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Open Discussion of Presentation by John P. McDonald, Esq.

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OPEN DISCUSSION

MR. CUTLER: I guess I am a little puzzled after listening to you as to what the test would be with regard to the databases, particularly if you are talking about a key element. What is your example of a key element of a database which you can take? Let's stay away, you know, from page numbers. That gets into obvious discussions.

MR. McDONALD: Page numbers. Jim [Schatz] told me the answer to that.

MR. CUTLER: What is your answer?

MR. McDONALD: Actually I think a whole new standard is going to emerge. I think there is going to be flesh put on the bones of selection, coordination, and arrangement. As things presently exist, selection, and arrangement are kind of the easy ones. People looking at something can readily ascertain what is there. They can say clearly this has been selected; there was some criteria to doing that and I understand what selection process took place.

Arrangement, arrangement when we think about a printed work becomes kind of easy. You can look at it and say here is how they arranged things. There is some criteria to doing that or there was some authorship to arranging that.

In the *Feist* case itself, while they used the word coordination fairly infrequently, they used it mostly when they were citing the statute or the definition of compilation. They did not really address coordination. And I think coordination, particularly, would be good in talking about electronic databases—take Dun & Bradstreet databases, for example. Within certain categories our objective is to obtain the universe of certain information and we work very hard to achieve that. Saying that we are trying to achieve the whole possibly blows us out of the water on selection. We are not making a selection, we are taking the whole.

In terms of arrangement, most of our databases are electronic. They do not have any fixed form except as they exist in the bits and bytes of the computer.

Coordination of the database, though, may be the answer. I do not know how many of you ever worked in a large database trying to construct it. You have to have a whole bunch of judgment criteria to go into it to make sure that when you say something is in column one, that all the things that are listed in column one have the same characteristics. You would have to make a bunch of judgments about that. You would have to make a bunch of judgments about what goes in rows so that each category or each avenue of data or statistics that you put into

them has comparable characteristics. And I think too when you begin looking for those comparable characteristics and the coordination associated with them, that that's where you will begin to find your answer.

I am not sure, but I suspect that aspect of it may be applicable to many of the software cases. I mean the question there—actually I should not wander into software because I do not know very much about it—I suspect that there is an element there that would be useful for people who do know more about it. But I suspect that there is going to emerge a criteria that begins to flesh out these elements and we will then go back to, if something is taken, is that something that is substantially similar. In a sense, coordination may be, if you think of a brick wall and you have the bricks as stacks, it may be the cement, the contributed authorship, that holds the thing together.

MR. CUTLER: What you are saying sounds an awful lot like a broken field. I think we ought to get into the software aspect because I think that is the danger zone in what you are proposing in the way of the test. There have to be—I cannot even remember the difference between the D&B credit reports and an [Equivat], but I am sure there are some.

MR. McDONALD: Yes. They deal in consumers and we do not.

MR. CUTLER: I mean the way they are organized and the information presented. I know we use two or three different business credit reports.

MR. McDONALD: You only need one, us.

MR. CUTLER: There is a basic format to the way it is logically laid out with all the information you ever wanted to know. Beyond that, is that what you are talking about, the way the report data is laid out?

MR. McDONALD: There is a neat dilemma. If something simply becomes the logical format, then it is not entitled to protection anyway. If you simply decide to do things alphabetically, you are not going to get much credit for alphabetizing.

One of the problems is that once you start doing something in a particular way and that way becomes adopted by the industry or the universe as the way to do it, the uniqueness of what you do goes away, and then they are saying, yeah, that should not be protected because that is the way everybody logically does it. That is a problem and you know I do not know how they are going to overcome that, but you probably will lose something there.

MR. METALITZ: What strikes me in both of these comments is about one of the post-*Feist* cases that I found most interesting, the *Key Publications* case, is that the test that the court seemed to be applying is a lot like a trademark test.

