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BEYOND NAPSTER: DEBATING THE FUTURE OF
COPYRIGHT ON THE INTERNET

INTRODUCTORY REMARKS

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INTRODUCTORY PROCEEDINGS

DEAN PIKE: On behalf of the Washington College of Law, I would like to welcome you to today's conference, *Beyond Napster, Debating the Future of Copyright on the Internet*. Every generation or so new technology emerges that many people view as a threat to the copyright system. Napster, like video recording technology before, represents the leading edge of such a new technology in today's society. Simply put, Napster furnishes Internet users with the ability to share music files using the company's file-sharing software.

Since its creation, it is estimated that over thirty million people have used Napster, including, unfortunately, my two daughters. Recent legal challenges to Napster raise some very important questions that our distinguished panel of legal scholars, attorneys, and business representatives will discuss today. These questions include, first, is modern copyright law up to the task of effectively protecting copyrights on the Internet? Second, what legal arguments can Napster use to fend off allegations that it facilitates copyright infringement? Third, how will the entertainment industry respond to Napster's method of distributing music on the Internet? Fourth, what new business models and regulatory models are available to address this issue?

We hope that today's symposium will provide some possible answers to these questions and, at a minimum, provide an interesting and informed perspective on the future of digital information on the Internet. Each of our panels will discuss one of these issues. The panels are entitled: The Road to Napster; Which Legal Rules Should Control; and New Business Models and Regulatory Options. Before we proceed further, I would like to express the school's sincere thanks to all of our panelists and to the efforts of the *Law Review* editors who organized what is an absolutely world class conference.

I also have the great honor of introducing Mr. Bruce Lehman, our welcoming speaker. I would like to point out some of the true highlights of Mr. Lehman's extraordinary career. Mr. Lehman has been a distinguished public servant and actor in the private sector throughout his career. He currently serves as President of the International Intellectual Property Institute and is also a member of the Policy Advisory Committee to the Director General of the World Intellectual Property Organization or WIPO. For six years, Mr. Lehman served as Assistant Secretary of Commerce and the United States Commissioner of Patents and Trademarks. In 1997, the *National Law Journal* named Mr. Lehman as its lawyer of the year and in 1997, the *National Journal* named him as one of the 100 most influential men and

women in Washington. Prior to joining the Clinton Administration, he was a partner in the Washington law firm of Swidler and Berlin and before that, he served as Counsel to the U.S. House of Representatives Committee on the Judiciary and Chief Counsel to the Subcommittee on Courts, Civil Liberties and the Administration of Justice. He received both his undergraduate and law degree from the University of Wisconsin. Mr. Lehman, we are very honored to have you here today.

MR. LEHMAN: I was not exactly sure what introductory remarks should be and then, in a panic, looked at the schedule last night and noticed that I had a half-hour to speak, so I did not have time to prepare a lengthy address or a law review article, which I would like to have done. However, I immediately went to the library and started reading the Napster case, and reviewing all of the things that I have done so that I could at least refresh my memory to open this conference with something coherent.

There is a part of me that wants to be very partisan in this debate. Then there is a part of me that says, also, as the person giving the opening remarks, I need to be a little more even-handed. So, let's wait a few minutes to see which side comes out in my opening remarks. The title of this conference, *Beyond Napster: Debating the Future of Copyright and the Internet*, is an interesting one, and it was obviously decided on quite some months ago when the conference was planned. Already, in the period of time since this conference was originally organized, we see the world beyond Napster developing very quickly. The panel that will end the day, the panel on business models, really is the key to the title *Beyond Napster*. I have to say that I personally am extremely encouraged to see development right now—certainly in the Bertelsmann investment¹—that may provide consumers with the benefit of Napster, while remaining consistent with copyright law. Certainly consistent with these ideas is the important role played by policy makers, of which I was one, at the very beginning of this whole process. With that in mind, I would like to take us back a little bit in time to set the stage for the debate today.

Actually, I would like to go beyond my service in the Clinton Administration, way back to the 1970s, when I was counsel to the House Judiciary Committee and was working on the 1976 copyright law.² As both a blessing and a curse of my career, I have been

1. See David Segal, *Napster and Former Foe Plan Online Song Sales; Bertelsmann to Quit Industry Lawsuit*, WASH. POST, Nov. 1, 2000, at A1 (reporting the acquisition of Napster by music conglomerate Bertelsmann AG).

2. See Copyright Act of 1976, Pub. L. No. 94-553, Oct. 19, 1976, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-803 (1994 & Supp. 2000)).

privileged to be a part of an extremely small group of lawyers—some of them are in this room—who really have been policy copyright lawyers for the last 20 or 30 years. Most lawyers around the country work in litigation, write contracts or do transactions. Washington is the only place where you have a very small group of people, who have been involved in the legislation policy process. This is the starting point for copyright. I have really been privileged to be part of this policy process since 1976.

