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Open Discussion of Presentation by John A. Odozynski, Esq.

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OPEN DISCUSSION

PROFESSOR KARJALA: We, I think, have now another good example of the other danger of *Feist*. We have talked for some time about the underprotection that may result from *Feist* for works that perhaps need some protection. Now the *Feist* emphasis on creativity shows the danger of overprotection, and we see it arising in a number of examples that just came up. In *Bellsouth*, for example, the business classifications system was held to be copyright protected.

Now, as Mr. Odozynski has indicated, the court should have looked for whether the classification scheme was original, but more fundamentally there is problem, I think, in protecting these business classifications because they are functional. Some are more useful to users of yellow pages than others, and, besides, there is a real social value in having standardization; you really do not want the yellow pages to be different whenever you go to a different city. So I would suggest that, even if there were some new additions to the standard yellow page classifications, we should have serious reservations about according copyright protection just because they were clever enough to put new classifications in.

But we are seeing this now in various cases. There was another case, I forget the name of it. I think it was decided by Judge Winter in the Second Circuit where the yellow pages were for the Chinese community in New York, and he pointed out that the choice to use a heading for bean sprouts and bean curd was a kind of creative thought by the plaintiff. I think that is a fairly obvious choice. If you like Chinese food like I do, that would be a fairly obvious classification choice and it may not be creative.

But, even if it were creative, I do not think it should be the protected property of the first one who happens to think of it, any more than the first person who happens to put hospitals on a map should get protected just because it turns out to be a very useful map. People may really want to have maps with hospitals on them. I do not think that mapmakers ought to get copyright protection just because of creative selection of items shown on the map.

Functional works of all kinds should be protected, if at all, by patent law. We do protect some under copyright for reasons I will not go into now. I will get into it a bit tomorrow. But we should be cautious about using copyright to protect function. I think *Kregos* is a very good example of the kind of problem that you run into, where the court protects a format for presenting statistical information. That is what it is—a system for presenting information. I do not care how creative it

is, it should not be copyright protected if it is excluded by section 102(b).

With *Feist's* emphasis on creativity, the courts are going around looking for creativity and protecting it wherever they find it without inquiring into the other limitations on copyright protection: Functionality, 102(b); limited protection of the facts, they are all there. So we should not be looking just for creativity in determining what is copyright protected.

Suppose Kregos had gone beyond just supplying the nine categories he happened to choose. (In fact, he did not just happen to choose them—he was making gradual improvements over prior forms. The opinion makes this very clear. There was only one additional statistic that he included that had not been included in the other forms. Improvements had been coming out over the years as to what users of these forms really wanted and that is how this thing was developing.) Suppose he had been really clever and had worked out a formula that you take, say, the earned run average for the last three games, and the men on base average, and you combine them in a particular way and you end up with the probability of victory, suppose also that this happens to be an accurate formula. I think most people would conclude that that formula could not be protected. It is functional. It is a system for predicting the outcome of baseball games. We would not copyright protect it in any of its aspects, including the nine elements. You are not free to choose the nine elements. If this is the formula that works, these are the ones that you must use.

Now the same thing is true in the actual case. He was not smart enough to supply the actual formula, but he is suggesting that these are the statistics that readers really want to know about if they are going to bet on a baseball game. So I suggest that they are functional. He has created a system for presenting information. It should have been excluded completely from protection by section 102(b), and the *Feist* emphasis on creativity is what threw us in this box.

That argument wins, right?

MR. McDONALD: I hate to see anybody win without a contest, but I suspect that there are others.

THE CHAIRMAN: He is on your side, is he not?

MR. McDONALD: I have trouble deciding what side I am on. I am not sure that your equation example works. If you take an equation, an algorithm, I suppose if it were reduced down to elemental forms, a single equation that properly captured the universe, then that would be the only way of expressing it. But on the other hand, since that equation has not been found, and an equation is simply a short-

hand way of expressing your view of what a relationship is, and to that extent, I have trouble seeing why that should not be protected.

