

## **Copyright in the Digital Environment: Restoring the Balance**

**24th Annual Horace S. Manges Lecture, April 6, 2011**

### **INTRODUCTION**

Jane C. Ginsburg

Good evening. Please find your seats, and it's wonderful to see so many people here. Welcome to the Twenty-Fourth Annual Manges Lecture. The Horace S. Manges Lecture and Conference Fund was established by the firm of Weil, Gotshal and Manges in memory of Horace S. Manges, Columbia Law School Class of 1919. Mr. Manges was a distinguished trial lawyer who worked on behalf of countless writers and publishers.

Tonight's speaker, Dr. Francis Gurry, was appointed Director General of the World Intellectual Property Organization, WIPO, on October 30, 2008. During a career at WIPO that began in 1985, Francis Gurry was instrumental in establishing the WIPO Arbitration and Mediation Center in 1994, and, subsequently, in developing the highly successful Uniform Domain Name Dispute Resolution Policy. He served on the WIPO Top Management Team from 1997, initially as Assistant Director General, then from 2003 as Deputy Director General, with responsibility for Patents and the PCT System; the Arbitration and Mediation Center; and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources. Francis Gurry holds law degrees from the University of Melbourne in Australia and a PhD from the University of Cambridge in the UK. He is the author of numerous publications and articles in international journals on intellectual property issues.

The title of his talk this evening is, "Copyright in the Digital Environment: Restoring the Balance," and there will be a question and answer session following the formal part of the lecture.

Two other administrative details: these proceedings are being taped and will be posted in due course on the Kernochan Center webpage.<sup>1</sup> And finally, there will be a reception following this program, which will be in the Case Lounge on the seventh floor. For those of you who are not familiar with the building—you take the elevators, and then when you exit on the seventh floor, the room will be to your left and there will also be a big sign. So, with that, thank you very much, Dr. Gurry. It is a real pleasure and an honor to have you here.

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1. Dr. Francis Gurry, Dir. Gen., World Intellectual Prop. Org., The Annual Horace S. Manges Lecture at Columbia Law School (Apr. 6, 2011), *available at* <http://www.law.columbia.edu/kernochan/manges>.

**MAIN ADDRESS**

Dr. Francis Gurry

Thank you very much, Jane. Ladies and gentlemen, a very good evening to you all. It's a great honor to have the opportunity to deliver the 2011 Horace S. Manges Lecture, and I should like to extend my thanks to the law firm of Weil, Gotshal and Manges, and pay tribute also to their foresight in establishing this lecture series. When one looks at the list of persons who have delivered the lecture over the years, I think we can say that the firm has certainly succeeded in its objective of preserving the memory of someone who was very actively engaged in the practice of copyright and in the development of copyright policy. I think, as I will say a bit later on today, that that sort of activism is exactly what we need at the moment. Let me extend my thanks also to Jane Ginsburg for her very kind invitation.

The topic that I've chosen for tonight is a rather large one: the impact of the digital environment on copyright. And, in one sense, I think that one can say that we have talked ceaselessly about this topic since the widespread adoption of the Internet and digital technology. But in another sense, I don't think we can speak about it enough.

The current international copyright agenda deals with the remnants of what was a very promising—and, for an international organization, a very early—start in tackling or in addressing this question in the holding of the 1996 Diplomatic Conference, which led to the two so-called WIPO Internet Treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Since that time, what we are now dealing with at the international level is the remnants. We are still trying to accord audiovisual performances the treatment that is given to musical performances in the 1996 Treaty. And, we are still trying to update broadcasters' rights, the third subject matter of the Rome Convention in 2011. The rest of the agenda is concerned with exceptions and limitations, which is highly important subject matter, but I sometimes think that if we don't address the elephant in the room—the impact of the digital environment on copyright—then there will be nothing to limit and there will be nothing from which to make an exception.

So few issues in intellectual property, or in cultural policy, are as important as the consequences of the revolutionary structural change that has been introduced by digital technology and the Internet. And as the world sees the number of persons who have access to the Internet pass two billion, there are some signs of support for addressing this question from a very high level.

