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### Conferring about the Conference (Recalibrating Copyright: Continuity, Contemporary Culture, and Change)

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# AFTERWORD

## CONFERRING ABOUT THE CONFERENCE†

*Jessica Silbey\**  
*Aaron Perzanowski\*\* &*  
*Marketa Trimble\*\*\**

*Jessica Silbey:*

We heard at the conference five rich papers, all addressing in one way or another the conference's theme: "ReCalibrating Copyright: Continuity, Contemporary Culture, and Change." Professor Craig Joyce, in his capacity as conference convener, asked us as Fellows, at the end of the day of presentations and discussions, how we thought the Presenters' papers spoke to each other and to the conference's focus.

One perennial question about law reform, and a question the scholars at the conference addressed, either implicitly or explicitly, is: how does the reform start? By this I mean, literally, does reform begin with a big picture sea change or a series of small-scale tweaks? Professor Wendy Gordon's paper begins with the big picture, asking a very basic but important question about the role of copyright: can or should copyright law be understood to authorize exclusive rights for the purpose of aiding noncreative disseminators? With this question, Gordon takes issue with two Supreme Court cases, *Eldred* and *Golan*, making a persuasive case for why encouraging authorship and not distribution of works is the sole function of copyright law. From this fundamental critique of Supreme Court doctrine and copyright scholarship supporting it, Professor Gordon draws the intriguing conclusion that the right

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† The Fellows' commentary is based on the papers in their original form as delivered at the Conference and without reference to subsequent revisions to the papers by the Presenters.

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of dissemination should be understood to protect authors' interests and that when the right does not incentivize creativity, but benefits distributors' interests only, in a standalone fashion, dissemination effects should be irrelevant to assessing the breadth and validity of the copyright statute. Were we to engage in an overhaul of the copyright laws, which Professor Gordon encourages, we should do so, she says, from the perspective of incentivizing creativity by authors, not by focusing on incentivizing dissemination (except as it helps the copyright owner catch infringing copies).

Professor Thomas Nachbar evaluates our copyright system less from a ground-zero approach and, instead, mobilizes critical legal concepts—rules and standards—to ask whether our copyright system is properly calibrated to optimize allocations of rights to creators and users. He concludes that the fuzzier standard is optimal when evaluated at critical times of decision (whether to make or use a creative work). This conclusion counterintuitively undermines the more frequent call to clearer rules in copyright to promote access.

Professors Jacqueline Lipton, Lydia Pallas Loren, and Olufunmilayo Arewa approach the copyright reform question at the most detailed level of tweaks and particular rule changes. All three in their analysis ask important questions about the productivity and ongoing practices of particular creative communities. The level of detail about the creative industries (fanfiction, digital music distributors, and African American musical genres) underscores how small changes in a highly complex system could make meaningful differences in the achievement of underlying copyright policies.

*Aaron Perzanowski:*

I agree that each of the approaches we see represented in these papers has its own merit. Considering an alternate past of copyright frees us from the path dependence that limits our ability to imagine its future. Thinking systematically about copyright law's relationship to available information helps us separate rules and standards from their substantive outcomes. And paying careful attention to the legal, social, and marketplace conditions facing creators informs our theorizing about copyright's structure and purpose by revealing the often messy facts about creative practice.

From my perspective, one common element shared by these papers is an interest in copyright law's relationship with temporality. Copyright policy tends to keep one eye on the future

creators that its incentive structure is designed to motivate and the other eye on the incumbent rights holders and intermediaries that dominate today's cultural landscape. To some extent, each of these papers is concerned with the balance between the forward- and backward-looking tendencies of the copyright system and the relative weight we assign the interests of past and future creators. Lydia Pallas Loren's critique of music licensing is in part a story about compensating creators of past works at the expense of future market entrants. Olufunmilayo Arewa highlights the problems that develop when we enshrine the creative practices and assumptions of a previous era in ways that are inconsistent with prevailing contemporary expressive forms. In Jacqueline Lipton's work, we see an effort to reconcile the rights of authors and publishers with the follow-on creativity that inevitably develops in their wake. Wendy Gordon usefully distinguishes between the sometimes-conflicting goals of encouraging the creation of new works and the dissemination of existing ones. And Thomas Nachbar demonstrates that the choice between rules and standards is informed by temporal considerations, namely, whether and when information is available to creators and users of copyrighted works.

