VIRGINIA JOURNAL OF LAW & TECHNOLOGY

SUMMER 2005 UNIVERSITY OF VIRGINIA VOL. 10, NO. 9

Symposium Paper: *Would Jefferson File Share?*[†]

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ABSTRACT

One would assume from my role in life as a journalist—a role in which I am dependent on copyright—that I would favor strict enforcement of long copyrights and patent protections. It's not true. I favor a balanced approach, consistent with the intention of the Founding Fathers that copyright and patents would be limited rights, granted for a limited time and for a limited purpose. Today, however, corporations have emerged as the dominant holders of patents and copyrights, and the system has become so imbalanced that it actually stifles creativity rather than encouraging it. I argue that questions of copyright and patent should be resolved in the market, between inventors or artists on the one side, and willing buyers on the other. The interests of corporations must be restricted to enabling that exchange, rather than preventing it.

† Adapted from a symposium on Real Law and Online Rights, held on Feb. 19, 2005 at the University of Virginia School of Law in Charlottesville, Virginia.

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I. INTRODUCTION

¶ 1 I was privileged to address the February 19, 2005 VJOLT Symposium on copyright.

¶ 2 I was the first speaker. Since I am a journalist rather a lawyer, I set the scene with some journalism on the history of copyright in the United States. One would assume from my role in life as a journalist—a role in which I am dependent on copyright—that I would favor strict enforcement of long copyrights and patent protections. It's not true. I favor a balanced approach, one in keeping with the intentions of the Founding Fathers. That intent was that copyright and patents would be limited rights, granted for a limited time for a limited purpose. There is nothing of "property" in them. The phrase "intellectual property" does not appear in the Constitution.

¶ 3 Where then did the phrase come from? It is a framing device, meant to influence the debate by dictating its terms. George Lakoff has written extensively about this in terms of political issues[1] and the 1997 passage of the laws governing "intellectual property" was a political struggle.[2]

¶ 4 What changed between 1787 and 2004? I would submit that only three things changed:

1. The U.S. built a positive balance of intellectual capital in the late nineteenth century, exporting more ideas than it imported;

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1. Bonnie Azab Powell, *Linguistics professor George Lakoff dissects the "war on terror" and other conservative catchphrases*, UC Berkeley NewsCenter, http://www.berkeley.edu/news/media/releases/2004/08/25_lakoff.shtml (Aug. 26, 2004).

2. Tom Zeller Jr., *As Piracy Battle Nears Supreme Court, the Messages Grow Manic*, N.Y. TIMES, Feb. 7, 2005, at C1, *available at* http://www.nytimes.com/2005/02/07/technology/07sharing.html?ex=1108443600&en=03487c3e2e033517&ei=5070.

2. Corporations came to be treated as persons under the law, starting in the Age of the Trusts; and
3. Corporations came to be the main holders of copyrights and patents in the twentieth century.

That's a big indictment. But it's one anyone with access to Google can prove quite quickly.

II. WOULD JEFFERSON FILE SHARE?

¶ 5 The quick answer is yes, he would. Most founders did so fairly routinely, grabbing the ideas of the likes of Locke[3] and Montesquieu,[4] and adapting them to their own use. Benjamin Franklin, in fact, made his fortune on what we would now call "copyright piracy."[5] His printing shops often reprinted the works of others. There is no evidence that he paid for what was in those reprints.

¶ 6 During the debate on the Constitution, Jefferson, while still in France, wrote to James Madison. He claimed support for a "freedom from monopolies," including monopolies on ideas.[6] It should be very clear from the following excerpt that by "monopoly" he meant "copyright":

> With regard to monopolies they are justly classed among the greatest nuisances in government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our governments than in most others? Monopolies are sacrifices of the many to the few.[7]

¶ 7 In arguing for copyright and patent protections, which were eventually placed in Article 1, Section 8, as a power given Congress,[8] Madison, too, used language describing these as monopolies—exclusive rights granted to individuals for limited time.[9] Take, for

