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Presentation by Professor David Lange

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PROFESSOR LANGE: The last time I said that I was delighted to have been invited to participate in a conference, I spent the next half hour fielding vitriolic attacks on crypto-marxists in Cleveland, so I am not delighted to be here.

If there were eleven of us and we had an elephant, I have a hunch that we would come closer to sensing the shape of *Feist* than we are likely to do in the two days that we have together. This is, I think, a problem, an exercise in perspective, and I am going to give you a perspective that is very personal. It is one in which I invest some considerable belief, but it does depend on a series of intersecting perspectives that you need not share and probably no one here will entirely share. So I am confronted at once by the probability, certainly the prospect, that even if I am very clear, I cannot hope to succeed entirely in explaining what it is that I sense in the *Feist* case with respect to what I think is the increasing likelihood that we will be practicing and studying in the field of intellectual property under an overarching umbrella of (you will forgive me, I hope, for using this word) constitutionalization that we simply have not experienced before.

I want to immediately address the objection that anyone knowledgeable in the intellectual property field would offer to the suggestion that there is somehow to be a new developing overarching constitutional sense of constraints in the field of intellectual property law at large. The objection, I think, would come along two lines of resistance. First, that has not been the history in the field. The field is, in fact, a very old one, and we simply do not have any reason to suppose that that is going to be the trend. If we look at the cases so far, it is not that they do not suggest such a trend; indeed, more to the point, it is that they *did* suggest, each in its own time, that there might be some room to develop such an overarching constitutional set of restraints in the field of intellectual property, but in fact these cases did not develop such restraints themselves. So the first objection to the subject is that what we are embarking upon is unlikely. Historically, it is not indicated. Second, the other objection, which is more doctrinally grounded than the first, but still I think even more powerful, is that the subject does not take into account what constitutional developments the Court has given us in the field of intellectual property at large, which historically, and still apparently on the strength of what the Court has said even quite recently today, suggests that we may have an inner ring of constitutional doctrines and an outer ring, and that the two simply do not overlap in any important way. The intersecting lines are simply not

there. So that if you look, for example, at *Feist*, you could object, as Professor Raskind does, to Justice O'Connor's citation to *The Trademark Cases* (even if indeed you may take some great pleasure in her citation to *The Trademark Cases*). The fact is that *The Trademark Cases* themselves, when you read them, clearly contemplate those kinds of intellectual property doctrines which are governed traditionally, and even now, under the Article I, Section 8, Clause 8 constraints—the more or less immediate constitutional constraints that touch the field. There are those cases as to which the Court at that time, and probably still now, seemed willing to see consigned to a kind of outer ring of constitutionalism that only involves whatever modest restraints there may be under the Commerce Clause. In short, anyone who suggests that *Feist* was a case in which one can sense the Constitution more strongly than had been the case before, I think, has to necessarily expect some real resistance from others who know the field equally well and probably better. I should say before I proceed further what I had meant to say at once. I suppose in the interest of academic ethics I am obliged to disclose that I have a more immediate interest in the outcome of *Feist* than some of you may have had since I participated in both the briefing in *Feist* and also in the preparation of the petition for oral argument. In that sense *Feist*'s outcome is not merely intriguing to me, but indeed, an outcome which I earnestly wanted as a practicing lawyer, and I have no misgivings at all in disclosing that. Perhaps you should know this, because it does seem fair, to the extent that my perspectives are tinged by that experience, that you should have it in mind.

When I read *Feist*, I read an opinion by a jurist who is not at all casually but quite seriously devoted to the proposition that there are some constitutional constraints in the field, certainly in the field of copyright. However, I think when eventually challenged, she will see that they are constraints that extend far more widely into the field of intellectual property than we have been accustomed to recognizing.

I think that it is not wrong to sense in the *Feist* case the beginnings of a new era, not merely of protection for databases and facts and the like as many do, but more important, I think, a new era of constitutionalization. I want now to attempt impromptu to take up Jerry Reichman's point which I appreciate very much, and I want to incorporate into the tenor of my own remarks. In this new era, we will be obliged to deal with at once the increasing sweep, scope, and reach of the Constitution in the intellectual property field, while at the same time wrestling with the problem which will, for just that reason, become more insistent and more imperative for us. The problem is simply this—the question that Professor Reichman asks: Should the grandchil-

dren of Verdi go hungry or have to search for their bread? This is a question that I think does not necessarily have the answer that I assume Professor Reichman supposes, given the nature of his use of the question as a rhetorical device.

To tell you the truth, quite frankly, I do not care about the grandchildren of Verdi. I care somewhat about Verdi but not a lot. I am not invested in Verdi in the way that I think that Professor Reichman is, and certainly I am not invested in the grandchildren of Verdi. Because, you see, if I invest myself in the grandchildren of Verdi, I also have perforce to invest myself in the grandchildren of Groucho Marx or Johnny Carson, and I have no disposition to be interested in any of them. My view is that they can take care of themselves. Similarly, I expect my grandchildren to take care of themselves, at least insofar as the general draw that they might otherwise be inclined to make on the disposition of the elemental substance of our abilities to engage in discourse with each other.

