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Open Discussion of Presentation by Professor David Lange

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OPEN DISCUSSION

THE CHAIRMAN: Thank you, David [Lange]. We now have ample time for discussion of David's comments or remarks or you can pick up other thoughts that you have from Leo's [Raskind's] talk.

PROFESSOR REICHMAN: You will be delighted to know that we agree on about eighty-five percent of what you said. Of course, we do not agree about Verdi's children.

PROFESSOR LANGE: Can we talk about that?

PROFESSOR REICHMAN: In my latest work on *Legal Hybrids Between the Patent and Copyright Paradigms I,* I make the point that copyright law embodies a special kind of economics, one that is more concerned about Verdi's grandchildren than with overall economic efficiency. I also make the point that a tacit condition of the world copyright system is that the general products market, regulated by patent law, must be insulated from the special or kooky economics of artistic property law—think of *Baker v. Selden* in this light. In a word, my whole starting point is that copyright law is a special case on the margins of the general products market, and the international intellectual property system specifically conceived that way. So, even though we might disagree about Verdi and his grandchildren, we could agree that the mature copyright paradigm should not govern borderline factual or functional works.

But there is another point on which we would even more strongly agree, and for this I call your attention to subtopic Two in my paper, "The Public Interest at Odds with the Two-Party Deal." It starts exactly from the very same point that you raised, namely, that the printing press made copyrights necessary, whereas the electronic applications that are now available make it possible for publishers to sidestep all of the public interest constraints and all the free speech constraints built into the legislated deal. And I think this does raise problems, and that is where we will have to address serious constitution concerns. So I applaud your raising these issues and your insight.

PROFESSOR RASKIND: May I pose a two-part question to you? First, in the preparation that you did with regard to the actual case, did you rely on *The Trademark Cases*?

PROFESSOR LANGE: Yes.

PROFESSOR RASKIND: Secondly, would you be—

PROFESSOR LANGE: I must add not only did I rely on them, I participated in the drafting of one of the amicus briefs. Not only did I rely on them, indeed, I fought for their inclusion in the brief. Yes, I did.

PROFESSOR RASKIND: The second part is in connection with an otherwise unprotectible so-called fact database. Would you be surprised to find the incorporation of some doctrine like secondary meaning into the copyright area?

PROFESSOR LANGE: If we simply agree to suspend present day doctrinal constraints so that we are trying to envision in common the world that will be, for the sake of an academic discussion, would I then imagine the development—

PROFESSOR RASKIND: Would you welcome it?

PROFESSOR LANGE: Would I welcome it? Actually, no, I would not, but I would be willing to give it a try. I practice regularly in the trademark field so, as much as anyone, I know how you can torture the secondary meaning doctrine into submission. This is being taped. I never do it on behalf of my clients, but I have seen it done by other scoundrels.

I would not so much welcome it as sense its inevitability, but I would hope that it would be more actively constrained than it is now when you actually get to the level of practice in the trademark field. Where I have seen some, it is what I call the sudden secondary meaning syndrome, in TRO litigation.

I have seen some pretty thin secondary meaning, and so, no, I think I would not welcome it, though I do not think it can be avoided. I have no doubt if we were to move in the direction that I think you have in mind hypothetically, that it would become a concomitant of the practice.

But I would also say to you that it would not necessarily lead to any of the remedies of the Lanham Act. It presupposes to be correct and fair. It may very well be that all that what you should have in cases of that kind is what Holmes himself envisioned in his opinion in the *INS* case, which was that we should be at pains to take steps affirmatively to avoid the kind of confusion that might arise. That, he thought, would be enough in that case, and I have always thought, not since that time you understand, but nunc pro tunc, as it were, that he was correct.

PROFESSOR RASKIND: So where does that lead to the secondary gain meaning because the relational interest he was describing was between the seller and the customer, I think, and in the cases that we have been talking about, we are talking about the relational interest between two competitors. How would secondary gain meaning work if you see it that way? How would be it adapted?

PROFESSOR LANGE: You will have to tell me again how it is that you read the *INS* case because I am beginning to sense that we are not reading the same case.

PROFESSOR RASKIND: Was not Holmes' opinion a dissent or was it a concurrence?

PROFESSOR LANGE: He did not join in the majority language. His opinion was in the nature of concurrence; it was also in the nature of a dissent.

PROFESSOR RASKIND: He was not willing to take the third step that the majority took; that is, that the cause of action said it cannot take the uncopyrighted material from bulletin boards. He was willing to, I think his phrase was they are not entitled to any more than a statement that says, "this is AP news."

PROFESSOR LANGE: That is the thrust of what he said.

PROFESSOR RASKIND: I took that to mean that he was describing the fact that secondary meaning and trademark protection only lies between the relational interest of a seller and a customer so that a customer could not be deceived. I thought that is what he meant. Do we differ about that?

PROFESSOR LANGE: I think in substance I agree with you. Your language is not language that I would necessarily use, but as you explained it again, and I apologize for being thick about this, I think we probably agree that is what he meant.

PROFESSOR RASKIND: So now in our hypothetical there are two databases, or two map makers, and a map maker who was a putative defendant comes along and the claim of protection focuses on the doctrine that is derived from secondary meaning. It would have to be crafted to take account of these relational interests of the two competitors so you are not confusing the competitor. You could argue that this is all about the consumer.

PROFESSOR LANGE: I know what you are saying. It would not be very hard to do that, because, in fact, in the actual practice of secondary meaning, we are always doing it in both directions at once, always. The language may be more conveniently sent in one direction than another in a given case but always, in fact, what we are doing is moving secondary meaning and its disclaimers in both directions.

But more to the point, let me remind you of the fact that, under contemporary trademark practice and unfair competition practice, the end game is not a disclaimer or a warning or an advice as to the truth of the origin. That really is not the end game. The end game is appropriation and injunction and the destruction of what are regarded—this is a telltale term—as infringing materials.

So that we make of the secondary meaning doctrine not merely matters of the straightening out of relationships in either direction but really the work of appropriation. So that, in fact, we use secondary meaning in order to create property interests.

I think that is precisely what I would expect eventually, and also as an incidental matter, but important to me, hope we would see a more serious constitutional set of constraints of intellectual property law.

PROFESSOR RASKIND: To my surprise I think we are in complete agreement.

PROFESSOR LANGE: I had hoped that it would be so.