I was sort of low-man on the totem pole in the House Judiciary Committee staff. The glamour had been in the impeachment process against Richard Nixon, and I was assigned to work on some of the intellectual property issues. I recognized very quickly, however, that—whether it be patents, copyrights or even trademarks—we were really dealing with the law of the future. Technology was already beginning to emerge as a major sector of the U.S. economy, even before “the information age.” One of the most interesting things about the 1976 Copyright Act, which was already under development for almost 20 years, was that most of the issues in revising the old 1909 copyright law had been pretty much resolved by the time I arrived. The issues were pretty much cut-and-dry. One of the underlying principles of the 1976 Act was to put the United States in a position where we would be close to being able to join the Berne Convention. However, the difficulty is that the U.S. had many anomalies in its copyright system compared to the international regime. The international regime of the Berne Convention is a pro-authors’ rights regime. The U.S. system is very different from the strict copyright system established in Europe. There were lots of debates about this differentiation in the 1950s and 1960s and, in some ways, it seems that the U.S. was falling behind in being able to regularize the system. Even back then, we were having difficulty in dealing with new technologies. The principal issue in the 1976 copyright law reform involved a then new technology: cable television. There are still some of the old-timers remaining here in Washington, like Cary Sherman, currently with the Recording Industry Association of America, who were deeply involved in this issue. The cable television problem arose from a litigation, *Teleprompter Corporation v. Columbia Broadcasting System, Incorporated*³ and *Fortnightly Corporation v. United Artists Television, Incorporated*,⁴ where copyright owners asserted that the right to retransmit a work was a part of their copyright. These cases were litigated to the Supreme Court, which referred the matter to the

3. 415 U.S. 394 (1974).

4. 392 U.S. 390 (1968).

Congress—always a nice thing for courts to do. On the surface it looks good, but it creates terrible difficulties. After an industry is already established, with thousands or millions of people using copyrighted works in an unregulated context, it is very difficult for Congress to then come in and create some kind of a rational structure.

In the 1976 Copyright Act, Congress created a compulsory license for cable television, which has been amended a number of times. What the cable compulsory license really amounts to is a contract between cable television operators and the rights holders that is codified in the law. In my view, this is very bad legislating, and unfortunately, it is not the first time that Congress resorted to this. If we go way back to the *White-Smith Music Publishing Co. v. Apollo*,⁵ the first so-called statutory license case, we saw the same thing happen: the first technological revolution in the modern copyright era (player piano rolls) and the record industry came into being. The case went to the Supreme Court, and the Court found that there ought to be protection, but the protection was not afforded by the statute. Therefore, Congress should take a look at it. We ended up with another compulsory license. My personal opinion is that compulsory licenses, which try to dictate business practices, are not the way to go.

Serving as chief counsel to the House Subcommittee was one of the most exciting periods of my professional life. We handled a lot of issues besides copyright, including all the post-Watergate reforms and investigations of criminal activities inside the FBI. It was really a heady experience for a young lawyer, and I have only recently come to appreciate how much fun it was. Most importantly, it introduced me to this area of intellectual property law, which has turned out to be a lifelong fascination. Later, it provided me with a career in private practice, and, of course, led to my second stint in government. Although it is very common for hill staff to find positions in the executive branch, I had to wait sometime before being appointed by President Clinton to serve as Assistant Secretary of Commerce and Commissioner of Patents and Trademarks. In that position, my idea was to transform the U.S. Patent Office (USPTO) from an agency that just examines patents to the lead agency in developing intellectual property policy. This was very much a part of the Clinton Administration's overall thinking.

Now, there is a very nice book that I have here, *Intellectual Property and the National Information Infrastructure*,⁶ which became known as the

5. 209 U.S. 1 (1908).

6. Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 1

“White Paper.” The new Administration wanted to look at the issues in the new economy, including telecommunications policy and privacy policy, security policy, and, of course, intellectual property. I was asked to lead the Working Group on intellectual property issues. In 1993, the USPTO held public hearings to provide an opportunity for anybody in this country to come and tell us what they thought about the subject. In 1995, we issued the White Paper, which became the foundation for the Digital Millennium Copyright Act (DMCA)⁷ of 1998. When I look back at it, I am still very proud of the report. The DMCA also is the basis for the current litigation and judge-made law that is setting the stage for the future of copyright in a digital and Internet environment.

I want to insert a philosophical thought here. I was very conscious of my experience back in the 1970s. During the Clinton years, I wanted as much as possible to try to be ahead of the curve so that we would not find ourselves in a chaotic situation where there would not be a legislative template. I did not want to find ourselves writing contracts into the law the way Congress did in 1976, or even going back to 1911 with the *White-Smith* case. We were partly successful even though certain provisions of the DMCA, like the safe harbor provisions, have elements of this contract to them.