In short, I would answer Professor Reichman by saying that it is precisely because of the elevated standard for originality in the most active Berne Convention countries that the increasing use of the constitutional standard in this country will cause us problems. Because what we have here, that they do not, is this additional source of constitutional constraint that has never really been adequately conflated with the thinner and far more tentative development of constitutional doctrines in the intellectual property field. Of course, what I have in mind is our very particular doctrinal concern for First Amendment freedom of expression for which there is actually no clear affirmative positive law doctrinal counterpart in any of the Berne Convention countries. I do not mean, of course, to suggest that the Berne Convention countries do not devote themselves to freedom of expression because indeed they do. I do mean to suggest, however, that they do not do so under the overarching umbrella of positive, doctrinal statements of the nature of that freedom which we have accustomed ourselves to conform with. So that for us, and not for them, as we begin to wrestle with higher standards of originality, if indeed that is the direction in which we are moving, we will also begin to have to take into account some of the reaction the First Amendment doctrines beget.

Now, it is here, in contemplating the First Amendment, that I begin to return to the resistance that I anticipate you may have to my first proposition, which is that we will, in fact, experience a greater degree of constitutional constraint in the intellectual property field than we have been accustomed to experiencing. Such constraints will be not just greater, but so much greater that the field will simply not look the same as we move forward into the new millennium. We will do this, I

think, for a number of reasons that will at first seem separate but in their entirety will have a common set of antecedents. The reasons are these: that we are just now attending to the business of aligning and realigning doctrines in a field in which the fundamental presuppositions about what we are dealing with are simply no longer there, and, when we speak of our copyright, we are speaking about a field of doctrinal law in which the expectation has been that the presupposition is still that we will be dealing with and disposing of the substance of an expression having its origins chiefly in the products of the press.

That is really how the copyright law has, in fact, come to us. It is a press-oriented law, and we are simply in a post-literate millennium or about to enter a post-literate millennium. So that what we are dealing with here in a metaphorical sense is how best to consolidate the gains of feudalism in an era in which feudalism is, in a sense, out the window. We will face the need, in short, to redefine the field rapidly, precisely because we are going to encounter a dizzying set of conflicting claims for recognition and denials of property-like interests that we have never encountered before. The question, for example, what do you do with someone who invents a language, would have seemed, in the main, chiefly droll and hypothetical 200 years ago, but today it is a perfectly active serious question for which we must have answers, and the answers must be answers that we can actually use.

I think that because of our capitulation to responding to social questions of that magnitude with an increasing development of constitutional law, as well as doctrinal law, it is most likely that we will begin to constitutionalize the field. I think that probably nothing seemed more natural to Justice O'Connor in drafting her opinion than that she should pick up *The Trademark Cases* and that she should, in fact, make her opinion in the *Feist* case an expression of constitutionalism. I think she was responding to pressures that she thought not merely exigent, but indeed more to the point, quite natural.

Now, the First Amendment, as you know, is a set of doctrinal propositions which are now so complex that entire seminars have to be taught about them in the upper classes in law schools around the country because you can no longer teach the First Amendment in the first year constitutional law course. And yet, as you know, had we met to discuss freedom of the press and freedom of expression exactly one hundred years ago, not a single precedent in the field would yet have existed. In fact, had we met one hundred years ago to discuss freedom of expression, we would have had to wait more than thirty years before we encountered the first pair of precedents in this field. Not until 1964, in fact, did the field actually begin to explode rapidly. So today we may take it for granted that when David Duke campaigns for the governor-

ship in the state of Louisiana, it is quite beyond thinking that we should simply pass a law that should send him back to wherever it was he came from. It is not in us to do that. We have foresworn that kind of response. And yet, how recently we have foresworn that type of response is telling, I think, if you ask about the role that the Constitution may yet play in the development of doctrines within the intellectual property field.

When I went into practice in 1964, I began to represent newspapers. It was what today would be called an entertainment practice but what was then called a media practice. We represented Ann Landers, Mike Royco, and many newspapers and magazines, and so it was then necessary for me to attend conferences like this one in which we appreciated the significance of *The New York Times v. Sullivan* case, which was new that year. I remember encountering practitioners from similar firms and from newspapers around the country who said: "Well, a portentous case to be sure, if you read it as it is written, but surely it cannot be taken seriously, and, then, after all, it really only has to do with public officials. It won't reach public figures, we can be sure of that, and certainly there is not going to be any reach under these new sets of doctrines for matters of general public interest and concerns. So I think we have to assume that here is a case in which perhaps the Court simply said, in exigent circumstances, more than it needed to say." Well, nothing could have been more wrong. In the seven years from 1964 to 1971, the law moved at blinding speed to encompass all of those doctrines and more, and now it has surely receded, but nothing will ever be as it was before 1964.

I do not know whether *Feist* presages that kind of rapid movement. Certainly *I* think it does not. I doubt it. But that it is a different kind of case in constitutional terms, I equally have no doubt. It cites *The Trademark Cases* as though the distinctions between trademarks and copyright, which appeared in *The Trademark Cases*, were distinctions which deserve to go on unchanged. I think, however, that we have to doubt whether in fact that would be so. I suspect that the distinctions between trademarks, insofar as they involve the elements of appropriation that are of concern to Professor Raskind, and which in the past have enjoyed a separate status constitutionally as against copyright, will become conflated with copyright in just those respects and increasingly so. How rapidly and in what kinds of cases, of course, I can no more predict than you. But that those cases are coming, and that they will be driven by a jurisprudence grounded in the exchanges in our time—exchanges themselves no longer grounded chiefly in the press but rather in fiber optics and micro chips—I also entertain no doubt about.

I sense in the *Feist* case the immediate presence of a Constitution which will begin to live in our lives and order the arrangement we may make of interests in this field that we call intellectual property, far more immediately, far more insistently, than has been the case before.

And, I must say because I think the time has come that if this is so, I welcome the advent of these cases and look forward to meeting with you happily at conferences like these in the future. Thank you.