INTRODUCTION

JUSTIN HUGHES*

This year marks the thirtieth anniversary of the *Cardozo Arts and Entertainment Law Journal*, a law review that has been a trailblazer among specialized intellectual property law reviews and remains one of the country's most influential journals in IP and communications law. In honor of the occasion, the current editors of *AELJ*–you will pardon the familiarity, but at Cardozo the "C" is understood–have assembled this special issue. We celebrated the Journal's twentieth anniversary with a massive book, reprinting many of its most important articles from the first twenty volumes.[1] In contrast, this decennial celebration features new contributions from some of Journal's most cited authors in the past decade. Many of these pieces are reflections on and updates of the author's earlier contributions–a nice way to celebrate the Journal's past while looking toward the future.

AELJ DEVELOPED AS CARDOZO'S IP PROGRAM DEVELOPED

When the Journal's inaugural issue was published in the spring of 1982, it opened with the following "Statement of Purpose":

> During the past several decades the importance of the arts in American life has increased dramatically. Technological achievements have expanded communication capabilities and have created new legal relationships and issues. Many of the traditional legal concepts associated with arts and entertainment are being reexamined by legislators and courts. Few law school journals specialize in the area of entertainment and the arts and the Benjamin N. Cardozo School of Law seeks to fill this void.
>
> The *Cardozo Arts & Entertainment Law Journal* will be a lively, issue-oriented forum for the exploration of current problems in the growing field of arts and entertainment law. Legal scholars, jurists, practicing attorneys and students will provide original articles on the full range of

> legal issues affecting the arts and the entertainment industry, both in this country and abroad.

Of course, the handful of Cardozo students who launched *AELJ* did not know that they were also establishing one of the flagships for what would become one of Cardozo's academic hallmarks: its program in intellectual property. (It's hard not to mix metaphors, but you understand what I mean.) Beginning with the first *U.S. News and World Report* rankings, Cardozo found itself consistently ranked in the top cluster in this emerging–now emergent–field of law. And *AELJ* was–and remains–one of the reasons.[2]

Not surprisingly, the Journal quickly expanded its coverage beyond the strict confines of "art" and "entertainment." Reflecting the energy of Professor Monroe Price (the law school's dean from 1982 to 1991), *AELJ* published fascinating and important work on media law–including most recently a 2006 symposium on media policy in Iraq.[3] Articles and Notes on patent law became a regular staple, so much so that I once half-jokingly suggested we might jigger with the masthead for occasional issues labeled a "(Useful) Arts & Entertainment Journal." Just as "arts & entertainment" gave way to IP, IP itself came to mean information policy as much as intellectual property. Some folks might have suggested a complete rebranding of the Journal, but I think the original name is just fine. We all know what work is done by Scotland Yard and that New York's very highest state court is the Court of Appeals. Sometimes tradition should trump crystal clarity in marketing.

Speaking of courts, *AELJ* has certainly received its share of attention from the bench. Scholarship and commentary published in *AELJ* in the past decade has been cited by the U.S. Supreme Court, several circuits, and in district court cases from Maine to Los Angeles. The Southern District of New York ("SDNY") pays the most attention to the Journal but that's not just a home court advantage: the SDNY also handles a disproportionate percentage of the country's copyright and trademark cases.[4] Perhaps even more impressive for a journal that concentrates on *federal* law, in the past decade *AELJ* has been cited by the supreme courts of California, Kansas, Massachusetts, Tennessee, Texas, and Vermont–as well as Puerto Rico. And it's really no wonder: just one intellectual property treatise, NIMMER ON COPYRIGHT, cites to well over a dozen articles from *AELJ*'s pages.

