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# Open Discussion of Presentations by James E. Schatz, Esq., and Professor L. Ray Patterson

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## OPEN DISCUSSION

THE CHAIRMAN: I think the gauntlet has been thrown down here. David Lange.

PROFESSOR LANGE: Mr. Schatz, I wanted to let you have a chance to get back to your seat. I would like to respond to two of your comments, one of which I agreed with as far as it goes and the other one with which I disagree completely. I think I'll take the second one first.

When you say that copyright is not an instrument of suppression or not an instrument that has much role to play in the process of suppression, I have to tell you I think you are just wrong. It may very well be that in your encounter with it in the context of work you do, for example, with West, that is so, but to say that is not so at large is, I think, to miss a vast additional area of practice in which suppression is, in fact, an everyday occurrence.

One of the first cases that I was drawn into in practice was one which you may remember. William Manchester had written an authorized account of the assassination of John Kennedy, authorized in a sense that it was he who had been selected by Mrs. Kennedy and by the Kennedy family to do that work.

Now when that account was finished, Manchester had drafted a work in which, among other things, scenes were set encounters between Mrs. Kennedy and President Johnson in Air Force One, encounters which I think there was not any reason to suppose had not taken place, but which, when she read the manuscript, deeply troubled and vexed Mrs. Kennedy, who was a person then and now with great sensibility and concern for privacy. It was her wish that that account not be published, and it was not published, to make a long story short. And it was not published, in part, because of the availability of these kinds of documents in the background which simply allow one to bring that kind of unwelcome publication to a dead halt as a matter of fact, in spite of the theoretical ability to go outside the field and to do the work in an unauthorized fashion.

How, in the mechanism of that particular piece of litigation, is a long and really kind of beside the point story, but it happens all the time in copyright works.

The reason we know very little about the life of Sylvia Plath and the circumstances on her death, is again because of the ability of the Ted Hughes family to control much of the documentation of that life, death, and the reason.

MR. SCHATZ: That is a problem of the control of the basic facts, not a problem of copyright and what is written about it. It is not the problem—

PROFESSOR LANGE: But if you will forgive me, Mr. Schatz, I am not done with my point. I do want you to respond and I do understand your point. But one thing plays into the next. Eventually we get to the point at which, when we deal with those objections to my point, we come to the account that Ray [Patterson] has in mind when he speaks about our conflation of the work and of the copyright.

That kind of problem arises where, in effect, there is in fact an inextricable merger that takes place between work and expression. And the account that I will give you is the gravest in its threat, though one that the court actually spared us from was again in the aftermath of the Kennedy assassination, the case of *Time v. Bernard Geis & Associates*. You understand what the author there wanted to do was to use anything but Abraham Zeb Gruder's account of the event.

What the author wanted was the event, the facts, but he could not get those facts without getting to them through the intervening medium of the expression of those facts which was, in fact, the only account that we had. So it was not possible for him to do what he wanted to do with the work without having to muck with the copyright in the work, which I think is the point that Ray [Patterson] is making when he speaks about this particular problem in conflation.

Now, that case confronted the proposition from which there was no escape as the court saw it—but I think there is an easy escape and one that I think will eventually be placed in effect—the Court simply said we have sort of odd fair use tinged with an important concern for the First Amendment. So in that case we managed to escape, but in other cases we do not escape.

The in terrorem effect of the concerns that authors have for confronting the substantial or striking similarity doctrine in the production of what are inherent independent constructions of work under copyright terms, but which are, in fact, beyond the capacity of that would-be author to demonstrate in terms of the necessary originality, keeps people from working in many ways at all in fields in which they fear eventually that they will confront a copyright claim.

I think that you underestimate the in terrorem effect of the copyright in suppressing speech. But let us suppose that that is not so and just put that debate to one side.

I can now show you the point which I agree with you on, about your point on the post-*Feist* position of the states in connection with erecting what Professor Raskind has in mind with respect to unfair competition protection for an array of fact collections that might here-

tofore might have been thought preempted by section 301. We find no help in footnote 27 in *Goldstein v. California*—I have not read your work so I do not know whether that's a part of your thinking but I presume it is—there again it is similar that footnote 27 kicks in only with respect to those instances in which Congress is, in fact, empowered to act, but we are not the first to envision that problem.

