The Propertization of Copyright
Michael A. Carrier

I. Copyright has become propertized

Copyright has been transformed from a regime providing limited rights for short periods of time into one resembling a fee simple that lasts forever and gives powerful rights.

A. Duration has expanded
B. Scope has expanded
C. Subject matter has expanded
D. Rhetoric of absolute property

II. Limits of property

Limits are at the core of property. Here are fifteen representative limits:

A. Limits on right to exclude: easements, imminent necessity, public trust doctrine, encroachments, antidiscrimination in public accommodations
B. Limits on right to transfer: adverse possession, restraints on alienation, eminent domain, racial covenants, antidiscrimination statutes
C. Limits on right to use: zoning, nuisance, takings, government regulations, lateral support

III. Applying property limits to copyright

It is appropriate to apply limits to copyright for several reasons:

A. The inaccuracy of the traditional story of copyright
B. The dangers of an expansive copyright
C. The presence of limits in property despite its more numerous and more justified rationales

IV. Limits on copyright

Here are some representative limits on copyright:

A. Existing limits: fair use, exclusions, compulsory licenses, first sale doctrine, copyright misuse, equitable estoppel
B. New limit 1: necessary fair use (increases diversity of viewpoints making up dialogue essential to democracy)
C. New limit 2: equitable fair use (activity that falls within widely followed societal practices).