INTELLECTUAL PROPERTY IS INCREASINGLY INTERNATIONAL

Arguably the most significant way intellectual property, media law, and information policy evolved since *AELJ*'s 1982 founding has been the *internationalization* of the legal environment. The first shift came in 1988 when the United States joined the Berne Convention, the dominant multilateral treaty for the protection of copyright.[5] But that development–momentous in itself–paled compared to the sea-change brought about by the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS").[6]

By the late 1980s, efforts to include intellectual property norms in the global trading system were well underway in the "Uruguay Round," a vast negotiation that ultimately converted the General Agreement on Tariffs and Trade ("GATT") into the "World Trade Organization" ("WTO"). As part of the WTO agreements, TRIPS embedded the core elements of the intellectual property system deep into the global trading system. Not only did TRIPS make compliance with the Berne Convention (for copyright) and the Paris Convention (for patents and trademarks) an obligatory part of trading commitments, but it updated many of those rules, brought norms for the protection of appellations to the true multilateral level, and–most importantly–established a new world of still largely untested obligations for the enforcement of intellectual property. TRIPS–and the new WTO system–suddenly made violations of international IP norms subject to dispute resolution and, ultimately, to trade sanctions. Grand questions of intellectual property that were once the provenance of academic musings became the subject matter of a growing body of what are, effectively, arbitral decisions.

The TRIPS Agreement established the WTO as a new forum for international intellectual property. But the ink on the TRIPS Agreement was hardly dry when discussions started at the World Intellectual Property Organization on a whole range of issues to update the Berne Convention, improve the trademark system, push forward harmonization of patent law, and explore possible protection of folklore and traditional knowledge. The results to date have been the WIPO Copyright Treaty (1996), the WIPO Performers and Phonograms Treaty (1996), the Patent Law Treaty (2000), the Singapore Treaty on the Law of Trademarks (2006) and–at a different level–a set of "Development Agenda" recommendations addressing norm-setting, technical assistance, and internal WIPO operations. At the same time, intellectual property became an important component of new bilateral and plurilateral free trade agreements being negotiated far away from Geneva by the United States and the European Union. All this has

meant that international intellectual property is a shifting, multi-polar environment in which many legal norms have solidified, others are being developed, and still others–perhaps once seemingly settled–are hotly contested anew.

AELJ has responded to this globalization and contestation with a steady flow of articles, commentaries, and student notes. *AELJ* pages have chronicled WIPO's efforts at a "broadcast treaty," explored the tough problems in protecting traditional knowledge, and continued inquiry on the TRIPS Agreement. Another rich vein of *AELJ* efforts has focused on comparative analysis and commentary, particularly regarding China and European jurisdictions, but also exploring legal issues in India, Indonesia, Israel, and Thailand. In an effort to make foreign case law more accessible to Americans, *AELJ* has also offered up careful translations of important cases from Belgium, Switzerland, and France. As for *AELJ*'s footprint abroad, in recent years the Journal has been cited by the Supreme Court of Canada and the High Court of Australia. In 2008, an Irish website "IT Law in Ireland" found itself referring to *AELJ*'s translation to explain the importance of a decision coming out of one of Ireland's *fellow EU jurisdictions.*[7]

IP ALSO CAME TO MEAN 'INTERNET PROTOCOL'

For some, it will be heretical to say that the internationalization of law has been the most important development in intellectual property since *AELJ*'s founding. Today, for many "IP" means "Internet protocol" and there is no question that the Internet has profoundly challenged not just copyright and trademark laws, but also our notions of privacy, media, cultural policy, and participatory democracy. In 2002, Professor Marci Hamilton wrote (in her introduction to the *AELJ*'s 20th anniversary book) that "we have landed in the midst of a pitched political, legal, and ideological struggle that arises out of the technological changes of this era."[8] I could have plagiarized her words to describe our situation in 2012–no need to "remix."

The earliest days of the Internet triggered a wave of bizarrely utopian commentary from legal academics. In the words of Danny Weitzner, "there was a brief period of time where there was some sense that the Internet was going to be this kind of law-free zone, or it was going to make its own rules, or nothing bad was going to happen."[9] Those who initially advocated a "law-free zone" quickly fell back to an Internet-has-its-own-rules position, which itself gave way to a project of "translation," that is, applying and adapting

well-known legal principles to the online environment. Often this is done by legislatures, often it is done by regulators, and often it is done by courts. My own sense is that when judges have been faced with new fact patterns involving the Internet and established legal interests (whether copyright, defamation, or privacy), they have been practical, craftsman-like, and even-handed in evolving legal principles that work, as seamlessly as possible, between cyberspace and "meatspace."