We would have been perfectly happy to have Congress enact our legislation as soon as it arrived on Capitol Hill in 1995. But, that is not what happened. In the modern world, there always is a linkage between domestic legislation and international rules. It may be a cliché, but that is what it means to be part of a globalized economy. Indeed, the Internet is inherently a globalized context. At the World Intellectual Property Organization (WIPO), we had an opportunity to move things along very quickly. A couple of treaties were languishing for many years. One was a proposed protocol to the Berne Convention. The other was a proposed treaty on the rights of performers in the audiovisual context. The United States was never much interested in these treaties, which were being pushed by other countries, mainly European countries. Basically, the treaties were attempts on the part of the Europeans, as I saw it, to impose their system on the United States. There was a lot of resistance to the European approach due to its strong authors’ rights approach and the fact that it provides few exceptions. It was my job to come up with a strategy for handling the situation. I did not want the United States to be in a position where a treaty would be adopted and the United States would not be able to adhere to it. That

(1995).

7. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

would only create more disharmony in this increasingly globalized world. I saw an opportunity to meld the work that we were doing in the National Information Infrastructure Task Force with this WIPO exercise. Low and behold, it ultimately worked out that way. These pre-digital WIPO treaties were turned into treaties for the digital age, the WIPO Copyright and WIPO Performances and Phonograms treaties. If you look at those treaties, they embody many of the principles that we set forth in the White Paper. For example, the idea of the distribution right was not a part of the pre-existing Berne Convention regime. We called for a digital transmission, which never was enacted into law, because we felt that we already had that in U.S. law. The distribution right is now part of the international regime. Significantly, for the first time, the treaties adopt the principle that a rights holder may use technology to protect and enforce copyrights. I always thought of that as a bedrock principle of the exercise.

There are some people who still do not agree with that. I just reviewed Professor Paul Goldstein's book *International Copyright: Principles, Law and Practice*.⁸ I gave the book a glowing review. I must say that I disagree with part of it: Goldstein's criticism of a central element of the 1995 working group report, the treaties and the DMCA. Specifically, he criticizes the linkage between being able to use anti-circumvention technologies and the right of the copyright owners. Professor Goldstein argues that the copyright law is based on the right of private action against infringers in court. I admire and respect Paul Goldstein a great deal, however, I think we have reached a time when that model has broken down. I am very happy that the Working Group accepted the fundamental notion that people have a right to protect themselves and they can even use technology to do so. We will see where the cases take us on that issue.

The safe harbor provisions were debated in the treaties and in the DMCA in 1998. The time line was public hearings (1993), the White Paper (1995), Copyright and Phonograms treaties (1996), and DCMA implementing legislation (1998). The first lawsuit filed—the Napster case—was filed in December of 1999. We now have two cases, which are still in litigation, the Napster case and the MP3.com case,⁹ which are going to provide us with the judicial foundation now for the coming year, building on these statutory and treaty precedents. I am very pleased that we provided the courts with a good foundation and am

8. PAUL GOLDSTEIN *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* (Oxford Univ. Press, Jan. 2001).

9. *UMG Recordings, Inc. v. MP3.com, Inc.*, 2000 WL 524808, at 1 (S.D.N.Y. May 4, 2000).

pleased with the way things are proceeding. In the modern age, everything moves very quickly. I remember back in mid-1970s, a lot of people thought that it would be at least another twenty years before we did anything more. Actually, if you look at the statute today, it is vastly different from 1976. There has not been a Congress that has gone by when there has not been some very significant change in the statute. There has been a lot of litigation in that time. Things are moving very rapidly, telescoping everything into an ever briefer period. That is precisely what we are seeing right now. It took years for the *Williams and Wilkins*¹⁰ case to work its way up to the Supreme Court and for us finally to regularize photocopying in *American Geophysical Union v. Texaco*.¹¹ It also took a long time to get the cable television situation resolved. Today we are seeing a much more compressed environment. Even before the legal issues are resolved in the Napster case we can already see the business solutions on the horizon.

Interestingly, we may never see a Supreme Court or appeals court decision that fully resolves these issues, because the business models are already being created based on initial judicial decisions and this legislative and treaty foundation.

This is a very exciting time to be involved in intellectual property issues. Back in the mid-1970s when I first got involved in this, I knew that there was something there. I knew that the future of copyright was going to be interesting, but I never had any idea just how interesting. Back in those days, the impeachment proceedings against Richard Nixon were on the front page. Little did I know that 25 years later copyright would be the subject of daily headlines and would be about as interesting to young people as perhaps some of the global issues of war and peace were back in my generation. I am not sure that is a good thing, but this is a fact.

I want to commend the law school for organizing this conference. The panels we are going to have, the brain power, and the discussion will, in itself, generate a certain amount of momentum toward bringing the opposing sides closer to creating workable business models. Thank you.

(WHEREUPON, A RECESS WAS TAKEN).

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10. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975).

11. 60 F.3d 913 (2d Cir.), *cert. denied*, 516 U.S. 1005 (1995).