On the whole, these discussions reveal that, for a system that is designed to encourage future creativity, copyright law often privileges the past. By favoring established interests rather than the next wave of creativity and innovation, copyright reveals itself as surprisingly backward-looking. In part, I'd suggest this tendency to favor the creators of the past is a result of copyright policy's failure to clearly articulate a vision of its intended effect. Copyright's goals remain rather amorphous. We expect the copyright system to result in more creativity, to produce stuff. But beyond that, copyright policy has avoided considerations of what kind of stuff, produced by whom, and for whom. Copyright law should not, and probably cannot, provide definitive answers to those questions. But by ignoring them, copyright law has failed to imagine the range of futures available to us all. And without some positive vision or visions of the output of the system, copyright law becomes more susceptible to the backward-looking lens that favors incumbents and deemphasizes future creativity.

*Marketa Trimble:*

Identifying optimal goals for copyright policy is a crucial task; however, the search for goals should not overshadow the need to identify the appropriate means to achieve the goals. Whether they suggest systemic changes or small adjustments to the copyright

regime, all five papers suggest the need to identify the appropriate means for the changes and adjustments.

What limits the implementation of any major systemic changes to the copyright regime, such as the changes suggested by Wendy Gordon, is the current international copyright regime, which does not allow any country-party to the regime to undertake major systemic changes to its copyright system that are inconsistent with the international regime; a country would only make inconsistent changes if it were not concerned about its international obligations stemming from the regime. However, that the present international regime exists, binds its signatories, and is unlikely to be changed in the foreseeable future (given the current state of international intellectual property law negotiations) should not foreclose the exploration of alternatives to the current copyright regime. Further, the flexibilities built (intentionally or unintentionally) into the international copyright regime provide leeway for countries to undertake certain changes within the framework of the regime.

All five papers refer to the U.S. copyright regime, but their analyses are informative for copyright law reform discussions globally. Thomas Nachbar's analysis of the role for rules and standards in copyright law certainly applies internationally. In Europe, scholars have discussed the possibility of changing from rule-based provisions to standard-based provisions when they have contemplated the possibility of switching from enumerated exceptions to copyright to a fair use provision (or complementing exceptions with a fair use provision). The justification given in Europe for adopting the proposed standard is the necessity for sufficient flexibility to facilitate technological progress. However, the European proposals have paid insufficient attention (as have the U.S. proposals that are commented on by Nachbar) to the rule/standard distinction and have not adequately assessed the appropriateness of the two types of means and the costs that arise when suboptimal means are selected to pursue goals.

Olufunmilayo Arewa suggests in her paper the negative effects that copyright law historically might have had on European classical music; because copyright law discourages improvisation, it prevents music from developing organically through incremental changes that reflect the preferences of its audience. While copyright protection might encourage composers to experiment and produce music that achieves the necessary level of originality that copyright law perceives as deserving of protection, copyright protection might at the same time contribute to the music departing from the generally shared tastes of its audience. The effect of copyright on musical works may be similar to the

effect that copyright might have on computer programs; copyright incentivizes computer program developers, as it does music composers, to depart from established, time-tested, and understandable patterns. If improvisation is an essential form of musical creation, does copyright offer any means to encourage improvisation while not depriving composers of their exclusive rights? Perhaps the solution is a matter of appropriate delineation of the sufficient minimal creativity required for copyright protection of a musical work, or perhaps, the solution is a different form of protection for the various stages in the development of a musical work.

Lydia Pallas Loren and Jacqueline Lipton also highlight the importance of selecting a means for achieving the optimal goals of copyright policy in their papers. Professor Lipton analyzes the facets of fanfiction as a very specific literary creation and shows how private actor intervention can easily alter the status of some fanfiction as a fair use of the underlying work. Professor Loren's review of the history and present status of the royalty rate setting processes suggests that antitrust enforcement against performance rights organizations may counterintuitively result in an even stronger position for the organizations; the organizations seem to succumb to incumbent lobbying to such an extent that the role of the organizations as nongovernmental actors may be questioned. A component of the process of selecting the appropriate means is to identify appropriate actors to design, implement, and manage the means. A preference for certain policy goals may influence the desire for the involvement of certain types of actors; the selection of actors, however, should not drive the identification of the appropriate means.

*Jessica:*

I agree that thinking more systematically about "appropriate means"—be that institutional or particularized processes—is important. And certainly considering what are the concrete goals of copyright—what is the "progress" the Constitution contemplates—is paramount. During the workshop, Wendy Gordon and Thomas Nachbar had an animated discussion about this last point. Thomas's paper focuses primarily on processes—whether rules or standards are optimal in light of the access to relevant information at particular decision points regarding creation and use. Wendy's paper justifies identifying the primary goal of copyright as incentivizing creativity and proceeds to explain how the current overly complex system of exclusive rights and limitations should

be (and could effectively be) trimmed to achieve that particular goal. Thomas thought that, without agreement on the substantive harms and benefits of the system (what is “progress?”), focusing on process makes the most sense. (And that goes to your international harmonization point, Marketa.). In discussion, Wendy did not seem to agree entirely. And, as her paper describes, by justifying copyright protection only by its ability to further the creation of new works of authorship, Wendy is explicitly describing “progress” in this way.