When legislatures have done the "translating," ideological passions have often flared, but accommodations have usually been reached and the extreme claims of all sides have frequently proved false. One sees this general pattern in the US Digital Millennium Copyright Act of 1998 (DMCA), the European Union's E-Commerce and Information Society Directives (2000 and 2001), and the recent laws in South Korea and France implementing "graduated response" against users of peer-to-peer systems. When the DMCA passed in 1998, Internet gurus told us it would be the end of the Internet[10]–it wasn't. The law is now praised as a balanced system. When the French established the HADOPI graduated response system in 2010, the digerati were sure it was ill-fated and backward-looking.[11] So far, the Internet seems to be flourishing in France and empirical researchers who were previously skeptical of enforcement efforts conclude that the moderate enforcement regime is making more people *buy* their music entertainment.[12] As head of the motion picture trade association, the late Jack Valenti famously claimed that the home video recorder would kill the film industry[13]–it didn't. But then the digerati believed that the Supreme Court's *Grokster* clamp-down on peer-to-peer would trigger a "technological winter"[14]–a season of frozen innovation that also didn't happen.

In the context of all this *sturm und drang*, the editors of *AELJ* in recent years have been curating a collection of thought-provoking articles on issues raised by the Internet–policy and law debates related to new top level domains (gTLDs), intellectual property in virtual worlds, how performance and distribution rights function online, user generated content, and lawsuits against downloaders. If recent events are any indication, future policy debates about the Internet and information law will only become more complex. And there will be even more to be explained, analyzed, and critiqued in *AELJ*'s pages.

A JOURNAL'S SUCCESS IS ALSO IN HOW IT TRAINS STUDENTS

Cardozo's faculty in intellectual property and information law

are a vibrant community of scholars,[15] but a law review's success truly comes from its students. Indeed, one of the remarkable things about legal academe is that the scholarly publication system depends on smart, young people who are only just learning the law–and not the system of peer-review gate keeping used in the arts and sciences.

There are familiar complaints about the inconsistent quality of law journal publishing and calls that law schools should adopt peer-review and abandon student editing. It has always been hard to know what to make of such complaints–and even harder in the Internet environment. First, most law professors already get comments from colleagues on drafts; if blind peer review would produce significantly better comments (and redrafting), that might imply law professors aren't currently being pillars of honesty to each other. Second, it is not clear that *quality* is the problem at all. The problem for law reviews today is not so much quality as *relevance*, both for courts[16] and for policymakers. Finally, because of the vast number of law reviews and the ubiquitous availability of their pages–on Lexis, Westlaw, SSRN, and journal websites (like www.cardozoaelj.com)–at the systemic level peer review only serves for "signaling," not "gate keeping." In an age of crowd-sourcing, surely there are more efficient ways to identify the brightest and the best amongst the deluge of legal commentary. As one treatise writer said to me, "I don't care where something is published; I only care if it's good."

And that is the lesson or part of the lesson that I hope *AELJ* editors–and all student law review editors–will take to heart. Law journals give students a chance to write, rewrite, edit, and research–all key to good lawyering. Law journal work also gives students a chance to dissect, critique, and push back against the arguments that authors make–and that will part of a good law career too, whether you're an associate in a law firm, a judge's clerk, or on Congressional staff debating the finer points of a bill.

As I write this Introduction, the United States has just gone through a surprisingly ugly struggle–or the first chapter of a struggle–over two such bills: online IP enforcement measures proposed in the House and Senate in 2011. Dubbed "SOPA" and "PIPA" respectively,[17] each bill proposed a suite of different ways to reduce traffic to foreign commercial websites dedicated to infringement: blocking domain name requests, blocking financial transactions, blocking advertising on the websites, and blocking search engine results. On top of this complexity, each bill went through several versions, including changes in key definitions. The changes reflected one thing that's great about our system–

legislators and staff listening to constituents–but made detailed discussion of the bills even more difficult.