We see that in the last three months, both President Sarkozy of France and President Medvedev of the Russian Federation have suggested that the topic of the impact of the Internet on copyright needs to be addressed at a very high level.<sup>2</sup> In

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2. Nicolas Sarkozy, President of the French Republic, Opening of the e-G8 Forum (May 24, 2011), available at <http://www.g20-g8.com/g8-g20/g8/english/for-the-press/speeches/opening-of-the-e-g8-forum.1247.html>; Dmitry Medvedev, President of the Russian Fed'n, Opening Address to the World

his speech earlier this year at the opening of Davos, President Medvedev stated, and I quote, “that the old principles of intellectual property regulation are not working anymore, particularly when it comes to the Internet. That,” he stated, “is fraught with the collapse of the entire intellectual property rights system.”<sup>3</sup> And he suggested, as President Sarkozy had suggested, that this was a topic that the G20 ought to address.<sup>4</sup>

Digital technology and the Internet have created the most powerful instruments for the democratization of knowledge since the invention of moveable type. They’ve produced perfect fidelity and near zero marginal costs in the reproduction of creative works, and an unprecedented capacity to distribute those creative works around the globe, again at instantaneous speeds and at near zero marginal costs.

The enticing promise of universal access to creative works has come with the process, however, of creative destruction of the business models of the pre-digital world and creative industries. As a generalization, we now see a tendency for low-value and high-volume business models to replace high-value and low-volume business models. And we see a very large-scale and widespread society-wide experiment taking place on the part of authors and performers and their business associates in engaging audiences differently. That experiment has been producing results and those results, in turn, have been refining and reformulating the design of the experiment and so it will continue.

Underlying that process of fundamental change is a very radical question for society, and it is the central question of copyright policy: How can society make cultural works available to the widest possible audience, while at the same time returning some value to creators and to the business associates who helped the creators to navigate the economic system; and to enable the creators and their business associates to lead a dignified economic existence? That central question of copyright policy implies a series of balances. It is the balance between, on the one hand, the widespread availability of works and, on the other hand, the control of the distribution of works to extract some value to return to the creators. It is the balance between consumers, on the one hand, and producers on the other hand. It is the balance between the individual creators, on the one hand, and society at large on the other hand. It is the balance between short-term gratification by consumption of the work, on the one hand, and the long-term objective on the other hand of ensuring a dynamic creative culture.

Digital technology and the Internet have had a radical impact on those series of balances, and I would suggest that they have given the technological advantage to one side of the balance. They have given the technological advantage to the consumer, to immediate gratification and to society at large. We know that it is impossible to reverse the technological advantage that has been brought about to

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Economic Forum in Davos (Jan. 26, 2011), *available at* <http://www.weforum.org/session/transcripts/world-economic-forum-annual-meeting-2011-opening-address-dmitry-medvedev>.

3. Medvedev, Opening Address to the World Economic Forum in Davos, *supra* note 2.

4. *See id.* *See also* *Sarkozy Wants a Civilized Internet*, EDRI-GRAM (Jan. 26, 2011), <http://www.edri.org/edrigram/number9.2/sarkozy-civilised-internet-g20>.

one side of the balance. I think there is no other possibility than to seek an intelligent engagement with that change as a result of the technological power in the balance. If we don't do it, then the copyright system will perish.

The adaptation that is required needs activism. I do not think that a policy of passive response to the change in the technological circumstances is satisfactory. I am convinced that a reactive and passive approach will lead to a situation in which there will be a Darwinian "survival of the fittest" business model. And it may be that the fittest business model gets the series of balances (about which I spoke) right. It may be, however, that the fittest business model does not get those balances right. In other words, I do not believe that the balances that lie at the heart of copyright law should be left to a matter of technological possibility and business evolution. I think they should result from conscious design rather than a default position.

In order to have an activist policy and a successful policy, there are three main principles that would form part of a successful policy. The first of those principles is neutrality to technology and to the business models developed in response to technological developments. The purpose of copyright is not to influence technological developments or the business models that are built on technological possibilities. Nor is its purpose to preserve business models that are built on the basis of outdated or moribund technologies. Its purpose is to deal with any and all technologies—no matter what they are—for the production and distribution of cultural works, and to extract some value from cultural exchanges that take place pursuant to those technologies to return it to the creators and performers. It should be about promoting cultural dynamism, and not about preserving or promoting vested business interests.

A second principle besides neutrality to the technology is that we need a comprehensive and coherent policy response. I don't think there is one single answer, one single magical response to the very major situation that we confront with the advent of the Internet and digital technology. Rather, the answer will come from a combination of five things: (1) law; (2) infrastructure; (3) cultural change; (4) institutional collaboration and (5) better business models. All five elements play a part in a coherent and comprehensive policy response to the situation. Let me refer to each of those five elements briefly.

