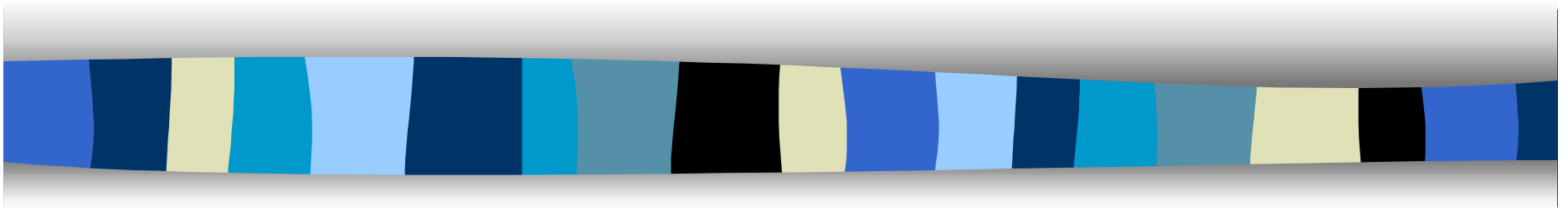


The Carrot v. The Stick: Does Copyright Enhance Access to Content?



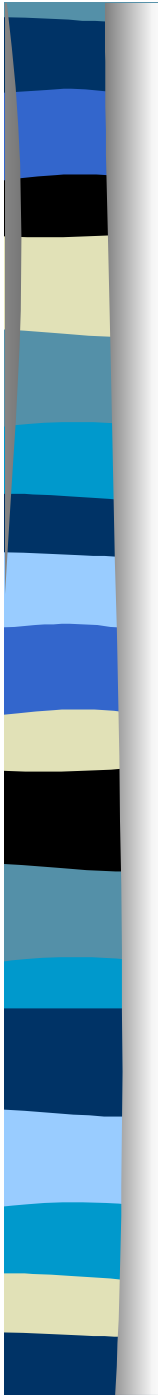
Rina Elster Pantalony

Intellectual Property Manager

AltaCultura Inc., a division of MoMA

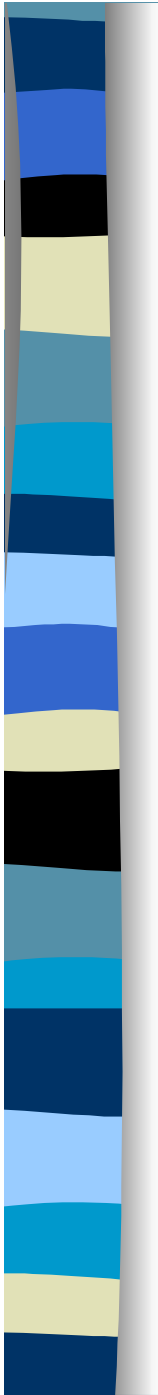
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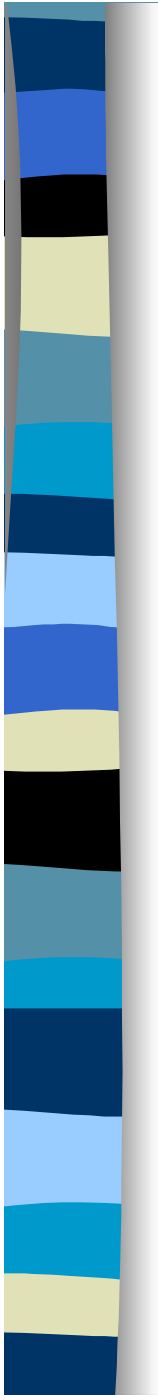
The Landscape

- Globalization of content
- Integrated media
- Immediate reproduction and distribution



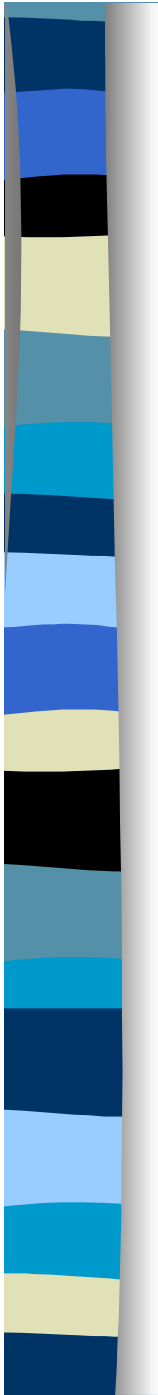
The Legal Landscape

- Napster
- Fair use
- First Amendment rights to free speech
- Privacy
- Digital Millennium Copyright Act (DMCA)