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3. STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *John Locke*, http://plato.stanford.edu/entries/locke/ (last modified Sept. 26, 2001).
4. WIKIPEDIA, *Charles de Secondat, Baron de Montesquieu*, http://en.wikipedia.org/wiki/Charles_de_Secondat,_Baron_de_Montesquieu (last visited July 7, 2005).
5. Dana Blankenhorn, *Would Franklin Blog, Would Jefferson Fileshare*, Corante, http://www.corante.com/mooreslore/archives/2005/02/21/would_franklin_blog_would_jefferson_fileshare.php (Feb. 21, 2005).
6. Zeio, *Thomas Jefferson, The DMCA, Copyright, Fair Use, et al.*, Kuro5hin, http://www.kuro5hin.org/story/2001/7/23/23214/3438 (July 24, 2001).
7. *Id.*
8. U.S. CONST. art. I, *available at* http://caselaw.lp.findlaw.com/data/constitution/article01/ (last visited July 7, 2005) *or at* http://www.law.cornell.edu/constitution/constitution.articlei.html (last visited July 7, 2005).
9. *Id*

example, Madison's commentary in *Federalist Paper #43*:[10]

> The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.[11]

III. PIRACY AS POLICY

¶ 8 For most of its history, the United States ignored patent and copyright claims.

¶ 9 One of the first "tourist traps" I ever saw was Slater's Mill[12] in Pawtucket, Rhode Island, a mile south of my mother's birthplace in Central Falls. It is a living monument to what today's "intellectual property" lawyers would call theft and piracy. British mills were intent on protecting patents in ways we can't imagine today, which included prohibiting those who worked in mills from leaving the country. Samuel Slater originally worked in a British mill, and moved to America in violation of British law. Once in America, Slater built his own mill. Slater was one of the first great heroes of American industry.

¶ 10 America didn't just ignore foreign patent rights. It also refused to honor foreign copyrights throughout most of the nineteenth century. Charles Dickens was among the victims. When he visited the United States in 1842, he complained bitterly of America's failure to recognize international copyrights.[13] He called Americans "pirates," and was roundly attacked for it.

¶ 11 Dickens later responded with the book *Martin Chuzzlewit*,[14] in which an Englishman journeys to America in search of fortune and finds the whole place to be a giant fraud. When Dickens returned to America in 1867, he grandly returned the copyright on *Chuzzlewit* to the United States. The joke, which Americans didn't get then, and generally don't get now, was that in order for the grant to be worthwhile, it had to be enforced. (The joke was later retold by Canadian humorist David Nicol.[15])

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10. Tom W. Bell, *Escape From Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 770 (2001), *available at* http://www.tomwbell.com/writings/(C)Esc.html#HIII.B.2.b.

11. THE FEDERALIST NO. 43 (James Madison), *available at* http://www.vote-smart.org/reference/fedlist/fed43.htm.

12. *Slater Mill: A Living History Museum*, http://www.slatermill.org/ (last visited July 7, 2005).

13. Phillip V. Allingham, *Dickens's 1842 Reading Tour: Launching the Copyright Question in Tempestuous Seas*, The Victorian Web, http://www.victorianweb.org/authors/dickens/pva/pva75.html (last modified Jan. 5, 2001).

14. *Some Discussions of Dickens's* Martin Chuzzlewit, http://www.victorianweb.org/authors/dickens/mcov.html (last modified Mar. 26, 2004).

15. Phillip V. Allingham, *A Canadian Satirist Looks at Nineteenth-Century British and American Copyright Law*, The Victorian Web, http://www.victorianweb.org/authors/dickens/pva/pva78.html (last modified Jan. 5, 2001).

IV. AMERICA AS AN INTELLECTUAL POWER

¶ 12 What changed? Why did America suddenly see the light on copyright and patent?

¶ 13 It's because, beginning in the late nineteenth century, America came to have a positive balance of intellectual payments. We began exporting more things subject to copyright and patent than we imported. It was in America's interests to ignore the interests of Charles Dickens, because he was British; it was not in America's interests to ignore the interests of Mark Twain. Not only was he one of America's foremost artistic exports, but he was also a capitalist and an investor. He sank much of his money into the "Paige Compositor"[16] (similar to what we would now call a Linotype machine), then returned to the lecture circuit largely to pay back the debts he incurred thereby.