What is good about the SOPA/PIPA debate is that significantly more citizens got involved and the legislative process responded to that activism by postponing votes on the bills. But the good part came at quite a cost. The public discourse on SOPA/PIPA quickly became as uninformed, vitriolic, and warped as our public debates about national healthcare.[18] Corporate behavior on both sides contributed to the mess–that's no surprise. But so did legal academics. Academics conflated issues in the bill with an enthusiasm you'd expect from Rush Limbaugh or Rachel Maddow. Law professors who in an earlier time would have told you that the Internet interprets control as damage and routes around it[19] were ready–in the interest of rhetorical flourish–to oppose the bills with a "don't break the Internet" mantra.

The SOPA/PIPA debacle reminds all of us how "traditional legal concepts . . . are being reexamined by legislators and courts" (to quote *AELJ*'s 1982 credo) and, concomitantly, how the need for quiet, thoughtful discourse never ends. I hope it will also remind the editors at *AELJ* and student-edited law journals everywhere that they should bravely scrutinize what we law professors say; call everyone to task for claims that may be extreme and inaccurate; and push back everywhere against poorly reasoned arguments. In the absence of peer review and in the face of law professors who never really give up their role as *advocates*, the ivory tower needs energetic, critically-minded students to defend its ramparts.

Thirty years ago, a handful of Cardozo students bravely promised us a "lively, issue-oriented forum for the exploration of current problems." It's a promise that the editors of each *AELJ* volume have honored and continue to honor. And you and I, dear reader, are the beneficiaries.

---

* Professor of Law, Cardozo School of Law. Professor Hughes served as faculty advisor for the *Cardozo Arts & Entertainment Law Journal*, 2002-2009. His first contribution to *AELJ*'s pages was *The Personality Interest of Artists and Inventors in Intellectual Property,* 16 CARDOZO ARTS & ENT. L. J. 81 (1998); before this introduction, his most recent contribution was *Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)* [introductory essay], 27 CARDOZO ARTS & ENT. L. J. 555 (2010).

1 THE MARKETPLACE OF IDEAS: TWENTY YEARS OF *CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL* (Peter K. Yu. ed., 2002).

2 As of the time of the writing of this introduction, *AELJ* was ranked #1 in "combined

score" among "Arts, Entertainment and Sports" journals and in the top five among "Intellectual Property" journals in the Washington and Lee University School of Law databases. WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, LAW JOURNALS: SUBMISSIONS AND RANKINGS http://lawlib.wlu.edu/LJ/index.aspx (last visited Mar. 2, 2012).

[3] *Iraq and the Making of State Media Policy*, 24 CARDOZO ARTS & ENT. L. J. 5 (2007).

[4] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions,* 1978-2005, 156 U. PA. L. REV. 549, 567 (2008); Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement,* 94 CAL. L. REV. 1581, 1594-95 (2006).

[5] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries), 828 U.N.T.S. 221, S. Treaty Doc. No. 99-27.

[6] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299.

[7] TJ McIntyre, *Sabam v. Tiscali (Scarlet) – English Translation Now Available*, IT LAW IN IRELAND (Feb. 13, 2008), http://www.tjmcintyre.com/2008/02/sabam-v-tiscali-scarlet-english.html ("The recent Belgian decision in SABAM v. Tiscali (Scarlet) appears to be the first time in Europe a court has considered whether ISPs can be required to monitor or filter the activities of their users in order to stop filesharing on peer to peer networks. The *Cardozo Arts & Entertainment Law Journal* has now provided an English translation of the decision. The decision deserves to be read in full. . . .").

[8] Marci A. Hamilton, *The Distant Drumbeat: Why the Law Still Matters in the Information Era*, *in* THE MARKETPLACE OF IDEAS: TWENTY YEARS OF CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL xiv, xiv (Peter K. Yu ed., 2002).