The first of them is the law. For many decades, if not centuries, the law was the way in which we made copyright policy, but I think we have all come to realize that the law is a very rigid and blunt instrument in relation to the Internet and the digital environment. In that environment, the volume of traffic and the international or multi-jurisdictional nature of the instrument itself, the medium itself—together with the loose regulation of the domain name system, which allows a large degree of anonymity to exist—all mean that the law is a mere shadow of itself in the physical world. It is a weakened force. And we do know of course that institutions of law and their reach are trapped in a territorial cage from which technology and business burst loose quite some time ago.

In consequence, the culture of the Internet is one in which platforms actually influence behavior as much as, if not more than, the law. But recognizing the

limitation of the law, and its inability to provide a comprehensive answer, should not mean that we abandon it completely. There are still many important legal questions to be addressed. It's just that we should be aware of the limitation in an overall design, which should incorporate, in my view, other elements as well. And among the legal questions that we need to address, I believe that the two related questions of how to deal with illegal peer-to-peer file sharing of protected works and the position of the liability of intermediaries are crucial. And when you look around the world it's apparent that there is not a coherent legal approach to these questions. There simply isn't.

In some countries, and not to mention them, a vigorous approach of pursuing consumers for infringement has been pursued. In other countries, the policy of a graduated response has been adopted. And in other countries, still, there is an opposition—a total opposition—to a graduated response. I believe that for as long as we do not have a consistent international position on these questions, we will have failed in our duty to provide society with a clear policy for pressing questions on a medium that has become part of the daily economic, social and cultural life of just about everyone. Not only everyone in the industrialized world but also two billion people around the world.

In addition, not only will we have failed to provide a clear policy position in relation to such a central question, but we are also placing courts in an impossible situation. Legislatures are abdicating their duty to provide a response, and we are asking courts to make policy. That makes the courts not only very uncomfortable, but also introduces a terrible complexity into a system that applies to a medium that is now used on a daily basis by everyone around the world.

So, the law has its limitations, but there are some central questions that really provide part of the overall solution. As I've suggested, I believe that infrastructure is as important a part of the solution as the law. And I would say for a start—let us dare to say—that the infrastructure of the world of collective management is outdated. It applies to a world of separate territories, and it applies to a world where rights holders express themselves in different mediums, not to the multijurisdictional and converged world of the Internet. That's not to say that collective management or collective societies don't have a very important role to play, but they do need to evolve and change. We need a simple global infrastructure that permits global licensing and makes it as easy to legally obtain cultural works on the Internet as it is to obtain them illegally.

In this respect, I would like to suggest that we need to have at least a rough plan or design of the sort of infrastructure that we need. I don't believe we have the sort of infrastructure that would provide simplicity for everyone involved in the use of creative works on the Internet. Also, we do not just need a rough plan or design of that infrastructure, but a roadmap of how to develop it. And as with many questions in this area, and I'll return to this at the end, it's unclear to me whether such a plan should be developed by the public sector, by the private sector or by both.

Undoubtedly, many of the best contributions to evolving infrastructure have come from the private sector. Let me refer to two of them. One is the work that is

being undertaken by the Digital Data Exchange—the DDEX. It concerns the development of standards for the management and communication of metadata relating to creative works.<sup>5</sup> So far, musical works—but I think the plans are to extend beyond musical works the management and communication of metadata. Now if you think about it, you cannot have a digital marketplace without standardization of that metadata. You need to have standardization of the metadata for an efficient and invisible digital marketplace. The Digital Data Exchange has done a lot of good work in this respect: It groups together a variety of stakeholders; it groups together the sound recording managers, the labels, the rights societies, the retailers and the technology companies. And it's not my function to say who should be the gold standard in the world of standards organizations, but simply to say that this is one essential element of global infrastructure that we need.

Another example that I'll give you is an example of an innovative piece of infrastructure, which is the pre-publication video identification system of YouTube. I'm not sure whether you're familiar with this, but this particular pre-publication filtering—and on YouTube there are 100 years of video—takes any work that is uploaded, and it compares it against the 100 years of video that exist on YouTube.<sup>6</sup> If there is a match, YouTube will notify the rights holder and will give the rights holder the opportunity to take down the work or to monetize it.<sup>7</sup> One interesting thing is that around ninety percent of rights holders choose to monetize it.<sup>8</sup> But it's a very interesting example because it's an element of infrastructure that helps ensure compliance with the law, that assists in developing a market and that makes a product—YouTube or a service—more attractive. So it's a piece of private infrastructure that performs both public and private functions, and as such I think it's very interesting.