When Mel Nimmer was alive, he thought about it too, and his answer was that if the states should, in fact, had the temerity to attempt to act in the way that we envision, then, at that point he said, I always thought fecklessly, and too hopefully, the First Amendment would intervene and prevent the states from so controlling collections of fact in that way as to import unfair competition doctrines wholesale into a new kind of intellectual property protection at their hands.

I think he was wrong. I do not think the First Amendment has that kind of grip on the field, or more precisely, I think it has no more prospective grip on the field in that case than would another source of constitutional protection.

But I will say, that one way or another, I do not think we are going to see the wholesale erection of unfair competition doctrines. To do what you have in mind, because in fact, we are going to confront the same proposition all over again, that has incensed [Ross] under *Feist* and the fact that we can only deal with it in the continuation of *Feist* up to a certain point does not mean the states are going to get away with that kind of protection.

I think the fact that exactly those encounters in the future, which we now have set the stage to have, will oblige us to rethink many regions of the Constitution as against the constraints of the Tenth Amendment. As against those constraints, I think that we will find there is a new peremptory effect coming out of the U.S. Constitution that we will be working out in conferences like this over the next twenty years.

MR. SCHATZ: On the in terrorem effect, I think that effect is true, but I think it is more true for piracy than for people who are truly interested in creating something.

PROFESSOR LANGE: But piracy in one view of it is not piracy in another view of it, and that's just a problem.

MR. SCHATZ: Right. I understand that. I was doing that on purpose. The view is that fair use makes what is a limited right even more limited. There is one other point on the need for state X to act. If the federal courts respond as they have in the recent *Bellsouth* case, there may be no need for state X to act, because, as has been indicated, they may interpret the law in such a way to protect the things that are piratable.

PROFESSOR LANGE: I came here thinking that there was something like eight or ten cases, and, in fact, Jack McDonald at dinner last night assured me that I had underestimated by a factor of one-half.

But remember the aftermath of *Sears* and *Compco* in which exactly the same thing happened. *Sears* and *Compco* were followed by initially dozens and then really scores of cases in which courts went all over the lot, so far in that pair of cases that I would have said ten years ago that there wasn't as nearly as much left of *Sears* and *Compco* as I might have supposed. And then what happens? Along comes *Bonito Boats*.

I think it is like *Beast*, if you read that new novel by Peter Benchley, they lie down there at the bottom of the sea and you think they are dead and they are only sleeping and then they rise with their tentacles to grab you. I think that this aftermath of *Feist* in the immediate terms is misleading and highly problematic in terms of what we can actually count on, again if we look down the road ten, of twenty years.

PROFESSOR KARJALA: I could not disagree more with both Mr. Schatz and Professor Lange on the question of congressional power. We do have an interstate Commerce Clause in the Constitution and, at least as to published works, I have no doubt as to Congress' power to regulate in this area. Now I fully agree that there are First Amendment limits to the Commerce Clause, and to the extent the First Amendment requires facts to go unregulated, I wholeheartedly support it and I think it ought to be used more.

But in terms of congressional power to regulate wholesale copying of electronic databases, for example, I think Congress is empowered to do it, and whether they call that legislation unfair competition or copyright I think is irrelevant because neither of those are constitutional terms.

PROFESSOR PATTERSON: I would like to make a response to the comment that other people are free to go out and collect facts on their own that happen to be contained in a copyrighted compilation.

It reminds me of the cartoon of Herb Loch back in the early sixties where there was a little urchin sitting on the steps of the Capitol and Senator Goldwater was walking by, and the caption is, "Auwk, go out and inherit yourself a department store."

I think that illustrates the hidden premise here. The assumption is that everybody has the capability to go out and collect these facts, which simply is not true. I have encountered this in cases that I have dealt with, and I simply wanted to show up the stupidity of the judge.

PROFESSOR REICHMAN: I want to say, first of all, that I thought Professor Patterson's analysis was really extremely brilliant and comprehensive.

