U.S. works so as not to violate Berne
      - Public Domain Enhancement Act
      - administered by private registrars
    - Institution of (nominal) renewal fee
    - Reinstitution of formalities across the board; notice or falls into public domain
      - would require repudiation of Berne and TRIPS
    - a. outmoded, clumsy educational exemptions
      - eg. Sections 114B & 118
      - eg. TEACH Act
    - current doctrine
      - Factor #1: Purpose and character of defendent's activity
        - commercial
        - transformative
        - shady
          - lack of good faith and fair dealing
        - customary
      - Factor #2: Nature of plaintiff's work
        - unpublished
        - newsworthy
        - computer software
      - Factor #3: Amount of work taken/used
        - quantitative
        - qualitative
        - denominator: each copyrighted work
        - interplay with other factors
      - existing market
      - harms to the value of a product--either the original work or a derivative product--the copyright owner seeks to market
      - identified alternative markets
      - traditional, reasonable, or likely to be developed markets
- 3. Impediments to Semiotic Democracy
  - Examples
    - Modified Films
      - Phantom edits
      - Batman(?)
      - dark version of "Artificial Intelligence"
      - "Shining"
      - Systems/Software for generating modified films
        - ClearPlay, Trilogy, Family Shield, etc.
        - Final Cut Pro
    - Mashups
      - e.g. Grey Video/Danger Mouse
      - Systems for remixing and supplementing music
    - Amatuer Webcasting
  - Cures
    - A. Modify Fair Use
      - greater latitude for transformative works
      - less latitude for consumptive (non-transformative) works
    - B. Define "Derivative Work" narrowly
      - Mirage Editions, not Lee
      - Require fixation in tangible medium
    - C. Eliminate "Derivative Work" right altogether
    - D. Resist expansion of rights of integrity
      - Hold the line at VARA (Visual Artists Rights Act)
- 4. Impediments to Search Tools
  - Examples
    - ditto.com
    - Google Book Search
  - Cures
    - Construe Fair Use to shield Google Book Search
    - Institute/change to default opt-out rule (instead of opt-in)
      - cf. Sect. 512 "Notice & Take Down" System
      - cf. "Fence out" rules in some western states
- Background
  - Traditional Entertainment
  - Technological Destabilization
    - Via Three Related Technologies
      - Digital Recording & Storage
        - CD
        - DVD
      - CODECS
        - MP3
        - MP4
        - DivX
      - Internet
        - i.e. fast mass distribution
    - New Ways of Accessing Entertainment
      - Downloading
      - Interactive Streaming
      - Non-interactive Streaming
    - Benefits
      - Cost Savings
      - Cultural Diversity
      - Opportunities for Creativity
    - Dangers
      - ?
        - Problem: Lawful v. Unlawful P2P (slides on...)
  - Struggle Over Copyright
- Symptoms
- Path #1: Strengthen IP Rights
  - Theory
  - Legal Reforms
    - Preotections for Real Property
    - Analogous Protections for I.P.
      - 1. Add full public performance right for sound recordings
      - 2. Eliminate compulsory licenses
      - 3. Lower "willful" requirements and increase enforcement of criminal copyright infringement
      - 4. Streamlined civil enforcement systems
      - 5. Expand third-party liability
  - Advantages
    - Record companies and studios may appropriate all the savings
    - Price signals distorted by focus on objects, not compensation (O'Hare)



Copyright Reform

William "Terry" Fisher

Berkman Center for Internet & Society

Harvard University Law School

Keynote Address Presented at UMUC

22 May 2007