

Intellectual Property & the
National Information
Infrastructure:
Looking Back & Looking Forward

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OVERVIEW

- 15 years ago, Clinton Administration launched its NII initiative
- “Green Paper” on IP & NII published in 1994, followed by “White Paper” in 1995
- 15 years later, what have been the consequences of this initiative?
 - What did it get right? What did it get wrong?
- Looking forward, what should the Obama administration do about IP in digital networked environments?

HAPPY BIRTHDAY, DARWIN

- Today is Darwin's 200th birthday, and 2009 is the 150th year after publication of *On the Origin of Species*
- Great(est) intellectual accomplishment of his day
- Then-prevailing view was that the earth and all its creatures had been created, as is, in accordance with God's plan
 - Maybe a few extinct creatures, but that was in the plan as well
- Darwin's big idea was that species had evolved over time & owed their origins to common life form
- Main mechanism of evolution was natural selection
- Lesson for ©? Not necessarily the smartest, strongest, or best lobbyists who succeed, but those who are best adapted to environment in which they find themselves

NII INITIATIVES

- Reagan and Bush administrations were not IT-savvy, had priorities in other domains
- Clinton Administration was initially praised for its seemingly forward-looking initiatives to promote a national information infrastructure
 - Oops, make that a global info infrastructure (GII)
- Hosted gatherings of telecom, cable, IT, and other providers of infrastructure to discuss policy initiatives
- Conclusion: “the private sector should lead”
 - And government should get out of the way!
 - Except that the © industries wanted additional protections
- Many other countries followed suit with own NIIs

NII “Working Groups”

- US interagency group formed to study NII intellectual property issues (mainly ©)
- Bruce Lehman, then Comm’r of PTO & deputy secretary of Commerce, headed NII & IP working group; he & staff wrote 240+ pg report
- “Green Paper” published in July 1994
- Recommended some changes to copyright law to make it more suitable for NII, and invited comments on its recommendations
- “White Paper” finalized in Sept. 1995
- Same proposals made to WIPO for new © treaty

KEY INSIGHTS IN GP/WP

- Digital networked environments pose significant challenges for © industries
 - Mainly because it is so cheap & easy to copy and disseminate digital copies that are identical to originals (not degraded as analog copies typically are)
 - Not easy to apply existing © law to some phenomena
 - Worrisome lack of respect for © by public
 - Worth considering new legislation & treaties to create stable, harmonized legal environment that would foster global ecommerce in digital content
- John Perry Barlow may have predicted that the digital revolution was like an asteroid that was about to wipe out the © dinosaurs, but WP ++

GP & WP © INTERPRETATIONS

- © owners have exclusive right to control all temporary as well as permanent copies of digital content (i.e., illegal to read or view w/o paying)
- © owners have exclusive rights to control transmissions of their works as distributions of copies (but amend law to clarify)
- ISPs are strictly liable for user infringements
- No more “first sale” rights to share your copy because sharing requires copying
- No more fair use because uses can be licensed

GP & WP PROPOSALS

- New legislation needed:
 - to protect © management info from falsification & removal
 - to outlaw making & distribution of technologies that bypass technical protection measures
- Need for units of © education for every child from kindergarten through college

GP & WP EXPECTATIONS

- Expected rise of DRM & licensing as ways to control over digital content
 - Has happened but less ubiquitous than expected
 - Porn industry, cable TV, databases, & WSJ use access controls, subscriber models; DVDs have CSS
 - DRM is not popular with consumers; sometimes competed away; consumer protection problems; UCITA failed as licensing law
- WP did not expect © industry to offer online content
 - Supported by advertising, subscriptions
 - Samples to induce purchases of enhanced versions
 - To build fan bases
- Nor did it predict rise of user-generated content (e.g., videos on YouTube) or proliferation of open source/content models

WHAT ELSE DID GP & WP MISS?

- GP & WP anticipated NII would mostly consist of proprietary network systems (telecom, cable, other closed gardens) through which people would obtain technically protected content
 - NII as empty pipes & tubes awaiting content that would only start flowing if © law was made stronger
- P2P technologies would become ©'s worst nightmare
- GP & WP didn't foresee incredible growth and innovation in Internet sectors
 - Importance of search technologies, peer to peer file sharing technologies, Apple iPod, licensing TV programs on iPhones, Web 2.0, Creative Commons

15 YEARS LATER

- Fair use much more alive than predicted
- Exclusive rights issues are still controversial
 - Is temporary copying a reproduction in copies?
 - Is “making available” a distribution?
- 1st sale exception controversial
 - UMG v. Augusto before 9th Cir.
- ISP liability for user infringements controversial
 - *Viacom v. YouTube* litigation
- As is technology developer responsibility for user wrongs
 - Should tech developers have to build “filters” or o/w impede unauthorized copies or dissemination of copies of © content?
- As are anti-circumvention rules
 - Deeply unpopular, some anti-competitive uses

TEMPORARY COPIES

- DMCA legislatively overruled specific ruling in *MAI v. Peak*
- Broadest reading of *MAI v. Peak* has been rejected in some cases (e.g., *RTC v. Netcom*, *Cablevision*, but cert. petition pending in latter)
- Safe harbors in DMCA for ISPs as to transmission copies, caching, etc. have worked reasonably well
- WIPO © treaty rejected temporary copying rule
 - But EU has adopted; some (wrongly) say treaty requires this
- *Field v. Google*: copying incidental to indexing & searching is fair use
- No ruling since 1995 that temp copies made to read or view digital content without paying is infringement

CMI & ANTI-CIRC RULES

- Removing or changing CMI only illegal if promotes infringement
 - Very little caselaw & insignificant effect in © industries as technology has not developed as WP anticipated
- Anti-circumvention rule scope unclear
 - Universal v. Reimerdes: very strict interpretation; fundamental change to IP landscape
 - Chamberlain v. Skylink: more balanced interpretation; need to show nexus between circumvention & infringement, room for fair use
 - Logic of *Reimerdes*: 1201 forbids making compatible, competing garage door openers; CAFC: can't be right

LOOKING FORWARD?

- WP shows dangers of articulating new grand vision for ©
- Modest proposal: reinstate Office of Technology Assessment to assess policy options, stakeholders, implications to inform Congress before it legislates
- In the meantime, I would advise the Obama administration to be wary of proposals to strengthen © rules further as they are probably unnecessary, proposed more out of fear than reason
 - better to encourage new business models, private partnerships
- Patent reform is more urgent than © reform, but it is time to start a conversation about © reform that will produce a simpler, more balanced & more normatively appealing © law than we have now
 - Good first step to distill core principles of a good © law

LESSON FROM DARWIN?

- © industries should adapt to the environment in which they find themselves, experiment more with biz models
- Unlikely that the whole rest of the world will adapt as © industries want them to
 - ISPs should not have to bear all of the risk and cost to protect © works (also harder than © owners think to do this)
 - Technology developers should not have the responsibility to build systems that will prevent infringement
 - The Internet should not be reconfigured to make it safe for ©
 - Members of the public don't have the respect for © that © industries want them to have
 - So offer them products & services they want at good prices!
- © law can't do all the work that © industries want it to do
 - Danger of breeding more discontent & disrespect that will undermine its survival