¶ 14 But don't take this journalist's word for it. David Post of Temple Law School and the Cyberspace Law Institute described it this way in his seminal 1998 paper on the subject:

> American authors took the lead in opposing the publishing interests and supporting efforts to remove the protectionist provisions from American copyright law. And differences of opinion developed within the publishing community itself, as those publishers who began to specialize in the works of American, rather than foreign, authors joined in those efforts to amend the copyright statute and to provide for recognition of foreign copyright.[17]

In any case, U.S. adherence to international copyright did not begin until 1887, with the Berne Convention.[18] Something else happened at about the same time that made for dramatic changes in both patent and copyright enforcement.

V. CORPORATIONS AS INDIVIDUALS

¶ 15 The nineteenth century struggles over copyright were between individuals, as creators, seeking payment from companies who published the creators' work without payment. The twentieth and twenty-first century struggles offer the opposite: corporations enforcing copyright for themselves. This would not have been possible were corporations not considered individuals under the law. It's a favorite phrase of corporate lawyers: corporations are individuals under the law. Where did it come from? It's not in the Constitution. It's not even in the main part of a Supreme Court decision. It is, in fact, found in the notes to one case, *Santa Clara County v. Southern Pacific Railroad Co.*

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16. *Mark Twain's Investment in the Paige Compositor*, http://www.marktwainhouse.org/themuseum/archivist.shtml (last visited July 7, 2005).

17. David G. Post, Some Thoughts on the Political Economy of Intellectual Property: A Brief Look at the International Copyright Relations of the United States (Nat'l Bureau of Asian Research Conference on Intellectual Prop., Chongqing, China, Sept. 1998), *available at* http://www.temple.edu/lawschool/dpost/Chinapaper.html.

18. WIKIPEDIA, *Berne Convention for the Protection of Literary and Artistic Works*, http://en.wikipedia.org/wiki/Berne_Convention_for_the_Protection_of_Literary_and_Artistic_Works (last visited July 7, 2005).

(1886), written by clerk J.C. Bancroft Davis. Check it out yourself—the word "individuals" does not appear once in the text of the decision, delivered from the bench by Justice Harlan.[19] This is the same Davis, by the way, who later wrote the memo on *Plessy v. Ferguson*[20] allowing racial segregation.[21] I submit that Davis' *Santa Clara County* note has done equal, if not more, damage.

¶ 16 Corporations are peculiar individuals. They are immortal, in theory, in that their interests are always reassigned, and never revert to the state as would your assets if you died intestate, without heirs. Even in a Chapter 7 bankruptcy, the closest we come to corporate death, these assets are scooped up.

¶ 17 Another important difference is that corporations can't be jailed. They can only be fined. So when crimes are committed in the corporate name, the individuals involved blame each other, or the company, and ultimately the company claims to have fired the responsible individuals and pays a fine.

VI. CORPORATIONS AS INTELLECTUAL PROPERTY HOLDERS

¶ 18 It was the business history of the twentieth century that led to the final change: the emergence of corporations as the major holders of patents and copyrights. As science became more complex, with engineers requiring teams and resources to keep creating new things, the corporations who bought their labs and gave them jobs created a *quid pro quo*, namely that the rights to any work these people did would be assigned to the corporation. Universities now routinely claim this right.