As Aaron suggests, there can be reasonable debate about whether there is a definable scope to “progress,” separate from process. Does the constitutional mandate of progress care about what kind of works are created? Or, just how many? Does it care about how the works are created or to whom they are accessible? Reckoning with the substantive contours of “progress” seems important and yet often goes unstated. There is some work on this topic but not nearly as much as one would think, given how central the term is to the idea of intellectual property and its regulation.

Implicit in Jacqueline and Olufunmilayo’s papers is that creative work—the existence of an output—is less important to “progress” than *creative practice itself*. Jacqueline’s description of the values of fanfiction and the problematic licensing transactions by which it is being commercialized through Kindle Worlds implies that restrictions on the practice of writing fanfiction (how one writes, in conversation with whom and what possible limitations exist with regard to content and character) undermine copyright progress. Olufunmilayo’s similarly focuses on how the copyright rule of fixation privileges written music for protection, which undermines long-standing and generative practices of music production based on performance and the nonvisual aspects of music (e.g., timbre and rhythm) central to African American cultural traditions.

By contrast, Lydia’s paper reflects Marketa’s point about process and institutions as a proper focus of improving copyright and (implicitly) promoting “progress.” Without focusing on the kind of music or the way music is produced, Lydia’s paper critiques the disparate effects of the rate-setting system for music distribution and its protection of incumbents. Her paper is an implicit plug for “progress” as directly related to dissemination and access to work.

None of these papers suggest the clean distinction I am making between dissemination and creation as attributes of progress, but it is worth paying attention to implicit or explicit emphases on both as we engage in conversations about reform.

*Aaron:*

I'm interested in the degree to which it is possible and useful to separate process and institutions from substance in a conversation about reform. I certainly see the conceptual value in distinguishing between them. But I'm somewhat skeptical about our ability to practically disentangle their impact on reform. Marketa's example of international obligations might help illustrate this difficulty. The primary hurdles those obligations create are undoubtedly institutional and procedural. But there is a deeply embedded substantive reform agenda favoring large copyright holders built into the choice to rely on international institutions and processes. As Congress becomes a less hospitable vehicle for that agenda, we've seen an increasing focus on the achieving change through the backdoor of international agreements.

Although Wendy and Thomas's papers focus on opposite sides of the divide between substance and process, they both implicitly embrace the notion that we can derive insight from thinking about one aspect in isolation. Wendy's thought experiment, whether derived from pure common law reasoning or constitutional principles, is an effort to elevate copyright policy above the institutional shortcomings that she rightly blames for the expansion of the copyright term. Thomas's effort to divorce the procedural choice between rules and standards from any substantive policy in many ways presents the mirror image of Wendy's approach.

The other papers are less concerned with the abstract and more focused on the inevitable interactions of substantive outcomes—both legal and creative—and process and institutions. Jacqueline worries about the ways market mechanisms could influence the substance of both legal and creative outcomes. Lydia raises concerns about the impact of legal institutions of the legislative, judicial, and regulatory variety on license fees facing new market entrants. And Olufunmilayo highlights the complex interplay between creative practice and legal institutions. While both of these general approaches have value, they reveal something about our authors' assessments of the relative importance of substantive and procedural concerns in the reform process.

*Marketa:*

Aaron states that international institutions and processes favor large copyright holders; I view the current situation differently. Multinational efforts, such as ACTA, and other trade



agreements since TRIPS, have been driven by attempts to strengthen copyright protection, particularly through more effective (or more aggressive, depending on one's perspective) enforcement—goals that large copyright holders promote. However, the failure of ACTA and the conclusion of the latest two international treaties (the 2012 Beijing Treaty on Audiovisual Performances and the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled) do not evidence victories by large copyright holders at the international level. Critics may doubt that the Beijing Treaty is useful as a data point in projecting the trajectory of international copyright negotiations; the Beijing Treaty was in the making for a long time. However, as some commentators have suggested, and as some large copyright holders fear, the Marrakesh Treaty might be a groundbreaking milestone delineating a trajectory that will place more emphasis on the interests of copyright users than the interests of copyright holders. Large copyright holders are concerned that the Marrakesh Treaty might have opened the door to negotiations of additional mandatory exceptions and limitations to copyright.

Industry groups and other stakeholders regularly turn to international negotiations (or negotiations at regional levels) in the hope that the resulting international treaties (or regional instruments) will promote stakeholder interests and force national legislatures to implement corresponding national legislations that will favor stakeholder interests. All the large stakeholders today, and not only the large copyright holders, realize the importance of international policymaking and exert influence at the individual national levels and at the international level. The question is whether national legislatures, such as the United States Congress, are more receptive or less receptive to particular stakeholder voices than are the representatives of the national executive branches and officials of international organizations—representatives and officials who are typically instrumental in negotiating international treaties.