Those are just two examples of infrastructure that I've given you, and I haven't chosen them systematically. I've chosen them for two reasons. First of all, because they show that *many* of the answers in this area lie beyond the law, and are found in practical systems or infrastructure; or, *some* of the answers lie beyond the law, and are found in practical systems or infrastructure. And secondly, I think they illustrate that it's very difficult to know whether infrastructure should be provided by public authorities, or by private companies/private actors. As an inveterate public official, I believe that some pieces of infrastructure ought to be global public assets, and ought to be developed and managed by public authorities. I give as one such example the idea—under discussion in various circles—for a global repertoire database, or an international music registry, as a place to which one could go for authentic data about who owns or controls rights in relation to music. I would emphasize that such a registry should not replace existing

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5. *Implementations of DDEX Standards*, DIGITAL DATA EXCHANGE, <http://www.ddex.net/implementations.html> (last visited Sept. 24, 2011).

6. *Content ID*, YOUTUBE, <http://www.youtube.com/t/contentid> (last visited Sept. 24, 2011).

7. *Id.*

8. David King, *Making Money on YouTube with Content ID*, THE OFFICIAL GOOGLE BLOG (Aug. 27, 2008, 8:00 AM), <http://googleblog.blogspot.com/2008/08/making-money-on-youtube-with-content-id.html>.

collecting societies. It rather should work somewhat as the Patent Cooperation Treaty works, casting a procedural network over the collecting societies and working with them rather than replacing them.

Now, beyond the first two elements of a comprehensive design—namely law and infrastructure—lies culture. And, of course, the Internet has developed its own culture, and we've even seen one political party—the Pirate Party—emerge to contest elections on the basis of the abolition or radical reform of intellectual property in general and copyright in particular.<sup>9</sup> Part of their platform is, and I quote, “that the monopoly of the copyright holder to exploit an aesthetic work commercially should be limited to five years after publication . . . . A five-year copyright term for commercial use is more than enough. Noncommercial use should be free from day one.”<sup>10</sup>

Now, you might consider that the Pirate Party is an extreme expression, but I would suggest to you that it also represents a fairly widespread sentiment of distrust on the Internet with respect to intellectual property rights, and that we would do well by recognizing that that actually exists—whether we like it or not. One example of that is widespread illegal peer-to-peer file sharing. We may argue about statistics, and we may argue about the methodology—there's of course a big argument going on about the methodology to measure the economic impact of illegal peer-to-peer file sharing, or even the incidence of it—but we all know that it is widespread.<sup>11</sup> It has reached alarming proportions. So, the question of the measurement is to some extent secondary to the question of what we do about it. In order to effect a change in attitude on the part of the public, we have to reformulate the question and speak less in terms of piracy. Some people even like to be—as I've given in the example of the Pirate Party—referred to as pirates. I think what we have to do is challenge society to share responsibility for a fundamental question of cultural policy: How are you going to finance cultural production in the digital environment and in the twenty-first century? Because it can't be free. How are we going to do that? That is the question that we should ask society as a whole to share, and for which to share the responsibility. It's implicit in what I say that the sometimes overly aggressive and adversarial tone of discussions about how to deal with the digital challenge is not helpful. Perhaps that's best characterized by the term, “The Copyright Wars.” But I do note that Matthew Arnold, in the United Kingdom, in 1876, in relation to the hearings of the Royal Commission on Copyright, then referred to it as a “Great Battle.”<sup>12</sup> So, maybe any discussion of public policy and rights in creative works is fraught with this militaristic terminology.

A fourth element—going back to the comprehensive design—is institutional

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9. See, e.g., Davin O'Dwyer, *Sweden's Swashbucklers*, THE IRISH TIMES, Oct. 9, 2009, at B10.

10. *International—English—The Pirate Party*, THE PIRATE PARTY, <http://www.piratpartiet.se/international/English> (last visited Sept. 24, 2011).

11. See generally Stan J. Liebowitz, *Pitfalls in Measuring the Impact of File-sharing on the Sound Recording Market*, 51 CESIFO ECON. STUD. 439 (2005) (comparing and critiquing various methodologies that have been used to assess the impact of file-sharing on copyright owners).

12. Matthew Arnold, *Copyright*, THE FORTNIGHTLY REVIEW, Mar. 1, 1880, at 319.

collaboration. This is “The Artist Formerly Known as Enforcement.” This is a very, very delicate area. Because any action in this area can have a disproportionate influence on the battle for hearts and minds in connection with this important area and question of public policy. But I think what we can say is that it’s a very incoherent area, and there is no uniformity in the approach internationally to this question, or amongst the various countries.