[9] Interview with Danny Weitzner, Deputy Chief Technology Officer for Internet Policy, White House Office of Science and Technology Policy, at Web 2.0 Summit 2011 (Oct. 21, 2011), *available at* http://www.youtube.com/watch?v=RqKT9go_55I [Weitzner interview].

[10] *Id.* ("The DMCA was greeted in the online civil liberties community in the late nineties when it first came out as a horrible thing that was going to end the internet as we know it. What we actually learned is that it's a pretty balanced system.").

[11] Nate Anderson, French Anti-P2P Law Toughest in the World, ARS TECHNICA, http://arstechnica.com/tech-policy/news/2009/03/french-anti-p2p-law-toughest-in-the-world.ars (last visited, Mar. 2, 2012).

[12] Released on January 21, 2012, the results of a new study "suggest that increased consumer awareness of HADOPI caused iTunes song and album sales to increase by 22.5% and 25% respectively relative to changes in the control group." Brett Danaher, Michael D. Smith, Rahul Telang, and Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240.

[13] *Home Recordings Act of 1982: Hearing on H.R. 4788*, *H.R. 4794*, *H.R. 4808*, *H.R. 5250*, *H.R. 5488*, *and H.R. 5705 Before the Subcomm. on Courts*, *Civil Liberties*, *& the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 14 (1982) (statement of Jack Valenti, President, Motion Picture Assoc. of America, Inc.) ("I say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone.").

[14] Following the *MGM v Grokster* litigation there was a fair amount of hyperbolic rhetoric such as that the decision would cause "ten years of chilled innovation," *see* Interview by Robert Hof with Lawrence Lessig, Professor, Harvard Law School (June 29, 2005), *available at* http://www.businessweek.com/technology/content/jun2005/tc20050629_2928_tc057.htm. *See also* John Paczkowski, *Rehnquist, Scalia! Quick, into the FreezeMobile*, Good Morning Silicon Valley (June 29, 2005, 6:26 AM), http://blogs.siliconvalley.com/gmsv/2005/06/29/rehnquist_scali ("Monday's Supreme Court decision in MGM v. Grokster may well be the beginning of technology's next long winter.").

[15] *See, e.g.* BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES (2012); MARCI HAMILTON, JUSTICE DENIED: WHAT AMERICA MUST DO TO PROTECT ITS CHILDREN (2008); Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747 (2011); Susan Crawford, *The Communications Crisis in America*, 5 HARV. L. &

POL'Y REV. 245 (2011); Justin Hughes, *The Photographer's Copyright*, 25 HARV. J. ON L. & TECH. (forthcoming 2012); Stewart Sterk, *Strict Liability and Negligence in Property Theory*, 160 U. PA. L. REV (forthcoming 2012); Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293 (2011).

16 Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8, *available at* http://www.nytimes.com/2007/03/19/us/19bar.html (describing 2007 conference at Cardozo in which Second Circuit judges discussed lack of relevance in most law review scholarship).

17 Stop Online Piracy Act, H.R. 3261, 112th Cong. (2012); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2012).

18 A good commentary on this came from Jaron Lanier, *The False Ideals of the Web*, N.Y. TIMES, Jan. 19, 2012, at A23, *available at* http://www.nytimes.com/2012/01/19/opinion/sopa-boycotts-and-the-false-ideals-of-the-web.html?_r=1.

19 The cyber-famous quotation "The Internet interprets censorship as damage and routes around it" is commonly attributed to John Gilmore. *See* Philip Elmer-Dewitt, *First Nation in Cyberspace*, TIME, Dec. 6, 1993, at 62, 64. The phrase was picked up and frequently repeated by news media and early "cyberprofs." *See, e,g.* Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, *in* BORDERS IN CYBERSPACE 129, 143 (Brian Kahin & Charles Nesson eds., 1997); JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 6 (2006); James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty and Hard-wired Censors*, 66 U. CIN. L. REV. 177, 178 (1997) (noting there are many versions of the quote, but this is broadly consistent with the original).