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Interview with Attorney Lois Wasoff Recorded at OnCopyright2010

**For podcast release
Monday, April 19, 2010**

Q: You said something that I thought was really interesting, it captured a lot about this debate, which is that it is unusual in that it's not a partisan matter, it's not a blue state, red state, Democrat, Republican thing, because regardless of political affiliation, people get very involved and very passionate, sometimes on surprising sides of the issue. What were you trying to get at?

A: Well, we hear generally in our lives a lot about how dysfunctional things are in Congress right now, and how hard it is for legislation to make it through Congress, and we see that. And we heard a little bit today, maybe some of the other people you interviewed spoke to this. We heard a little bit today about a certain pessimism about whether or not it will be possible to make changes in the copyright law going forward. I'm less pessimistic, I think, than some of the other speakers, for exactly the reason that you just stated. The deadlock we're seeing is a partisan Democratic-Republican disagreement. What's fascinating to me about copyright, among the many things that are fascinating to me about copyright, is that it doesn't break down along those lines. So there are Democrats and Republicans who are strong proponents of copyright protection, and there are Democrats and Republicans who see issues about copyright and want to see changes made.

So it seems to me that it's an area where we could see some legislative activity in the next couple of years, because it may be one of the few areas that has general impact on our lives, where it will be possible for people to depart from their political party positions and think about issues in a different context.

Q: And whether we do see legislative change, you also pointed out, I think, kind of personal patience for the evolution of copyright, that it wasn't necessary to be going to Congress on a regular basis to update the legislation.

A: Yes, I think that's actually something that's very important. The copyright statute is intended to be largely format-neutral. There aren't separate kinds of protection for movies or music or text. There are certain exceptions that apply to specific circumstances, so the statute doesn't deal with everything in exactly the same way. But the concept is that technology shouldn't determine protection. And we talk about this all the time, that the rules for digital, in terms of when you can use or



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reuse materials, are not substantially different from the rules for print. Analog and digital really have the same underlying principles that apply.

So one of the things, I think, that's good about copyright law – and there are flaws, and we've heard criticisms, and the debate will continue – but one of the things that I think is good is that our system includes both some flexible provisions, like the Fair Use Doctrine, that are not mechanical in their application, and that can evolve and change over time based on changes in industry, in technology, in behavior on the part of producers and users. And then there are provisions that are much more explicit and specific, because they do apply just to only certain situations – uses that can be made by libraries and archives, uses that can be made in classroom teaching, uses that can be made in digital distance education. There are some very specific parts of the Copyright Act. But there is room in the way it's structured now for there to be a certain amount of evolution outside of a formal legislative process. And I think that's a very positive thing.

Q: And it's also important, you pointed out, to be mindful about what you called the first principles of copyright, which is what's stated in the Constitution.

A: We didn't get into this too much in our panel, but this is something that I do think about a lot, and was implicit in some of the things that we were talking about. Copyright comes – as does patent – comes out of the US Constitution. And the US Constitution states clearly that the purpose of providing for intellectual property protection is to advance knowledge. It's to advance the development of the useful arts and of the sciences. And it's – that's the ultimate purpose. And that purpose is the focus of a lot of the commentary that we hear. People talk about the need – the claimed need for very broad exceptions to copyright protection in order to fulfill that mandate.

But what gets lost in that discussion sometimes is that the Constitution doesn't just say what it wants to achieve. The Constitution also is specific in choosing a mechanism to accomplish that goal. And the mechanism that is chosen is reserving to inventors and creators exclusive rights to their creations, to their inventions, for a period of time. So you have to honor both the purpose and the chosen means of achieving it when you think about changes that should be made to the copyright law.

Q: Well, the program today concluded with an interesting panel discussion about art, and that takes us right back to those creators. And these creators on the panel were both creating new works, and also working and reusing, otherwise manipulating



existing works. Just as somebody concerned with the issue at large, how did you respond to that discussion?

A: Well, it was very interesting. It was surprising in some respects, and very interesting. It's not – artists, like Newton, stand on the shoulders of others when they create their works, and using preexisting works is an important part of the creative process. And that's what we heard a lot about today. I think it is important that the copyright law include the safety valves, the flexibility, that lets that kind of creative work happen. And I think it was interesting that all of those artists who were creating those works that are, to some extent, derived from, incorporate elements of prior works, are working, producing works. They showed us their products. They're doing all that within the current copyright regime. So things may be imperfect, but they don't seem irretrievably broken. That a lot of – lot of things seem to be working.

Q: So it's a flexibility that's important to you.

A: Yeah, I think that's right. It's a flexibility, it's a balance. I think what was important about the arts panel, what was very interesting about the arts panel, was that all of the people on that panel were talking about making uses of other people's works that were part of building something new, and something different. So that if you think about a lot of the uses that were being described, they're right on that line between, is it a fair use, is it creation of a derivative work, which might be an infringement? There – some might fall closer to one side of the line than the other, but the point is that the product that each of those artists was creating was really – had a substantial element of added originality, of added creativity. And that's the kind of copying that copyright law should not act as a barrier to. The kind of copying that copyright law appropriately should implicate in a different way is convenience copying; is the scanning of works and the delivery of those works into the same marketplace that the author is trying to reach. That kind of nontransformative convenience copying that is facilitated by current technology, that's the problem. Some of the piracy that Jeremy Williams from Warner Brothers talked about, that's the kind of stuff that's in a different category. But using existing works to create new artistic works, that should be part of the process.

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