¶ 19 But it was the movie industry that created a need for the corporate copyright—before the emergence of the movie industry, creation costs were low enough to make copyright an individual possession. In particular, it was the work of one company, the Walt Disney Company, which allows us to draw a straight line between the immortality of corporations and today's immortality of copyright.[22] In 1927, cartoonist Walt Disney produced the film "Steamboat Willy" and assigned its copyright to his company, in his name. The law at the time gave the Walt Disney Company a twenty-eight year copyright on the work and its star, Mickey Mouse, with the possibility of a twenty-eight year extension. Hence, Mickey Mouse was due to enter the public domain in 1983. Walt Disney himself died in 1965. Eleven years later, the 1976 Copyright Act was passed. While the Act did codify fair use rights, it also extended the copyright term, to life plus fifty years. This effectively gave the Disney company control of Mickey until the year

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19. Santa Clara County v. S. Pac. R. Co., 118 U.S. 394 (1886), *available at* http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=118&invol=394.

20. Plessy v. Ferguson, 163 U.S. 537 (1896), *available at* http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=163&page=537.

21. *Historical Documents: Marking some milestones in the corporate theft of human rights*, http://www.thomhartmann.com/uphistory.shtml (last visited July 7, 2005).

22. A timeline can be found on the Web site of the Association of Research Libraries. Ass'n of Research Libraries, *TIMELINE: A History of Copyright in the United States*, http://www.arl.org/info/frn/copy/timeline.html (last modified Nov. 22, 2002).

2015.

¶ 20 But time passes, and as the Internet developed into a significant market force, 2015 itself loomed ever closer. Thus, in 1998, Disney was a major backer of the Sonny Bono Copyright Act, which extended copyright protections to life plus seventy years. Disney now holds all rights to the 1927 cartoon until 2035. Is there any doubt that as this date approaches, moves won't be made to extend that protection even further?

VII. CORPORATE-OWNED COPYRIGHT

¶ 21 The corporate copyright protection that was first applied of necessity to movies also came to be applied, over time, to music. Record companies now routinely have copyright assigned them on all musical works before they will sign any artist to a contract. Thus, the idea of musical copyright as an "artist's right" or "artist's incentive" is, frankly, a lie. The history of music in the twentieth century is replete with stories of corporations stealing the work of artists, and of artists ending up destitute while corporations continue to profit from their work.

¶ 22 One of the best codas to this I have found was written at the University of Virginia by Professor Scott Deveaux, in his book "Birth of Bebop."[23] Deveaux notes that the bebop form of music was a way for black musicians to assert their ownership over something, by taking jazz in a direction that white publishers couldn't go. Only by making the performance the thing could individuals assert copyright.

¶ 23 And music companies didn't just exploit blacks, although they have done this shamelessly for a century. They have also routinely treated white musicians the same way, with one-sided contracts that push all costs onto the musicians and essentially bind them to the publishing company, which controls the copyright.[24] The group Crosby Stills Nash & Young, for instance, didn't fulfill the terms of its original Atlantic Records contract until 1988.[25]

VIII. LICENSE INSTEAD OF SALE

¶ 24 The future of copyright is based on the legal requirements of another industry, one that my wife and I both happen to work in: the software industry. Music, books, and movies all work when you get them. In fact there is an implied warranty that they will work. If the book is misprinted, you can return it. If you buy a scratched CD or DVD, the

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23. For a review of Deveaux's book, see John Andrews, *What bebop meant to jazz history*, World Socialist Web Site, http://www.wsws.org/arts/1998/may1998/bop-m22.shtml (May 22, 1998) (reviewing SCOTT DEVEAUX, THE BIRTH OF BEBOP: A SOCIAL AND MUSICAL HISTORY (1997)).

24. Alex Burns, *almost famous inc: musicians on industry* standard practices, Disinformation, http://www.disinfo.com/archive/pages/dossier/id1995/pg1/ (Jan. 28, 2002). Steve Albini, producer of Nirvana and other groups, describes how bands are still being taken advantage of. Steve Albini, *The Problem With Music*, Negativland, http://www.negativland.com/albini.html (last visited July 7, 2005).

25. *So Far: A Crosby, Stills & Nash Web Site*, http://crosbystillsnash.tripod.com/page8.html (last visited July 7, 2005).

same rule applies.

¶ 25 But the same is not true for software. It would be ruinous for this rule to apply in the case of software. Software is notoriously buggy. So from the creation of the very first mainframe software programs, the corporations who sold them wrote complex license agreements, promising only to make their best efforts at making the programs work, not promising satisfaction or even that they would actually work.