New incumbents play an important role in determining how national and international policies are shaped; notwithstanding concerns that current copyright policies help entrench existing incumbents (a concern that Wendy and Lydia's papers emphasize), new stakeholders emerge who overtake the role of incumbents. In some instances, new incumbent interests eventually align with old incumbent interests, as Jacqueline's example of Kindle Worlds demonstrates; in other instances, new incumbents bring their own interests. Typically, incumbents cast their interests as identical to or parallel to the interests of other established stakeholders with

whom the general public can identify: large copyright holders present their interests as aligned with those of authors and performers; and Internet service providers portray their interests as extensions of the interests of Internet users. We may wonder how society's policy preferences and allegiances will develop when today more Internet users are also becoming authors; as the Internet generation grows older and provides for their families and their retirements, this generation may view free content creation and sharing on the Internet differently than it did one or two decades ago. Jacqueline's observations about the developments in fanfiction might indicate a trend of monetization of user-created content as a manifestation of changing perceptions about the role of copyright with respect to user-created content.

*Jessica:*

Marketa, your point is well taken that yesterday's disruptive entrants are tomorrow's incumbents, and that productive allegiances may form between disruptive entrants and established stakeholders. Lydia's paper comparing the development of performance rights organizations with that of Internet radio services makes these points by example.

What her paper also highlights is the diversity of institutional mechanisms through which these tensions may be worked out—and how, to Aaron's point, the same substantive values may nonetheless repeat and entrench themselves. Lydia's paper identifies these repeating values as particular narratives animating institutional decisions charged with determining the proper licensing terms for music performances. These institutions include the Copyright Office, the Copyright Royalty Board, privately negotiated agreements, and court decisions overseeing antitrust decrees, all across a 100-year history. Despite the profound changes within the music industry during that time and the diversity of institutions tasked with shaping music copyright, Lydia identifies two primary narratives that explain the substantive outcomes: (1) maintaining fair remuneration in light of changing music technology; and (2) protecting the status quo of large incumbent entities from competition wrought by new music technologies and business models. If Lydia is right that no matter the nature of the institution—be it private, quasi-governmental, or judicial—these two narratives drive institutional decisions (narratives being stories with a moral or a point), her paper speaks to the irrelevance of the institution for reform purposes and the importance of identifying and authorizing or rejecting the fundamental values being promulgated and protected.

*Aaron:*

I appreciate Marketa's optimism about international processes, although I don't share it. But her accurate description of the recent changes in the fortunes of large copyright interests shows that the interplay of procedural and substantive considerations is not necessarily static. I think that underscores my broader point that it's difficult to talk sensibly about reform without understanding the dynamic relationships between processes, institutions, and substantive outcomes.

So while it might be the case that the driving narratives are consistent across institutions when it comes to music licensing today, we shouldn't necessarily expect that sort of consistency over time and across the full range of potential reform opportunities. In another context, institutional choice could be crucial. Perhaps the courts would resolve the questions Jacqueline raises about commercial fanfiction very differently than Amazon would, for example. So some sensitivity to and awareness of that context strikes me as an important part of the effort to think through copyright's future. Papers like Thomas and Wendy's make valuable contributions but are most useful when their insights are situated within a broader contextual understanding.

*Marketa:*

Aaron draws our attention to the dynamic relationships among processes, institutions, and substantive policies, and rightly emphasizes the need to analyze the three components as the parts of a single puzzle whose individual components should complement each other within a given context. Often when we think about a recalibration of copyright we think solely of recalibrating the interests of various stakeholders in the substance of copyright law; the focus on the substance of copyright policy is understandable, and, as Jessica suggests, a search for the optimal substantive recalibration of copyright should be society's paramount goal and should involve the questioning of even the basic premises of copyright policy. All five papers presented at this conference in some form address the complexity that is involved in the process of a recalibration of copyright. The complexity created by the intricate web of interests embedded in the substance of copyright policy makes the recalibration of copyright challenging; and the recalibration is made even more complex by the fact that the substantive law changes must be accompanied also by appropriate changes to processes and institutions.

As legal scholars, we are fortunate to be able to participate in the response to momentous societal and technological changes that affect changes also in the copyright laws during this period. Digital technologies have opened possibilities for an unprecedented large-scale public engagement with copyright policy because the technologies are facilitating an environment in which more and more people are becoming authors, users, and disseminators of content. The five papers on which we have the pleasure to comment are important pieces of legal scholarship. They offer valuable windows into the complexities of copyright law recalibration in our swiftly changing society.

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