I do want to say that one need not accept all of its internal premises to reach the same conclusions that he reaches. One need not accept all of the constitutional and historical analysis to accept the other premises that go deep into the theory and then come way down to the conclusions, which are the same.

It is interesting, for example, that he makes a lot of English law. English law actually betrays this whole tradition by being the most abusive of the copyright.

Why is that? The reason given by the leading English authority is, well, they do not have a roving misappropriation law so they abusively use copyright law in its place. Why don't they have a roving misappropriation law? Because it is hypocrisy; because that, well, that conflicts with free competition.

And, at the same time I would point out to you, he is holding the Berne Union countries to a purer standard that they are about to abandon because his taking of the view that the corporate authorship is an anomaly, is, of course, the official Berne Union lore that kept sound recordings out of the Berne Convention countries up until Dr. Bausch's last sally, and it has already elicited a lot of opposition.

So there is some weight and possibly some contradiction. I think you underestimate the power of the authors' rights development. I think you focus too much on the English side. But I really think your analysis is brilliant.

And I would like to suggest there is empirical verification for your proposition. It has largely gone unnoticed here, despite my best efforts to bring it to everybody's attention.

Professor Troller of Switzerland shared your views and was successful in having enacted in 1986, Article 5C of the new Swiss Unfair Competition Laws, which do exactly what he wants them to do. And it is indeed in Switzerland where Professor Troller lives, and in Europe where he is very well known, and it is known as the Troller Law.

It is an attempt to give what I call artificial lead time to new technology. It is a trade regulation basis completely outside of the patent or the copyright scheme and, indeed, the operative criterion here is that there should be a reasonable time to recoup investment, not profit. Whether it would work or not is another question.

But that does lead to some very important international implications. Because if Professor Patterson is right, and I really believe that he is right in many of his basic premises and all of his conclusions, we are in a very false position internationally because we are now beating

other countries over the head to adopt this extremely overextended version of the copyright law, and lock it in, and lock ourselves in to a modified Berne Convention.

That is going to come back to haunt us because, I am convinced it is going to haunt the very people who are most pressing for it, IBM, because they are the people in ten years who are going to have to do the most amount of the copying, just like the rest of us.

I would like to point out that were Professor Patterson's suggestion and Swiss Unfair Competition Law idea to catch on, as I have tried to suggest in my GATT article that it ought to catch on then, there is an antidote to what we hear.

The party line out of USDR, and those who are egging it on, is that there is no other international solution unless we stuff this stuff into copyright, and that's completely false because under the Paris Convention we have Article 10B. There are more countries that belong to the Paris Convention than the Berne Convention by about thirty more countries, most of them developed, and Article 10B gets at unfair competition.

So if there were an agreement to make a Troller law, an anticopying of new technology databases, international, we have a section of the Paris Convention in which we could put it. Indeed, customary law would immediately take off if enough countries put it there and kind of rope in the recalcitrants much more effectively than it would under copyright law.

I have been proposing in my GATT article that that is the way we ought to go. I can tell you after a consultation with [UMTEH] this summer that the developing countries are perfectly prepared to go along with this; whereas, they do not want to go along with a universalization of copyright to standards that we were only prepared to accept last year.

MR. CLARK: Professor Patterson, with regard to the Copyright Clause, my reading of that clause suggests there is a qualification on the congressional power and that is the exercise with regard to progress of science and the useful arts. That is a phrase I do not believe you dealt with in your talk.

To your mind does that at all limit the ability of Congress to enact a copyright law that would impede that progress or the ability of a court to make an interpretation that the copyright law is impeded, or in addition, the ability of the states to enact a law dealing with this subject matter?

PROFESSOR PATTERSON: Now we were including the useful arts there?

MR. CLARK: Yes.

PROFESSOR PATTERSON: I think the copyright law should be registered. I think the useful arts applies to patents and inventions, the parallel structure.

MR. CLARK: The point I am getting to is, it seems to me in the scheme of things the copyright law was to put ideas in the public domain so that others could discuss those ideas and their works, to improve on them. Without it there would be no public discourse; the idea was to encourage getting ideas for free use in the marketplace. But is the Copyright Clause interpreted so as to give protection to the ideas or the state laws or allow them to protect ideas; in other words, interpreting the law to give ideas protection? Is there anything in the Constitution that would place limits on that sort of thing?