Perhaps I like Whelan a bit too much, but I think some of his analysis works there. If you are going to have expression, it ought to be protected unless you are down to the sole way of saying it or you have said it in such a mundane way that there is nothing very creative about it that would make it worth protecting.

PROFESSOR KARJALA: You would agree that E equals MC squared is not protected?

MR. McDONALD: God, I failed that course.

PROFESSOR KARJALA: Or do I have to call it F equals MD squared in order to be safe? Must I use a different set of symbols?

MR. McDONALD: I think that represents a problem because I am not sure it fully captures the relationship.

PROFESSOR KARJALA: We do not know whether E equals MC squared is true. With the current state of knowledge we think it is probably true, but they used to think the relationship was something else. Can we say it is just Einstein's opinion? You can have your opinion? I think maybe F should equal MC cubed or whatever, but the fact is that no one would say only Einstein can talk about that particular equation, even though it is only a theory. He may very well be wrong.

But I do not think we give it copyright protection. We do not even give patent protection for a formula like that. We might. It is a legitimate view, I suppose, that we ought to protect it. But I certainly do not think we should. And if you do not believe we should protect basic scientific equations of this type, then I do not see the basis for protecting lesser discoveries.

We are not all Einsteins. But if somebody figures out some sort of a formula for combining a certain set of factors in order to predict earthquakes in California, China, or wherever, that is a very useful kind of tool. You cannot just throw it in with whatever you feel like. If somebody has done some empirical work to determine the set of factors that is useful and predictive, right now, that is the best we know. If you are going to say that "selection" of factors is protected as a compilation, then only one person gets to use this highly functional work. I do not think that is the state of copyright law today. The question is whether you can see the analogies between the earthquake predictors and the *Kregos* situation.

This *Kregos* stuff is kind of trivial. So, we say, oh, well, it is not very important; it is gambling and it is illegal in most places, so we do not worry about it. But I think the problem is really deeper than that.

Take the Dow Jones Industrial Average. That might not be a very accurate predictor of what the economy is doing or what the stock mar-

ket is doing, but it is somebody's best shot at it and now it has become a standard. You can say, well, someone else can choose thirty more corporations if he or she wants to, there is no need to choose the Dow Jones companies. Sure, you can always choose others, but maybe theirs are the best. We just do not know, and that is why we should not protect it with copyright, especially not for seventy-five or a hundred years. That is too long for functional works.

MR. ODOZYNSKI: In response, I guess maybe I misconstrued what Professor Karjala was saying. But the fact that Kregos' compilation had facts and had functional aspects, does not deprive it of copyrightability any more than any other work that has some functional aspects.

The whole debate in *Kregos* was about whether or not it was, in fact, determinable that—first of all, Kregos did not have a formula and he did not suggest a formula, but even if he had hypothesized a formula, the debate was about whether or not Kregos' formula or Kregos' compilation of statistics were, in fact, accurate enough or particular enough to be the only ones that were useful. In fact, what they really were, were his opinion that these statistics somehow had relevance to picking the outcome of a baseball game.

PROFESSOR KARJALA: That is true of any assumption—

MR. ODOZYNSKI: No—

PROFESSOR KARJALA: —with any scientist.

MR. ODOZYNSKI: No, that is not true. That is not true with the formula that says E equals MC squared because although we may doubt about whether in fact it is, in fact, scientifically true, or demonstrably scientifically true, we believe it, and there is a limited range of expression with which we express that underlying idea.

In fact, if Kregos' idea were appropriately and properly that these statistics, that statistics are useful to predict the outcome of a baseball game, then as a majority says, I suppose some tongue in cheek, if you assume there are only twenty available statistics to characterize pitcher performance, you can take nine of those in 167,000 different ways. So, in fact, to render exclusively Kregos' one of 167,000 now is not much of an exclusive right, especially in view of the fact that there is no way to determine that these nine are better than any other nine.

PROFESSOR KARJALA: We can make that number one in a billion, by adding more statistics. What time did the pitcher get up on the morning that he pitched?

MR. ODOZYNSKI: Sure.

PROFESSOR KARJALA: Was the sun shining? And a whole bunch of other things. You can keep on expanding this thing forever.

