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PRESENTATION BY PROFESSOR L. RAY PATTERSON

PROFESSOR PATTERSON: One of my pet peeves is legal reason which I consider to be a classic example of the law of self-interest in operation. The lawyer always starts with the conclusion that the client wants and seeks justification.

So in line with David's [Professor Lange's] confession, since I am very fond of *Feist*, I think I should probably let you know my self-interest in *Feist*. I did participate with David in the preparation of a petition, and, of course, the article that I wrote with Professor Greg Joyce of Houston was cited by *Feist*, but I have a reason to love it even more. I have already used *Feist* to get a copyright injunction vacated, and since that injunction was granted six years ago, I look upon *Feist* very fondly.

I think that the *Feist* decision should be read as containing what I call an explicit lesson and an implicit warning. I think the lesson is that copyright law is overextended. The warning is that the time has come to examine both the cause and the effects of the overextension, and, by implication, to consider alternatives for protecting many works that are now under the copyright umbrella.

The expansion of copyright law, of course, is nothing new. It began in 1802 with the first amendment of the 1790 Copyright Act. But the expansion has accelerated in this century to the point of overextension, and there are three factors that help explain this development.

One is, of course, new communications technology, particularly television and the computer.

Another is the extraordinary remedies that the copyright statute provides which makes copyright law a desirable vehicle for protecting the products of new technology. I would like to remind you that the copyright statute is the only statute I know of where a copyright owner can recover substantial damages, without having been harmed, from a defendant who acted innocently and did no harm.

The third reason we have the overextension of copyright is an ambiguous and therefore infirm intellectual conception of copyright. I think you can see this in the distortion and corruption of fundamental ideas during the long history of copyright. For example, among the ideas that have been distorted is the notion that copyright is an author's right. Among the corrupt ideas is the misconception that copyright is basically a property right. Among the ideas that have been lost is the fact that copyright was early used as, and still can be, an effective device of censorship.

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Now what I call the infirm intellectual foundation of copyright meant that there was no sound, logical reason for extending the copyright monopoly, but it also meant that there was no sound, logical reason for not extending that monopoly. Therefore, reasons generated by self-interests prevailed.

Given these considerations, it is not surprising that one result of the expanded copyright monopoly is an increase in what I call the neo-copyright. That is, copyright for works of low authorship granted protection without regard to constitutional policies relating to the copyright.

A classic example of that genre right is the live telecast of a sporting event, such as a live NFL football game. I contend that however admirable the accomplishments of athletes, their antics are hardly entitled to the claim of authorship. But the response will be that the copyright is on the recording, not the sporting event, and my point will be made. To give the copyright to the recorder of the event is like giving copyright to an amanuensis rather than the actual creator, and those who think that the amanuensis is an author probably think that *Feist* dealt only with telephone directory white pages. They should think again.

The real subject of the *Feist* decision is authorship, and on this point there is an argument that *Feist* utilizes the widely held misconception that copyright is a natural law property right of the author. I contend, however, that the conclusion does not follow because the requirement of true authorship is more a matter of limiting the monopoly rather than rewarding the author.

The natural law theory, of course, is a source as well as the product of legal fiction, which I think manifests the infirm intellectual foundation of copyright that results from the conflict between the monopoly and the proprietary copyright theories.

The fact that the Supreme Court in *Feist* went to great lengths to dispel the fiction that a person is entitled to copyright for the results of his or her sweat of the brow suggests to me that the Court has taken the first step in providing copyright what it has lacked, and that is a firm intellectual foundation. If this proves to be true, much material now protected by copyright will be left unchallenged, and I think it is not too early to be thinking in terms of an alternative scheme of protection.

Considering that the materials at risk are works of low authorship now protected by neo-copyright and that neo-copyrights are primarily corporate copyrights, the logical alternative that comes to mind is an unfair competition or trade regulation statute. Before this will happen, However, we have got to have several things happen.

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First, we have got to appreciate the problem. Second, there has to be a conviction that the neo-copyrights are not constitutionally sound, and I think it will help if we have an understanding of the historical corruption of ideas whereby copyright as a trade regulation device came to be viewed as an author's property right. Finally, I think we have got to accept the idea that low authorship works need, and indeed are entitled to, only limited protection against competitors not plenary protection against users.

Now, the basic problem of copyright centers on the fact that copyright itself entails the power of both monopoly and censorship. In a society where freedom of speech is a prized right, the core copyright problem is information control, and that is a major reason for the constitutional limitations on the power of Congress to enact copyright legislation.

The fact that Congress has used fictions to override those limitations is important, because the further legal fictions remove copyright from its constitutional moorings, the greater the monopoly censorship problem becomes. Yet, I think that the problem is not readily apparent to most persons, because of the perception that the primary role of copyright is to protect creative, not informational works. That perception is supported by language in the Copyright Clause that Congress can grant copyright only to authors, whom we normally think of as creative artists.