PROFESSOR PATTERSON: As far as the states go, you mean?

MR. CLARK: The states, Congress, or courts.

PROFESSOR PATTERSON: I also argue that the Copyright Clause itself contains free speech values, and I think free speech is an aspect of that.

MR. CLARK: Apart from free speech, just the notion that science progresses through, you know, building on the backs of those people who came before.

PROFESSOR PATTERSON: I am not sure I understand your question precisely. Is Congress limited?

MR. CLARK: Would it be within their power to enact a burdensome copyright law that arguably impeded the progress of science? For example, making it illegal to make use of facts that were published.

PROFESSOR PATTERSON: I think probably not. The clause that distinguishes between facts and expression has been on the books for a long, long time.

But what a lot of people do not realize is the limited copyright protection that was available in the early part of the nineteenth century after *Wheaton v. Peters*, because the idea was that copyright protected the book only as it was published. So consequently another person could take the book and abridge it or translate it and get a copyright without, in fact, infringing the copyright of the original book.

In fact, my argument is that the fair use doctrine theory, contrary to what most people think, is an enlargement of the copyright monopoly because it was an effort by Story to supplant the abridgement doctrine with a fair use doctrine. So I think we need to recognize that, because clearly the courts have been giving a much narrower reading to the fair use doctrine than that doctrine warrants.

PROFESSOR LANGE: I want to make sure I understand you and I want to make sure I understand your questions because up to that moment I thought I had understood, but I am not so sure I do.

Your proposal is to take from copyright now some of the, sort of what Ralph Brown used to call low level demons, small bits of copyright, and put them in a different statutory scheme that would presumably, as Professor Reichman suggests, among other things, give them a much shorter protection, really as he put it lead time like the Troller Law.

PROFESSOR PATTERSON: Yes.

PROFESSOR LANGE: Now, the question that you [Mr. Clark] are asking though, and I certainly would ask it too, is that new scheme to be an article I, section 8, clause 8 scheme or is it to be a Commerce Clause scheme?

PROFESSOR PATTERSON: I think it should be a Commerce Clause scheme.

PROFESSOR LANGE: Then I gather that you [Mr. Clark] would find that deeply objectionable because it would have the effect of formally sanctioning the materials that now indeed might be cast into outer darkness by virtue of *Feist* and other things? Am I reading you right?

I would sort of think I might sign on for that too, Ray. Knowing you, I am surprised that you—

PROFESSOR PATTERSON: Well, of course, the problem with my suggestion is that the industry is going to hone in and write the statute.

PROFESSOR LANGE: But why not do it the way you want to do it, and as I think, not being inconsistent with the Troller Law, but having in mind his [Mr. Clark's] concerns, which is to say, do it only in circumstances in which you can satisfy this additional affirmative obligation to show how it is that this is going to promote the progress of science and the useful arts. That is, make it, as it were, a sort of separate chapter in the law under some comprehensive revision.

That is really what Bob Castenmeyer used to suggest. You ought to take some of these rights and simply give them a lot shorter terms. And then your [Mr. Clark's] objection would be met. We might not all sign on for the outcome, but at least formally there would be an effort to comply with what you have in mind.

MR. CLARK: That is right.

PROFESSOR LANGE: Why would that be objectional to you [Professor Patterson]?

PROFESSOR PATTERSON: Article I, section 8? No, not really, except I think useful arts does not apply to copyrights. I insist it applies to patents, and then I think it would be a mistake.

PROFESSOR LANGE: Well, somebody, I have forgotten who, maybe it was you said, I mean somebody just got through saying, copy-

right and patents are not constitutional terms. We can call them whatever we want when we are done with the revision. In other words, maybe we should not—

MR. STEELE: As somebody who has worked on the proprietary side of the fence for many years and has attended many meetings with users and users' groups, I find it very interesting sitting in this room with a number of academics. I think you are doing a better job in some respects, of describing values inherent in protecting and permitting copyright of works than many users typically do in these types of meetings.