You can choose all you want. It can be one in a trillion. You can make the number as small as you want.

MR. ODOZYNSKI: They are functional only to the extent that they are accurate or useful because otherwise they are conjecture and opinion and susceptible to any number of ways of expression. If we, rather than apply what the individual thinks are our own views of what ought to be and what ought not to be copyrightable, but in fact apply copyright doctrine, i.e., idea/expression merger, then you say there is an unlimited or a very large number of ways of expressing this idea.

PROFESSOR LITMAN: Is this a system?

MR. ODOZYNSKI: No, it is not a system.

PROFESSOR LITMAN: Oh, it is not.

MR. ODOZYNSKI: He has suggested a system. A system would be as Professor Karjala has suggested, you take ten percent of his earned run average, fifteen percent of his won/loss record, you know ten percent of time of the day, ten percent of his record against that team, and you have a formula and you have a quantity. What he has is a collection of statistical items. He does not have a system.

PROFESSOR LITMAN: Is it a system to just obtain the results if it does not predict them with that kind of specificity?

MR. ODOZYNSKI: How would you define a system? What is it? All he has is a suggestion that nine statistics are useful. If he were to have system, he would tell you how to divide them and how to make a determination. He has not even gone so far as to tell you how to make a determination. That is, you take these nine statistics with respect to this pitcher, these nine with respect to this pitcher, and he does not even tell you enough to allow you to make a determination as to who should win on that day. So, how you can characterize that as a system is a little difficult for me to perceive.

THE CHAIRMAN: Jessica Litman was interjecting some comments there or had some comments.

PROFESSOR LITMAN: Only the comment, it seemed to me that we were illustrating the point that Dennis [Karjala] was making earlier that somehow we were looking at: "Is this creative, are there other ways to say it," and not at some of the other limitations we have on copyrightable subject matter, and that this is a system for predicting who is going to win baseball games, or at least it is sold as being useful for helping people to ascertain which of two teams is more likely to win.

MR. ODOZYNSKI: I think it would be a component of system, but standing by itself I do not see how it does.

PROFESSOR KARJALA: The Court in *Baker v. Selden* never asked whether that accounting system was a good system or not, and

there are undoubtedly many, many ways of keeping account books, both before and after *Baker v. Selden*. The court never inquired into that. This is a way of keeping records. Those sheets were, what were they? If you put the numbers in the right way, they were useful for keeping accounts. Maybe there is an infinite number of ways you can put numbers on paper to keep track of the records of a company. The court never asked that question. The work is not copyrightable because it is a functional system.

MR. HIX: I cannot let it close without asking this. Was the formula not successful? Does the formula predict with any statistical—

MR. ODOZYNSKI: There is no formula.

MR. HIX: Did it come out with useful knowledge being that I could bet on?

PROFESSOR KARJALA: Some people used it.

MR. HIX: Should be able to statistically determine whether it was of any value whatsoever since that is abstracted.

THE CHAIRMAN: If I could ask a question. Are these nine categories that were listed in this form without any reference as to which were the more important categories or the less important categories and no formula for aggregating them, just nine categories?

MR. ODOZYNSKI: No formula. These were just a compilation of statistical items. And this is my argument, there was no system. There was no way as in, for example, *Baker v. Selden*, where either the text in conjunction with the forms or reading the forms alone were sufficiently explanative to tell you how to operate the accounting system. This simply does not occur, and there is no way to divine it on the simple setting forth of nine statistics. It simply is not a system.

PROFESSOR KARJALA: Let me make it clear for everyone. Maybe some people have not read the *Kregos* case. We are not talking about the actual numbers that appeared in the boxes. Those were recalculated every day by both sides.

We are talking about simply the form, which categories are you using. That is the alleged compilation in this case and that is what I am alleging is a system for presenting information and therefore excluded by section 102. The argument is not over the actual data that goes in there on a specific game on a specific day. That is not what we are talking about.

THE CHAIRMAN: I take it, Dennis [Karjala], that you are also not concerned these nine categories there were ones that this person set forth as being the ones that are most likely to be useful?