There’s a plurilateral agreement—the Anticounterfeiting Trade Agreement (ACTA)—which to some extent deals with it, but there was a big split in the parties discussing ACTA about the extent to which to go in relation to enforcement and whether to have a graduated response system.<sup>13</sup> So there are many, many different approaches being deployed—some of them private sector approaches—to the question of enforcement or the current question of institutional collaboration. It is an essential question and we need greater coherence in this area; and we need to start by sensibly and modestly defining what our objectives are in this area. It does not help that there are countries that will not permit any international discussion of the question.

The final element of a comprehensive design is better business models. I think this is now happening, and we have a flourishing market for new business models in relation to creative works, at least in relation to music nowadays. But the story hasn’t finished there—it is still to be played out in the publishing industry, and it is still to be played out in the film industry. I think that we should constantly remind ourselves that the confrontation of our classical copyright world with the digital environment has been more a sorry tale of Luddite resistance than an example of intelligent engagement.

I mentioned three guiding principles: The second was comprehensive and coherent design with a number of different elements; and so, then, the third is simplicity in copyright. Copyright is an extremely complex and complicated area of law, and it reflects the successive waves of different technological expressions of creative works. We have that complexity to serve a purpose: to differentiate treatment of different creative works. But I would ask whether in an age of convergence that differentiation is so important as to cause such confusion or lack of understanding on the part of the general public. Do we need so many different categories of works and so many different categories of rights in an age of convergence? I think we risk losing our audience here if we cannot make understanding the system of copyright more accessible. Future generations are going to regard many of the works, rights and business agents that we talk about as cute artifacts of cultural history much like the vinyl record became in a very, very short period of time.

Let me crawl towards a conclusion, if I may. Suppose that you accept my argument that the nature of the digital challenge requires activism and a coherent

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13. Anti-Counterfeiting Trade Agreement, art. 27, *text finalized* Dec. 3, 2010, *available at* [http://www.ustr.gov/webfm\\_send/2417](http://www.ustr.gov/webfm_send/2417). For a discussion of the debate over enforcement and graduated response, *see U.S. ACTA Internet Draft Intensifies Debate Over ISP Liability*, INSIDE U.S. TRADE, Feb. 26, 2010, at 1.



and comprehensive policy approach. Then, I think the question is: Who's going to do that? Who's going to provide that design? In many respects the question of the designer is even more complicated than the question of the design. Much of the difficulty we have relates to the designer rather than to the design. This is because the digital challenge lies in the intersection of two completely different cultures and two completely different worlds—one culture with centers and boundaries, and another culture without either of those. These cultures produce entirely different perceptions of the role of the public function, and entirely different perceptions of the role of public policy. The transition that we are undergoing in the digital environment is not just about the nature of the system of copyright that we want, but it's also about who decides and how to decide what sort of system of copyright we want, and that is as central to our debate as anything else.

Now, what I have suggested to you tonight is that everyone should be involved—the public sector with law; the public and private sectors with infrastructure, and with institutional collaboration or reinforcement; the whole of society with cultural change and the enterprise sector with business models. So that is what might happen. But how does it come about?

This leads us to the central challenge of multilateralism—and we have a great challenge with multilateralism at the moment. Because it's quite clear that global solutions whether in this area or any other area are not going to emerge from the “can't” and hubris that characterize some multilateral negotiations. It's very clear that we need high integrity policymaking processes if we are going to deal with the issues at hand. The problem of achieving high integrity policy processes, which are focused on the issues, is the interconnectedness of everything in a globalized world where things are played against each other, and where there is a policy virus that circulates from institution to institution, instance to instance, or policy to policy. That is one of our big difficulties.

I would just leave you with that challenge of multilateralism. But I would like to say one other thing before finishing: I think many of these issues are played out in the Google Books situation. It is a very, very interesting situation. At least some of the issues involved—the relationship between the public and the private sector insofar as a private copyright registry was envisaged to be established; insofar as you have two sovereign states—at least France and Germany—acting as *amici curiae* of the court in another state—present a very unusual situation.

Many elements of what I have spoken about in the transition are involved in the Google Books Settlement. One of the best encapsulations of this dilemma was written by Robert Darnton in an article called *Google & the Future of Books*, in *The New York Review of Books*, published two or three years ago. He says,

Looking back over the course of digitization from the 1990s, we now can see that we missed a great opportunity. Action by Congress and the Library of Congress or a grand alliance of research libraries supported by a coalition of foundations could have done the job at a feasible cost and designed it in a manner that would have put the public interest first. By spreading the cost in various ways—a rental based on the amount of use of a database or a budget line in the National Endowment for the Humanities or the Library of Congress—we could have provided authors and

publishers with a legitimate income, while maintaining an open access repository or one in which access was based on reasonable fees. We could have created a National Digital Library—the twenty-first-century equivalent of the Library of Alexandria. It is too late now. Not only have we failed to realize that possibility, but, even worse, we are allowing a question of public policy—the control of access to information—to be determined by private lawsuit.