¶ 26 This sort of thing happens every day in what used to be called the mainframe world. A company buys software, plus services aimed at making the software work for them. It is a very complex process that often breaks down because the vendor cannot deliver on its promises. But the customer can't get its money back either. Instead, a negotiation usually ensues in which the customer may buy a copy of the program's original "source code" and go forward from there on its own.

¶ 27 In the PC world, this is codified in what is called an End User License Agreement, or EULA.[26] Users are required to agree to a EULA's terms before they can even see if what they bought works. The EULA typically doesn't warrant a thing—the stuff doesn't even have to work. And the software isn't sold. Instead it's "licensed," usually to one machine, sometimes only for a limited time. Even free software usually has a EULA attached.

¶ 28 The most "liberal" EULA, known as the General Public License,[27] lets users see the software's source code, give away the source code, and even enhance the source code. The catch is that any such enhancements must be given away on the same basis as the original program.

¶ 29 With the advent of Digital Rights Management,[28] provided for under the 1998 Digital Millenium Copyright Act,[29] this form of licensing agreement has been extended to other types of works as well. You no longer "buy" CDs, for example. You are instead "licensed" to use them. You can't trade songs, legally, even with friends, as you could have passed books around twenty years ago.

¶ 30 One result has been the emergence of a new market argument about "buying" or "renting" songs[30]—an argument in which Yahoo has now weighed in on the rental side.[31]

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26. Webopedia, *EULA*, http://www.webopedia.com/TERM/E/EULA.html (last modified Oct. 20, 2003).

27. GNU Project, *GNU General Public License* (2d version 1991), http://www.gnu.org/copyleft/gpl.html (last modified June 7, 2005).

28. WIKIPEDIA, *Digital rights management*, http://en.wikipedia.org/wiki/Digital_rights_management (last visited July 7, 2005). For an example of a corporation's explanation and application of DRM to its own products, see Microsoft Corp., *Microsoft Windows Media—Digital Rights Management (DRM)*, http://www.microsoft.com/windows/windowsmedia/drm/default.aspx (last visited July 7, 2005).

29. The UCLA Online Institute for Cyberspace Law and Policy, *The Digital Millennium Copyright Act*, http://www.gseis.ucla.edu/iclp/dmca1.htm (last modified Feb. 8, 2001).

30. Dana Blankenhorn, *The Buy-Rent Scam*, Corante, http://www.corante.com/mooreslore/archives/032966.html (Feb. 7, 2005).

In the new market, you don't really buy anything; you buy access to a service, and your entire music collection immediately breaks when you stop paying for it.

IX. PATENTING EVERYTHING

¶ 31 In recent years corporations have caused something very similar to happen in the world of patents.

¶ 32 When individuals were patent holders, it was accepted that you could patent a mousetrap, but that others could then read your patent and get their own protection for an improved mousetrap. Not anymore.

¶ 33 Thanks to the 1998 *State Street* case,[32] which wasn't a Supreme Court finding, but rather ended in the U.S. Court of Appeals for the Federal Circuit, the way in which one does business can now be subject to patent. For example, Amazon didn't just patent a particular method for allowing one-click ordering; it patented the whole idea of one-click ordering.[33] It's a true rabbit-hole, because there are only a limited number of ways in which to organize a business. Once all of these are patented, it will be illegal to start a new business without paying someone else to be in business.

¶ 34 The same silliness is true in software. Software is just a collection of mathematical expressions, or algorithms. You can't patent 1+1=2, but if you put it in software you can, based on the same *State Street* holding.[34] *State Street* extended rules from a 1981 Supreme Court case, *Diamond v. Diehr*, which held that an algorithm could be protected when, "considered as a whole, [it] is performing a function which the patent laws were designed to protect."[35] These policies were never debated by the people. Unlike with copyright, there is no statute to point to that could explain these patent absurdities. These questions were never debated by the Congress or by the people. They need to be.