PROFESSOR KARJALA: I think he decided that they were the ones most likely to be useful and reportable in the limited space provided by the newspaper. This form had percolated through the test of

use. A number of pitching forms that had been used in the past, and Kregos used more categories than most of the prior people had used. He invented one new category and there was a slight rearrangement in presentation. So what you see here in all these pitching forms is what you always see as useful products improve: people will add a little bell here and a whistle there and things just get better. His form might not be the ultimate one. Somebody else may come along and find a tenth statistic that he can add or get rid of one and put another one in, and it may be better. I am not saying that he had the best by any means, but it is all part of a gradual progression.

MR. ODOZYNSKI: What the court, in fact, said that there was one element in his compilation that was never used anyplace else. If, in fact, there was another compilation that had eight of the nine elements identically, and he had added only one, then I suppose I would have to entertain that what he did, then, was not creative because it only differed by one. But, in fact, what he had was a compilation of nine elements, only one of which the court identified as never being used by anybody any place. Now how that compilation differed in its entire makeup from other compilations, I just do not know.

PROFESSOR KARJALA: It is in the district court's opinion—very little, if I remember.

PROFESSOR LANGE: This is not fair, but I would love to hear Kurt Steele on this debate. Do you have a position on this?

MR. STEELE: Dennis [Karjala], to what degree are you comforted by the fact that, as I recall, the court in *Kregos* said that a very small change in the statistical format would render the second work non-infringing? I think you are quite right when you point out we are not talking about the actual data elements but the scheme or organizational format for presenting them. But the *Kregos* court found only a thin layer of protection for that.

PROFESSOR KARJALA: That, I think, is a very good example of a really fundamental misconception of copyright by the court, which misconstrued copyrightability with infringement. The court seems to make small changes in the Kregos form, you yourself might have a new work that would be copyright protected. It then assumes that if you have a new copyright protected work, that work also would not infringe, which, of course, is nonsense. Any derivative work, almost by definition, if it is just a small change, would infringe the work on which it is based, unless the work on which it is based is in the public domain already. So the *Kregos* court just had to be wrong on that because it violates all basic copyright principles.

But I should indicate in fairness that even the dissent, in *Kregos*, basically said, Well, if Kregos were the first person to come along and

use pitching statistics to the predict the outcome of baseball games, I might have to recognize a copyright." That is wrong, too. My view says this is a functional tool and it is a 102(b) system. Section 102(b) excludes it from protection.

You said the copyright is thin, but even with a thin copyright, we have a problem because we do not know when we are at the optimal stage. At the end of this progressive line of development, what nine statistics are going to be the ones that these gamblers really need? Kregos may actually be there. Maybe this is it, and if he is, then he is the last one, the one who finally puts that last piece in the puzzle. This is a puzzle that has been building up for years. Now somebody has put the last piece in—he has really got what the newspaper readers want—and he is the one who collects royalties on it for a hundred years.

MR. STEELE: I think *Kregos* is a very informing and basically correct case. If we buy the *Feist* position in order to establish copyrightability, minimal creativity need be found. I am persuaded that out of the enormous number of different ways of selecting and organizing pitching statistics, that the plaintiff's particular way of doing that did evidence the minimal creativity to be copyrightable.

Assuming that is the case, the issue switches to what is the scope of protection. I think the Court said quite rightfully, short of there being virtually identical copying of that scheme, there should be no protection, and that even small changes would make it non-infringable.

I guess Dennis [Karjala] and I would part company right up front. I think you are saying there is no copyrightability; I would say copyrightability but with thin protection.

MR. McDONALD: The question, I guess, I pose as I sit here and think about it, is what you think about the *Nation* decision, because, fundamentally, you had President Ford writing his reasons why he pardoned Nixon and certainly those writings are of historical importance. They certainly are writings that are historically based and the way he wrote them was certainly important. And, of course, the court there said that indeed, even though that was true, his manner of expression continued to be protected. If you take the equation, or take the argument in that discussion, that is going on here, is that not the same thing that you are saying, you did not like that decision?