But, of course, the perception is belied by the work-for-hire fiction, which makes the employer, for whom a real author creates a work, the legal author. Since the employer is often a corporation, we have the corporate author making a mockery of the notion that copyright is an author's right, which is, and I contend has been, true only as a matter of rhetoric.

The author's right fiction persists primarily because of its great utility to copyright owners. It is the basis of the idea that copyright is merely another species of property. If this proposition is accepted as true, the monopoly censorship problem becomes a phantom, since property is a monopolistic concept that does not include the right of access by others.

And one of *Feist*'s lessons implicit in the decision is that the proprietary concept of copyright is not acceptable as a matter of constitutional law. The proper choice which *Feist* implies, but does not articulate, is that copyright is a regulatory concept because it is a right granted by statute and it is positive law to serve the interests of three groups: authors, entrepreneurs as distributors, and users.

Now, while copyright is a statutory grant, the anomaly in American law is that it is often viewed as a natural law right. Congress has

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enacted copyright statutes treating copyright as the grant of a limited statutory monopoly, but courts have tended to interpret those statutes as confirming copyright as a natural law right of the author. This is the heart of the positive law/natural law controversy that has been present in Anglo-American copyright since the 1730's.

The positive law theory has been dominant in the United States, but the struggle with natural law theory, is the major reason for copyright's infirm intellectual foundation, as I call it. The growth of the neo-copyright, for example, can be attributed at least in part to natural law ideas by reason of, what I call, the transference phenomena.

The natural law theory of copyright makes sense only if the effort that forms its basis is actually creative rather than merely industrious. Unfortunately, in American copyright law the originality criterion was substituted for creativity, and thus the "author" who produced a directory by industrious effort was deemed to be as original, that is creative, as one who produced a creative, that is original, novel. The reward intended for the author of imagination was thus transferred to the "author" of industriousness, who, as matters turned out, was more likely to be a corporate entity using the industry of many hired hands, rather than an inventor.

A major reason for this transference, I believe, is the failure to make and maintain the distinction between a work and its copyright. Analytically, it is impossible to avoid the distinction: There may be a work without a copyright, but there can be no copyright without a work. Thus, a work may continue to exist long after the copyright has expired, or, as *Feist* makes clear, there may be a copyrighted work that contains uncopyrightable material, which could not be if the work and the copyright were one.

Practically, however, it is almost impossible to get lower courts to recognize the importance of this distinction. And the importance is this: if a work is not separated from its copyright, then copyright becomes an ideal instrument of monopoly and a superior device of censorship.

Certainly this was true of the early English copyright, the stationers' copyright, which served both purposes extremely well. My point is supported by the fact that the successor copyright to the stationers' copyright, the statutory copyright, the Statute of Anne destroyed this unitary basis by separating the work from its copyright with two provisions: (1) it limited copyright to published books, which solved the censorship problem; and (2) it limited the term of exclusive publication to fourteen years, which alleviated the monopoly problem.

These two characteristics remained constant for over two and a half centuries, from 1710, the date of the Statute of Anne, to 1976, the date of the fourth major revision of the American Copyright Act. With

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the first, the duty of publication was eliminated, and, with the second, the limited term was diluted so that the second limited term now approximates a century.

The 1976 Act thus upset the balance between the rights of copyright owners and the rights of users with two radical innovations. One was the codification of the common law copyright; the other was the codification of the performance copyright.

The importance of the distinction between a work and its copyright arises from the fact that the ownership of a work and the ownership of a copyright are two different things. The separation of the two concepts is thus the key to the scope of the copyright owner's control. It is one thing to control the use of the work which the owner of the work can do, but it is quite a different matter to be able to control the use of the copyright, which the owner of the copyright can do.

My point perhaps becomes less metaphysical when one realizes that to use the copyright, it is necessary to use the work, for example to sell copies. But to use the work, for example in research, it is not necessary to use the copyright. But if the work and the copyright are deemed to be one, the owner of the copyright will control the use of the work as well as the copyright.

The unitary concept of work and copyright, for example, enhances the claim that any copying, even of a single page, warrants a fee, and herein lies the importance of the codification of the common law copyright and the common law performance copyright. The copyright clearance center, I am sure, is a direct result of both changes.

Now, the reason for the codification of the common law copyright and the common law performance right, of course, was new communications technology. I am firmly convinced that Pete Rosell is responsible for what I call the codification of a common law copyright. He wanted copyright protection for NFL football games because he was concerned about the developing cable television.

The computer also comes into play here. The changes have had far more consequential effects than Congress contemplated when the deed was done, because the common feature of these processes that distinguishes them from the printing press went unacknowledged, and these are processes of the television and the computer for performing not publishing works. This is the reason they have given new impetus to what I call the use of the neo-copyright.

