

NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Copyright and Access to Knowledge

Social Welfare and Developing Countries

Olufunmilayo B. Arewa

UMUC 7th Annual Symposium on Intellectual Property
May 22, 2007

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Overview

- Significance of IP
- Fair Use
- International Context
- Copyright and Access to Information

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Significance of IP

- IP frameworks have significant cultural and economic implications
- IP balance
 - Incentives for new creations
 - Dissemination and access
- IP and distributive justice
 - Margaret Chon and others
 - IP closely linked to human development needs
 - Education
 - Communicable disease

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Significance of IP

- Copyright frameworks as gatekeepers/bouncers for cultural production
 - Parody
 - Commentary
 - New creations
 - Educational materials
- Discussion today will focus on dissemination and access rather than creation of new works

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Fair Use

- Section 107 Broad Application
 - User generated content
 - Statutory language
 - Criticism
 - Comment
 - News reporting
 - Teaching
 - Scholarship
 - Research

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Fair Use

- Fair use doctrine today
 - Widely noted lack of predictability in fair use doctrine
 - Chilling effect
 - Clearance culture
- Vagueness
 - Weakness and strength (Lessig)

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Fair Use

- Copyright and access to information
 - Key question in digital era
 - Wide range of potential users of copyrighted material:
 - New creators
 - Educational purposes

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International Context

- Fair use atypical
 - Fair dealing in other common law countries
 - Statutory provisions elsewhere
- TRIPs
 - Establishes minimum standards for IP frameworks for all WTO member countries
 - Article 9 incorporates Articles 1-21 of the Berne Convention

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International Context

- Berne Convention Article 10
 - Certain Free Uses of Works
 - (1) Quotations compatible with fair practice
 - (2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of *illustration* in publications, broadcasts or sound or visual recordings for *teaching*, provided such utilization is compatible with fair practice
 - (3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon

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International Context

- Berne Convention Article 10(2)
 - Illustration for teaching exception
 - Permits compulsory license for purposes of access to education
 - Important provision influencing access to copyrighted works
- Neither transparent nor functional

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International Context

- Access to information significant issue in developing world
- A2K movement reflects importance
- Access to knowledge contained in copyrighted works critical in development of capacity for countries lacking access to textbooks and other educational materials

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International Context

- Developing countries net importers of copyrighted goods
 - Most publishing companies located in developed countries
 - Publishing industry characterized as cartel
 - *Information Feudalism* (Drahos with Braithwaite)

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Copyright and Access to Information

- United States
 - Did not join Berne Convention until 1989
 - Went from copyright pirate to holdout to enforcer
 - U.S. developing country in 18th and 19th centuries
 - At time of Declaration of Independence, lower standard of living than many countries in South America and West Indies
 - “Undistinguished developing country with agricultural economy, rural production and few pretensions to local cultural output.” (economist Zorina Khan)

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Copyright and Access to Information

- United States
 - Net importer of cultural goods
 - Attentive to social welfare implications of copyright and copyright balance between incentives to create and the need for diffusion of knowledge
 - Recognized importance of copyrighted goods (i.e., British books) for development
 - Refused to sign Berne Convention

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Copyright and Access to Information

- United States
 - 1790 Copyright Act explicitly discriminated against foreigners:
 - the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same (Section 1)
 - nothing in this act shall be construed to extend to prohibit the importation or vending, Reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States (Section 5)
 - American publishers thus free to reprint copyrighted works from other countries
 - Enabled development of domestic publishing industry
 - Not until 1891 that rights granted to selected foreign authors
 - US copyright law still retained manufacturing provisions as concession to U.S. printing interests

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Copyright and Access to Information

- Twentieth Century Asia
 - Policy of weak copyright laws
 - Korea, Taiwan
- Historical examples suggest that particular copyright policies can have potential impact on development
- Suggests that global top-down frameworks evident in TRIPs should be considered in light of
 - Development of capacity
 - Access to essential development tools (textbooks, etc.)

Copyright and Access to Information

- Countries with Specific Educational Use Exemptions (Chon, 40 UC Davis LR ____ (2007))
 - India
 - France
 - China
 - Czech Republic
 - Columbia
 - China
 - Brazil
 - Australia
 - Argentina