While the public authorities slept, Google took the initiative.<sup>14</sup>

That encapsulates much of the challenge that we confront. We do not have a performing international public sector. The nature of the challenge requires a performing international public sector in order to confront it, and the risks at the end of the day are risks to multilateralism and risks to public policy. Thank you very much.

### QUESTIONS AND ANSWERS

**Question:** I really appreciated your views, and it tracks along with what I've been concerned with for many years, going back thirty years to the early days of the Internet. And we actually had worked with various groups. I'm optimistic rather than pessimistic because I essentially see the copyright industries taking control of their lives. For example, in the former print publishers you have the International Digital Object Identifier (DOI) Foundation and their metadata registry, CrossRef, which has made really grand strides in a direction that I think is quite positive. But, my question was more conceptual, and I'm going to pick up on your waves of expression. Now a lot of people talk about digital as technology, or they want to label it all electronic, as if they're just electrons and not information—or photons if it's a photo. Perhaps we are facing a new form of expression: zero-one-zero-one-zero. The difference is that instead of that expression being fixed in a tangible form, what is emerging, in my view, is a substitute for tangibility. It is the unique and persistently identifiable data structure—and the basis of the registries, repositories and global infrastructure that would back that up—that I think I see bringing together perhaps the vision you are talking about. I am very optimistic that that could happen in the not too distant future. But I want to come back to the waves of expression and the need to recognize the new digital form of expression, where previous classifications of works are now represented in similar ways.

**Francis Gurry:** I don't know whether I can say I agree with you, but I don't disagree with you. I think the jury's still out and maybe you're right that self-regulation will provide the answers, assisted with some enlightened public policy as well.

**Question:** My name is David Fuller, and I very much appreciate your talk. I was just interested in how you felt about some of the recent developments where, on their own, businesses have tried to meet some of these problems. For instance,

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14. Robert Darnton, *Google & the Future of Books*, N.Y. REVIEW OF BOOKS, Feb. 12, 2009, at 11.

*The New York Times*—I would be curious to know how you felt about how they have developed, and if there's any future in how they're trying to handle their situation. And also, if there are any music decisions that you feel have merit and are leading us in the right direction. In other words, your comments on some things that have just happened recently and how they fit in with the criteria you mentioned.

**Francis Gurry:** I'm not sure, when you mention *The New York Times*, whether you are referring to their developing a platform that can be used to exploit all the data they've ever had—

**David Fuller:** Well they give you a certain amount and if you want to go further you have to start paying for it. That was their way around it. If you subscribe then you can use it any way you want—

**Francis Gurry:** Well I think it's very promising. I can't say with aggregators operating in the world that it is going to be possible not to have some form of payment model for newspapers. The aggregators don't have foreign correspondents. You have to find a way of supporting and financing a structure that goes into the collection and analysis of news. You have to find some way of doing that. Advertising can be one method, but the aggregator tends to take that away; you are then forced back to a payment model. So, I would have thought that this was going to happen. But, this is, as they say, a very dangerous area in which to make predictions, especially about the future.

As far as the court cases are concerned, there have been a series of interesting cases in Australia in this area recently, one involving Internet service provider liability. I can't really comment on different national approaches, but it seems to me that the legislatures are abdicating their responsibility in this area, and they are leaving the courts to make decisions and make policies, which is a function that I don't think they're very comfortable with.

**Question:** Rebecca Giblin. I completely agree with your point about the need for legislatures to step up to the challenges that are approaching, but I am concerned about the shape that such intervention might take. We all know that, since the Statute of Anne, copyright has taken an expansionist direction. But I think it has been pretty persuasively argued that, in some cases at least, the best way of promoting cultural dynamism and knowledge might involve winding that back, whether it's with regard to the scope of rights or the duration of rights, and so on. You've talked already about the need for high-integrity policymaking, but I'd really like to hear your insider's view: Do we have the global political will to actually achieve wholesale copyright reforms that might involve winding back as well as giving additional rights to content owners?