The neo-copyright, as I think of it, is a product of the sweat of the brow or the industrious collection theory and its most prominent contemporaneous use is to protect communication and the ephemeral as opposed to the permanent or printed form. That feat was made possible by the codification of the performance copyright.

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An early contemporary form of the neo-copyright was the compulsory recording license for musical compositions, a device that has now been extended to other kinds of performance, for example, cable television. As these uses of the neo-copyright suggest, the primary focus of that copyright changes from protecting the right to distribute copies of a work to protecting the right to perform that work, thereby giving the copyright owner complete control of access.

Such access has three major effects that are obvious to the copyright owner but not to the user, because the user assumes the work and its copyright are one property. One effect is to give the copyright owner the power to impose a tax for using the work; another is to provide an economic incentive for entrepreneurs to corral informational material and create works of low authorship of a utilitarian nature; and the third effect is the judicial application of copyright, contrary to the statute, in a manner to protect systems, for example computers programs, which enhances the copyright monopoly.

The profit potential here has resulted in three distinct forms of the neo-copyright. I think you have the performance copyright. I think you have the performance/service copyright, and the performance/process copyright.

The performance copyright really has been in existence since 1897 when Congress amended the statute to provide copyright protection for public performances of musical compositions for profit, and I suppose that you could argue that it goes back to 1856 when Congress gave copyright protection to dramas. The performance copyright has been very aggressively exercised by ASCAP, which reminds me of a little run-in I had with a lobbyist for ASCAP because of my temerity in seeking to get the Georgia legislature to pass a fair use bill in copyright. I was talking about the rights of users and the lobbyist curtly informed me that users have no rights, and I think that ASCAP honestly believes that. Certainly it acts accordingly, because notice the fair use provision of the statute is supposed to apply universally, if you ever heard of the fair use doctrine being applied to performance rights that ASCAP was interested in.

The performance/service copyright is a copyright for a service, and I think WESTLAW and LEXIS are your prime examples. Now, the nature of this copyright as a service copyright is obscured because the protection is ostensibly on the product, not the service. What is protected in these databases is "selection, coordination, and arrangement." But to treat these acts as authorship is, of course, a fiction, the purpose of which is to protect an entrepreneur for providing a service that makes public domain materials conveniently available. The ability

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to charge a fee each time one wants to have access to public domain material is, in effect, a tax for their use.

The performance/process copyright, of course, has been used to protect systems in computer programs, and I only need to cite to you cases like *Whelan* and *Lotus*.

Now, my basic concern here is the threat that these neo-copyrights pose to constitutional policies. As the Copyright Clause makes clear, there are three basic constitutional copyright policies: to promote learning, the progress of science; to benefit the author, who supposedly gets the exclusive right; and to protect the public domain, copyright is available only for new works and can exist only for a limited time. The neo-copyrights, by and large, disdain each of these policies.

Since learning requires access to the materials to be learned, the constitutional policy requires maximal public access to copyrighted materials consistent with reasonable incentives to authors; yet, the performance/service copyright requires the copyright owner's control of access thereby enhancing the copyright owner's power of censorship.

Nor does the televising of non-scripted events, such as football games, benefit the author, for there is no author. And in the case of computer databases, the materials—facts or otherwise—therein contained are for the most part public domain materials. In any event, the copyright involved is usually the corporate copyright under the work-for-hire doctrine with no human author as the copyright beneficiary.

The natural response to the claim of copyright unconstitutionality, of course, is that lawmakers should not be handcuffed by an eighteenth century document that has historically been read to have sufficient flexibility to accommodate changing conditions. The developments discussed above, it can be argued, are responses to changed conditions that are, in fact, consistent with the goals of copyright. But the hidden premise here, that the responses are consistent with the constitutional goals of copyright, is not necessarily true, for the responses have been made with the aid of legal fictions.

Now, the issues that I have sketched here do not lend themselves to easy answers, primarily because they are laden with self-interest concerns, and that is why I think an examination of the Copyright Clause in the context of history is helpful. Viewing legal developments in a historical setting provides a perspective that self-interest involved with the contemporary concerns often denies us.

So what I would like to talk about now is the meaning of the Copyright Clause. There are several words in that clause, and I read the Copyright Clause distributively because it is in the intellectual property clause, that are clear and as to which there should be no question: authors, writings, limited times, and so forth.

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The real issue is what is meant by exclusive right. The other terms are descriptive, but this one is different because the term exclusive right is the operative term. It is what Congress can grant. I think we can get some help here if we look to the source of that language which, of course, is the title of the Statute of Anne, the Copyright Act of 1710. In that statute, the title read, "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned."