PROFESSOR KARJALA: I am not going to have anything left to say tomorrow afternoon when I get up to talk. I addressed this briefly in my paper.

What I am arguing really on all this is that once we have something that is a protected work, there must be a balance in determining the scope of protection. We must balance functionality and factual in-

formation on one side against misappropriation-type piracy notions on the other.

I think the only thing I disagree with about the *Nation* decision was its emphasis on the unpublished nature of the work, rather than on more directly addressing what I think the court was really worried about, which was timing. It was the timing of the Nation's theft, not the actual taking, I think, that worried the Court. I personally believe that if the Nation had published what they did one week after Time Magazine had published its version, the Court would have found, and I think should have found, a fair use.

I think you can handle that case through a fair use analysis because we can give very limited protection if you recognize that protection is necessary just while the news is hot. In other words, under a fair use analysis, you are allowed to balance all the factors that are involved, including misappropriation, which favors protection and free use of factual information. The latter is very important in the long term. Historians, biographers, and scholars need access to that information sooner than seventy-five years, but they do not have to have it a week before it is published. They can wait a little while.

And I think we can use fair use to balance these factors. So I do not have any objection to the result in *Harper & Row*, but we have seen what I think is a terrible result of its emphasis on the unpublished nature of the work. Now we see that people who want to suppress the information forever, like Salinger, get away with it because of the Court's emphasis on the unpublished nature of the work.

So, we need to do some balancing. I would even give Kregos a little protection. The very last section in my paper deals with blank forms, and I give them protection against photocopying. Anyone ought to be free to use the same categories, but not to photocopy somebody's form for sale. At the very least, you ought to have to set your own type. I see no social policy reason for not giving that level of protection. But it is dangerous to go much beyond that level.

PROFESSOR RASKIND: Dennis [Karjala], one thing you said I would like you to clarify. Is functionality, as you use it, the predicate for defining system in 102(b); if something is functional then it limits the protection; is that correct?

PROFESSOR KARJALA: No, I do not think I can do that. There are several examples of functional works that are clearly protected by copyright, so you cannot just look at function. Computer programs are the best example. Computers programs are purely functional, so there is no doubt that we protect some functional works to some degree.

PROFESSOR RASKIND: Well, then, the question is how do you distinguish them. So if I give you this hypothetical. I will give you three objects in front of you: one of them is a Foundation Press' best seller, Gunther's constitutional law case book; the other is a telephone book, a yellow pages telephone book, privately made; and the third would be a LEXIS printout of a Supreme Court opinion or court of appeals opinion. Which of them is not equal? How does the functionality test work there? Which one of them is a function? You have got to state the function.

PROFESSOR KARJALA: None.

PROFESSOR RASKIND: How do you know that?

PROFESSOR KARJALA: I have got my own definition of functionality.

PROFESSOR RASKIND: That is the point. What is it?

PROFESSOR KARJALA: I adopt the Copyright Act's definition of a useful article. Basically, a useful article has an intrinsic utilitarian function or purpose other than to portray itself—

PROFESSOR RASKIND: If you ask Jerry Gunther, he would say I cannot teach copyright out of these other books.

PROFESSOR KARJALA: —other than to portray itself or to convey information.

So a casebook is not a useful art within that definition, and since I am writing the definition I will just tell you, my definition does not include Gunther's case book.

But I also think that is what the statutory definition says. It is not a useful article, but the scope of protection is thin—thinner protection than a Ken Kesey novel. That is standard copyright law; that is not me, although I happen to agree with it.

As for the Supreme Court opinion, we know Supreme Court opinions themselves are not protected. I suppose it is probably a fair use to print out one case; even if LEXIS has added some annotations. But dumping the whole LEXIS database into yours for competitive purposes, no, I do not think we should allow that, although you apparently could do it as far as the *Feist* opinion is concerned.

And what was your third example?

PROFESSOR RASKIND: Telephone yellow pages.

PROFESSOR KARJALA: At least you cannot photocopy it, in my view, but you can do almost anything else with the information it contains. I give reasons for all this in greater length in my paper.