X. CONCLUSION

¶ 35 All men are equal, Orwell wrote in *Animal Farm*, but some are more equal than others. In America's case, those somebodies are corporations. They are persons under the law, but they are in theory immortal, and they can't be jailed, only fined.

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31. John Paczkowski, *Yahoo Music Rentals—utilities included, and we'll move you in!*, Silicon Valley.com's Good Morning Silicon Valley, http://blogs.siliconvalley.com/gmsv/2005/05/napster_and_rea.html (May 11, 2005); *see also* Yahoo Music Unltd., http://music.yahoo.com/unlimited/ (last visited July 7, 2005).

32. State St. Bank & Trust Co. v. Signature Fin. Group, Inc., 149 F.3d. 1368 (1998), *available at* http://www.gigalaw.com/library/statestreetbank-1998-07-23-p1.html.

33. O'Reilly News, *The Amazon Patent Controversy*, http://www.oreilly.com/news/patent_archive.html (Feb. 28, 2000).

34. Michael Guntersdorfer, *Software Patent Law: United States and Europe Compared*, 2003 DUKE L. & TECH. REV. 0006 (2003), http://www.law.duke.edu/journals/dltr/articles/2003dltr0006.html.

35. Diamond v. Diehr, 450 U.S. 175, 192 (1981), *available at* http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=450&page=175.

¶ 36 When patents and copyrights were the property of individual people, they were routinely ignored. Once corporations became people, intellectual property rights became extended until they too were practically without limit.

¶ 37 The only way to end the tyranny of the immortal corporation is through the democratic process. That process can be perverted, but at least it is open to us. And I have a modest proposal for doing just that:

1. Overturn the *Southern Pacific* precedent, either in courts or in Congress. Corporations are not people; they are corporations. If you prick them, they do not bleed.[36]
2. Do not allow the permanent assignment of copyrights or patents to corporations. Allow assignments only for limited times, and limited purposes, as has long been the case with books.
3. End copyright hoarding (which is what most music and film piracy really is) by clarifying fair use. If there is no economic motive involved, trading works should be fine.

¶ 38 The holding in the *Grokster* case[37] may or may not muddy the issue further. The case is, at a basic level, about how the movie and music industries (not the artists, but the corporations who hold the copyrights) want to ban technology that allows copyright works to be exchanged. Grokster is a for-profit business which aims to allow just that, although the capability is inherent in the Internet. (I can attach a music file to an e-mail and send it to anyone. That is currently against the law.) At worst, the Supreme Court could overturn its ruling in the 1984 Betamax case,[38] which made VCRs legal. As in that case, the industry representatives in *Grokster* argued that the new technology would put them out of business. In fact, the VCR has been the savior of the movie business, along with its successor technology the DVD, creating vast new after-markets for movies and TV shows.

¶ 39 Whatever the holding of the *Grokster* Court, I doubt that the case will settle the matter. Questions of copyright and patent should be resolved in the market, between inventors or artists on the one side, and willing buyers on the other. Ultimately the issue will be settled only when the interests of corporations are restricted to enabling that exchange, rather than preventing it.

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36. Robert W. Peterson, Address to the North Bay Alumni: Content, Context and Evidence Code §356: "First Thing We Do, Let's Kill All The Lawyers" (1998), http://www.scu.edu/law/FacWebPage/Peterson/Links/shakespeare/shakespeare.html (last visited Nov. 16, 2005).

37. Katie Dean, *File Sharing Has Supreme Moment*, WIRED NEWS, Mar. 29, 2005, http://www.wired.com/news/digiwood/0,1412,67060,00.html.

38. Universal City Studios, Inc. v. Sony Corp. of Am., 464 U.S. 417 (1984), *available at* http://laws.findlaw.com/us/464/417.html. For additional information about the *Universal City Studios* case (often referred to as the "Betamax case"), see Tino Balio, *Betamax Case*, Museum of Broadcast Communications, http://www.museum.tv/archives/etv/B/htmlB/betamaxcase/betamaxcase.htm (last visited July 7, 2005).