On the other hand, I think we are at this point in this two day gathering jumping the gun in some very significant ways. Specifically, I think we have not even diagnosed what the problem is, and we are jumping in and trying in some relatively detailed ways to suggest solutions.

It seems to me that the way to approach this is to talk more about what we should do, what makes sense to do, and I would say, from some of the earlier speeches, what socially makes sense to do. Let's not talk for a moment about how to do that and to what degree history, whether the Statute of Anne or our Constitution, limits us in doing that.

There is no doubt that what we are talking about here is a very difficult issue as to how we balance rights. I have trouble accepting, however, to use one of your earlier examples, that some copyright-mandated historical disclosure limitations, as in the Kennedy context, mean the copyright law has problems generally, and that the types of works we are talking about today really do not need any protection.

I am also not ready to cut loose from copyright law protection many new technology works that have been the subject of comments today. I do not think we have established that the current copyright law cannot be protective with appropriate sensitivity to history and constitutional language, and, therefore, we have to stick these works off into some other protective scheme.

I also do not see the term of protection being very much of an issue. I think most of us that work in the information industry would say many of our products lose their commercial value relatively quickly, obviously with some exceptions. But just because other types of works lose their commercial value quickly does not mean we should have a shorter copyright term for them. The issue is the scope of protection.

MR. McDONALD: Since everybody has identified where they are coming from, I may be the only one in the room that a federal judge called an industrial pirate so I have to wear that hat.

I would like to go back to the question of what is preemptive and what is not. I think one of the things we have to keep in mind as we talk about *Bonito Boats* is that it was basically a patent case, and patents have gone off in a different direction. The field has been preempted. With respect to copyright there is a very different track and, as Professor Lange talks about beasts that keep rising up, the *INS* case is one that continuously arises.

*INS* was written in a time frame where the Supreme Court was engaging in developing what amounted to federal common law. It predates *Erie v. Tomkins*. It is interesting the same judges that engaged in the gallop of federal common law were the guys who wrote *Erie v. Tomkins* and said that is improper. But in spite of it almost being a relic, it is a case that continuously comes up.

When Congress enacted 301, which says that there cannot be any state laws in conflict with the Copyright Act, very prominent in the legislative history is their recommendation and endorsement of the *INS* case.

While *INS* talks about copyright, it was not a true issue in the case; neither side really contends that there was a copyright issue there. What was created in that case was a business interest that was to be recognized, a business property right that deserved to be protected.

I think as you look at Goldstein and as you look at *INS*, there clearly is a basis for the states and/or the federal government stepping in and creating additional rights or articulating additional rights with respect to a business that has as its subject matter material that may or may not be copyrighted. I think there is an opportunity there. I think the Supreme Court has set the pin.

If you look at the *Feist* decision it does reference both Goldstein and *INS*, and the places where it cites it, for propositions that quite probably there are a dozen cases that would be more appropriate for the proposition that they are citing them for. I think it was a conscientious effort by the Court to bring those cases back to mind as a possible remedy for their construction of where the Copyright Act should go.

So I think preemption in copyright does not apply as it does in patent, and I think that there are some wide open avenues that may be explored.

PROFESSOR RASKIND: Just to pick up on what several people said really. I agree with the last speaker in this sense, that if *INS v. AP* were not on the books, it would be some other opinion like it or someone would now come forward with it, so the notion that rampant taking of property would somehow get cloaked with some rights, so I think we have no address it.

And what Mr. Steele said, I think there is a fundamental question that we probably ought to address. You know, in other words, suppose there were not protection, then the implicit premise, and maybe you said it expressly from the proprietary sector, is we would not be doing this. We would take our capital and we would be doing something else.

The problem that that raises for people of every perception, including Congress, is that it is a problem in which you cannot adduce any data. You cannot measure it. It's not like a public health problem where you know how many cases you have, how many beds you have.

The extent to which there needs to be an incentive by giving a quasi-property proprietary right, and the response of commercial entrepreneurs who have devoted capital to it, that is sort of an article of faith, that is what makes it so soft, a moving foundation on which people have to talk about these things, and we have to address them.