**Francis Gurry:** Well, that's why I really quoted Presidents Sarkozy and Medvedev, because it is a slight change in the situation.<sup>15</sup> It's raised to a different level, both suggesting that this should be an issue for the G20—and that is perhaps a better way to go rather than leaving it to the full glory of a general assembly of 190 states. I think it's a very difficult issue politically because there are more

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15. See discussion *supra* page 2-3.

consumers than there are producers. So, in any given country, it's a rather brave government that tackles this issue full on, and that's what we've seen. That is another reason why an international solution could theoretically be better. Because not only do you need a global solution to a global problem, which I think it is, but it's also usually easier for a country to import an international solution than to develop a solution on its own. In addition, with a global medium you risk having inconsistent approaches across 190 countries. I think we're slowly getting to the point where governments are starting to think, well yes, we should do something about that. But it's slow.

**Question:** Leta Herman. I want to touch on the last point that you raised—one of the themes of your talk—about the international strategy. My question is how do we balance the need for an international strategy with the particularities of each country? Because in all five measurements you were talking about—whether it's culture, enforcement or law—we see so many differences between the countries that I first wonder whether it's feasible to get to one unified strategy? And second, if it's really desired, is it better to set a goal for each country to reach a manageable level of infringement without developing an international strategy? Why would it be better for us to develop an international strategy rather than to let each country form its own strategy and work towards an international goal?

**Francis Gurry:** Well I think you are practically right; that's where we are. But why is it better? I think because it's a global medium, and you can't have differing views of intermediary service liability across the world. It causes great confusion for business and for everyone involved ultimately. But we are a long way from getting to uniform solutions. That is not to say we shouldn't strive to achieve that as a goal. The possibility of a multiplicity of inconsistent national laws is not a very good one for the Internet and for a global digital marketplace. How do you reconcile the need for international norms with the different levels of development that exist in various countries in the world?

Well, I think the problem is more acute in the patent or technology area than it is in the area of creative works. I think developing countries are very rich in creative works, but they may not have as great of access to global distribution channels—but the Internet and good infrastructure provide that as a possibility. That's obviously the continuing tension and the continuing discussion internationally concerning, on the one hand, the need for a certain amount of functional standardization that is required by the interdependence created by globalization. You want your mobile telephone to work wherever you land. Well, the latest generation of mobile telephones has about 6,000 patents, and they are all territorial titles. So, your mobile telephone won't work when you land in another country unless there is some form of international functional cooperation and standardization.

On the other hand, the theory of it is that the TRIPS Agreement carves out certain areas, and, in these areas, says that there are very important public policy questions that relate to the patenting of plants and animals, and the protection of the

environment and agriculture, which can be found in Article 27 of the TRIPS Agreement.<sup>16</sup> Those are the flexibilities that are allowed, within which we can accommodate different levels of national development plus transitional requirements. That tension is always there, and furthermore that tension is exploited by the more advanced developing countries that would like to benefit from the exceptions and flexibilities.

**Question:** Andrew Joyce. While we are on the subject of international solutions and implementations, do you believe the international solutions we should be striving for fall under the purview and mandate of the WIPO, or as you mentioned the TRIPS Agreement? These are trade related issues.

**Francis Gurry:** That is ultimately something member states would decide, and they haven't decided on either, as a matter of fact. The reluctance to have a political will is a consequence of the appreciation of the importance of the issue, and a fear that letting it go into an uncontrolled, multilateral environment could produce very bad results. It's fear of an uncontrolled process that accounts for the lack of political will. I would naturally do it in the WIPO rather than the WTO (World Trade Organization). I'm not a very impartial observer of this.

**Question:** Mark Seeley with Elsevier. I had a question about international standards. I was thinking about the example of orphan works. In the European Union (E.U.), it appears as if there may be some push towards some type of extended collective license, which may have some basis in the nationality of the work. With respect to the collective management organization that might be involved, the pitiful attempts that we have made so far in the United States to do something about this issue have involved a safe harbor. Those are very different approaches. My question is, what is the practical difference in the end, as a user of an orphan work, of going through an extended collective license if the work is based in the E.U., or if you are based in the E.U., versus conducting a risk assessment, if you are based in the States, and trying to decide if you think you've hit the safe harbor? What practical difference would it make?

**Francis Gurry:** Well, I think you are in a better position to answer than I am as to the practical difference. But in that instance, perhaps there is none, there is no great practical difference of the consequence of different approaches. But, it might be different if you chose another area of law.

**Question:** Alex Montague. What are your views on the procedural difficulties that we have in dealing with these problems? We've heard a lot of talk about substantive multilateralism, but we are still locked down with local courts that are slow, and by the time a decision is reached and appealed, the technology has moved on. Have you had any thoughts on this? Have there been any proposals on more of an international procedural approach?