So you have the promotion of science, that is, the encouragement of learning. You have the exclusive right, which is really copies, because copies was the term for copyright in that era, and then you have authors or purchasers of such copies. As a matter of fact, the purchasers of such copies, the booksellers, was the only portion of the title of the Statute of Anne that was left out of the Copyright Clause, because you also had the limited times and you have writings, and writings was the term for, I argued, ink printed books.

Now, if we examine the problem in the light of history and we can do so in more detail than I have time to do here, I think the meaning of exclusive right emerges with surprising clarity. It means the right of the author to publish his or her writings.

I have confidence in the conclusion for a couple of reasons. First, marketing a writing by publication was the only way to gain a profit. Second, copyright which developed in sixteenth century England for the expressed purpose of protecting the right of publication had the same purpose in eighteenth century England. The right was exclusive because copyright was an exclusive right of publication.

I think my argument that the Copyright Clause empowers Congress to grant to authors only the right to publish their writings is consistent with the other limitations in the clause: the promotion of learning, limited times, authors own writings. Taken together these limitations reflect the three fundamental copyright policies: promotion of learning, the securing of the author's right, and the protection of the public domain.

My conclusion is supported by the background to the Copyright Clause which I will not go into in detail here except to mention that there were really four copyrights that had a background and that were relevant to the issue.

One was the stationers' copyright and that was the copyright of the publishers which was used to sustain their monopoly as well as for censorship.

Second, was the statutory copyright that succeeded the stationers' copyright. Of course, the stationers' copyright lost its legal support with the final demise in 1694 of the Licensing Act of 1662 which had sup-

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ported the stationers' copyright. The resentment of the public was more against the monopoly than it was censorship and I think the monopoly, and the records in the House of Commons journals will support this, was the reason it took some fifteen years for Parliament to enact the Statute of Anne and the first copyright act. And when they did enact that statute, it was not a copyright for authors, it was basically a trade regulations statute, and this explains the common law copyright.

The booksellers did not relish the idea that the new copyright statute would be used to destroy and prevent the recurrence of their monopoly by reason of the limited term of copyright. Notice the copyright was limited to fourteen years, and it could be renewed for another fourteen years but only by the author and only if the author was living, another indication of concern about the monopoly.

Well, the booksellers set about to override the limitations of the statutory copyright by trying to get the courts to create the authors' common law copyright, and they almost succeeded. In fact, they did succeed in the case of *Millar v. Taylor* in 1769, but the House of Lords overruled them and came up with what I call a compromise solution, saying, yes, the author does own the work he or she creates but only until publication; then the author has to rely on the statute for any protection. And then finally the common law performance copyright was recognized one year after *Millar v. Taylor*, in 1770, in a case called *Macklin v. Richardson* involving a drama called "Love a la mode," a delightful title.

My point here is that the drafters of the Copyright Clause had a choice of three copyrights to empower Congress to enact: the statutory publication copyright, the common law copyright, and the common law performance copyright. My point is that of the three copyrights extant, the founding fathers gave Congress the power to grant only one, that is the statutory publication copyright.

We do not know whether the choice was deliberately made with an awareness of the common law performance copyright, or even what role the presence of the common law copyright played in the decision, and, perhaps, it makes no difference, because we do know that the drafters reached back over almost a century to the Statute of Anne for the language of the Copyright Clause, and our present concern should be whether this was conscious conduct that reflected goals that the drafters had in mind.

I think there are three reasons suggesting that it was. First, the language of the Statute of Anne reflected goals appropriate for a new nation: to promote learning, to benefit authors, and to create and protect the public domain. Certainly the founding fathers were aware of the English experience.

Second, the new government was to be a government of limited powers, and it would have been inappropriate to give Congress the power to grant to an author the property in his or her writings. The author's property right had been recognized by common law courts in England, and the common law was to be a matter for the state and not the central government.

The third reason is related to the second. The copyright of the Statute of Anne was a right to which a work was subject; it consisted only of rights to print, reprint, publish, and vend the work. This meant there was a distinction between the work and its copyright, between the ownership of the work and the ownership of the copyright. The book had to be published in order for copyright to come into existence, for the Statute of Anne had separated the work from copyright.

I am sorry to say, I have been going on a little bit too long here. I should have distilled my remarks more. Just let me point out that the remaining portion of my paper deals with the corruption of copyright, and there are two explanations for that corruption. One is the inversion of the idea of monopoly and property. It started out in this country with the idea that copyright was a statutory monopoly in *Wheaton*, and throughout the nineteenth century that idea was exchanged for the idea that the copyright is the property right of the author. The other idea was the use of fictions, and all of you are familiar with the use of fictions in the copyright statute, and the extent to which the '76 Copyright Act is predicated on fictions.

My ultimate point is that because of this overextension of copyright, Congress needs to enact a law of unfair competition to protect what I call the products of the neo-copyright, and the model they should use for that purpose paradoxically is the Statute of Anne, because the Statute of Anne was, in fact, a trade regulation statute.

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