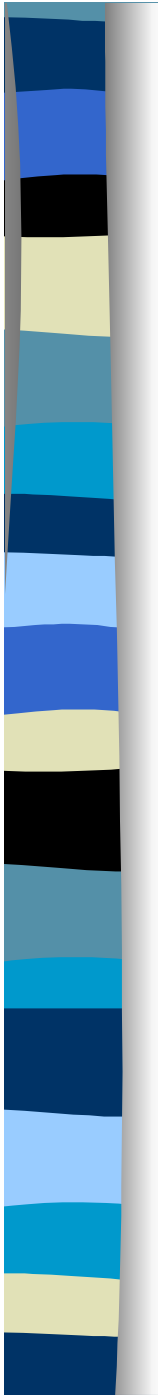
Philosophies behind Copyright

- British copyright— guaranteeing limited economic rights to publishers
- European/Civil copyright – roots in the French Revolution giving authors fundamental rights of expression
- American copyright – constitutional guarantee of the free-flow of information and the Social Contract
- Canadian copyright – balancing Civil and British philosophies



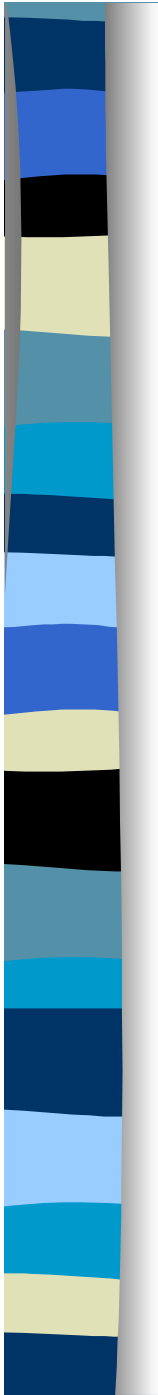
The Social Contract Theory

- Does not balance interests
- Entrenches authors **rights** as economic
- Users are given limited **privileges**
 - guarantee First Amendment rights
 - to stimulate further artistic creativity



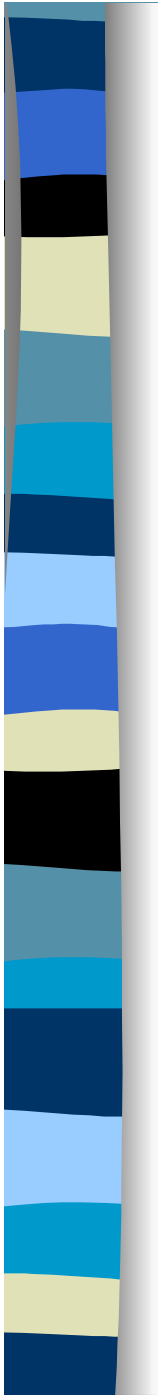
The Social Contract Theory

- “...the American argument for copyright stems from the conviction that encouraging individual creativity by personal gain is the best way to advance the public welfare.”
 - Michael Shapiro, “Not Control, Progress”
<http://www.aam-us.org/des.htm>



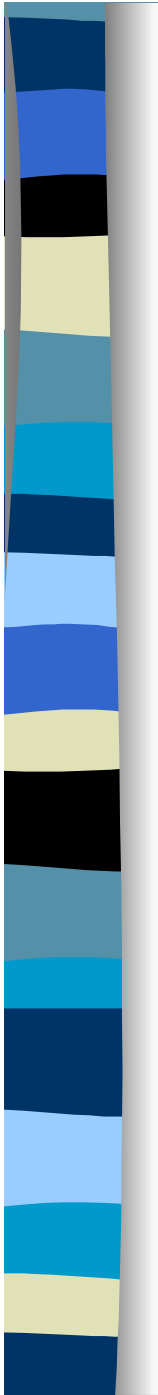
What About Access?

- General View: recent case law has curtailed access to works
- Reality: Decisions have both curtailed and increased access
 - Kelly v Arriba Software
 - Tasini/National Geographic
 - Gone with the Wind/Mitchell
 - DMCA cases



What Happens to Access When Copyright Denied

- Holders of content resort to contract law to control access to works
- Contracts are based on parties' positioning and leverage
- Statutory carve-outs, safe harbors, educational exceptions are omitted
- Parties become increasingly polarized



The Environment in North America -Digital Irony

- Where IP protection has been denied, contract law is being substituted to control access to content on-line
- Where contract law is used in place of IP, access has become more restrictive
- Therefore, users of analogue content have greater access than users of digital content