**Francis Gurry:** I think we are a long, long way from that. The international

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16. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27, Apr. 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, ANNEX 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

community in general has not been bad over the course of fifty or sixty years in making laws, but it has been very bad at trying to enforce them. There are just very, very few instances—in whatever field of policy—of international enforcement mechanisms. That is one of the great challenges here in this area. And then as you know, lawyers become extremely emotionally involved with their civil codes and they really don't like changing them. So that's an area that I think is further off than substantive law.

**Alex Montague:** You have a good example in the Uniform Domain Name Dispute Resolution Policy (UDRP) on the trademark side that more or less has been working. It hasn't been ideal, but at least it moves a little faster.

**Francis Gurry:** I agree entirely. It does work, and one might say that it was just a peculiar conjunction of circumstances in which the Internet Corporation for Assigned Names and Numbers (ICANN) had not yet been born, and in which there was a desire on the part of the United States government to actually go forward with devolving responsibility for the Domain Name System (DNS).<sup>17</sup> And they couldn't do that—business wouldn't allow them to do that until there was a solution to the conflict between virtual and physical identifiers. Things came together to permit a solution. And perhaps less people knew about the Internet, then.

**Question:** Giuseppe Mazziotti. Thank you very much for your talk. Is the reform of the Berne Convention on the agenda of WIPO, and if it depended entirely upon you, which aspects of the [Berne] Convention would you change to achieve the objectives that you list?

**Francis Gurry:** What's under discussion at the moment is updating the Rome Convention with respect to audiovisual performances and broadcasting. For the Berne Convention, under discussion are the exceptions and limitations. So, the three-step test of the Berne Convention is under discussion in specific areas. First, access to published works on the part of the visually impaired, and then the education and library exceptions. Those are all important questions. My difficulty is that they are not the central question.

**Giuseppe Mazziotti:** I agree with you on this.

**Francis Gurry:** So how do we change that? That is really the political question we confront, and why I think one can only welcome heads of government starting to pay attention to the question, because that could lead to more political will to address the question. But it is not a secret that the international community has a reduced capacity to agree at the moment. Whether it is the Doha round or something else—at the moment we are not seeing an international community that is very fertile in reaching agreement. And that's a great problem for the world. Never have we faced so many problems that were inherently international in nature—whether it's the movement of germs, pollution, persons, capital or ideas across borders—no single country can provide the complete answer. But at the

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17. ICANN is responsible for implementing the Uniform Domain Name Dispute Resolution Policy. See *Uniform Domain Name Dispute Resolution Policy*, ICANN, <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm> (last visited Oct. 4, 2011).

same time—lets face it—never has there been less confidence in the capacity of international institutions to solve those problems.

**Question:** Hugh Hanson. With the intractable problems in a multilateral situation, what role do individuals play? How important is the person who is running the WTO, or just another example, the WIPO? What can someone in your position do as a realistic matter to make a difference, or is it really that institutional forces just have to adjust in some way?

**Francis Gurry:** Frankly, we heads of agency have extraordinarily little power. I'm not saying that is a bad thing, but it is the fact of the matter. I think that our greatest attribute is being a nuisance—pestering people by saying, “Hey, this needs attention.” And we are not often successful. Of course there is supposed to be a facilitative role, and to some extent you can do that, but the main thing is to try to say, “Hey, this needs to be addressed.” For example, look at the WTO and the herculean efforts that Pascal Lamy has made over the Doha round.<sup>18</sup> But despite all of that, they are experiencing difficulty. So, unfortunately, I think we have very limited influence on the matter. At the end, that is the nature of the system that we have, and it is not necessarily a bad thing.

**Jane Ginsburg:** On that cheering note, we thank you very, very much.

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18. Pascal Lamy has been the Director-General of the World Trade Organization since 2005. *See WTO Director-General Pascal Lamy*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/dg\\_e/pl\\_e.htm](http://www.wto.org/english/thewto_e/dg_e/pl_e.htm) (last visited Oct. 4, 2011). *See also* Matthew West, *Doha Round at Risk of Collapse, Report Warns*, CNBC (May 26, 2011, 6:23 AM), [http://www.cnbc.com/id/43178515/Doha\\_Round\\_at\\_Risk\\_of\\_Collapse\\_Report\\_Warns](http://www.cnbc.com/id/43178515/Doha_Round_at_Risk_of_Collapse_Report_Warns) (highlighting Pascal Lamy's work to raise concerns about the increase in protectionist measures by various nations, and how those measures will ultimately block international progress).