Ultimately, when you look at what had been taken from the one Chinatown directory and put in the other Chinatown directory, the court concluded the second one was not an infringement because no one would really come to that directory and confuse it with the first directory. It is almost a consumer confusion trademark-like standard. And that is what you are saying. When some system of arrangement becomes almost generic, then you lose the protection. But it seems to me that that really is not very satisfactory in terms of *Feist* because the thing that the consumer might notice, or is most prominent in that kind of question—does this directory look and feel like the other directory?—is really just arrangement.

And the strongest case for non-infringement in *Key Publications* was on arrangement because there were a number of categories that were quite different and only two or three categories were exactly the same in that entire directory. That allowed the court to gloss over the question of selection, which the previous speaker talked about, where one-sixth of the listings in the first directory had been taken and supplemented by only a few hundred additional.

So if you have that kind of look-and-feel test, it almost reads selection, in many cases, out of the question of scope of protection, to say nothing of the problem that we are left with in *Feist*. What is coordination? When is coordination taken? *Feist* does not tell us anything about that.

MR. McDONALD: Again I do apologize because I do not know very much about the local field case or standard, but to the extent that can be analogized to the *Key* case, the problem with the *Key* case is that they did not look at what was taken, they did not look at what would constitute the act of infringement. They looked at how it turned out after the fact. And so, to a certain extent, that begins to send a message; take whatever you want just so long as when you republish it you do something with it to make it look a little bit different. And that cannot be the right answer.

MR. CUTLER: Isn't that the substantial similarity, though, basic copyright test of expression?

MR. McDONALD: Sure it is. And the problem there, and that test arises mostly where you have something like a play or a book and it is hard to determine whether there is or exactly what the copying has been. It is part of how you determine whether there has been copying. But the first step is still to determine what was taken, how it was copied, I think.

MR. CUTLER: I still think that begs the question in the context of what you were saying to me in the beginning, that if you take certain elements of somebody else's work and scramble them up, and there

was, in fact, no substantial similarity then it is still a violation, and I think that gets past what John [Odozynski] said, copyright is a pretty thin form of protection. You are talking more about misappropriation, or I guess, I do not understand. You are talking about another concept.

MR. McDONALD: The violation, the infringement, is in the taking; it is in the reproducing. That is what the statute says.

MR. CUTLER: But if it is not substantially similar, how can there be a violation?

MR. McDONALD: That is what the statute says.

MR. METALITZ: It is because what is being taken is not the facts, what you are worried about is not the facts, but you are worried about the authorship. For example, in the *Chinatown* directories case, what if they had taken all the listings but just totally rearranged them so that to the consumer they looked quite unusual because, after all, one has two hundred sixty categories and the other has twenty-eight, and you never look in the same place for the same listing. It seems to me if the selection of facts must have been taken, it must be an infringement of copyright in the authorship of selection.

MR. CUTLER: Then it has to be on a substantial similarity in the selection. I would like to get back to what is a fact, which we spent a lot of time on today. I am sorry, but to the uninitiated normal person your telephone number and your address is a fact, is a fact, is a fact, is a fact no matter how hard somebody looks for it. And you are talking misappropriation, particularly when you had a monopoly position of the telephone company as the person who created it.

MR. ODOZYNSKI: I thought about this a little bit and I am not doing very well on it, but I left off one guideline on the infringement area and then a comment on substantial similarity.

The best I can come up with is to take a look at what the accused infringer has taken from the copyrighted work or the work purporting to be copyrighted, and then determine whether or not that standing alone in and of itself, would be copyrightable, applying all notions of copyright, including notions of originally and creativity and applying the idea of expression and functionality, and anything else you wanted to throw into the kettle. But if you have identified what the infringer has taken from you, from the purported copyright owner, and you have identified that work and determined that it standing alone was copyrightable, then I think you have got infringement. It is simplistic but I think that is the best I can do.

On the topic of substantial similarity, that issue arises in *Worth v. Selchow & Righter*, and I think if I understand what he is saying, it is inadequate to take a superficial look at an accused work, especially a compilation, and as in, for example, *Key Publications*. Galore's twenty-

eight categories do not look like Key Publications' two hundred sixty categories because there are only twenty-eight of them. That is not good enough; that is truly not to adequately cover, even the fact that the phrases used to articulate those categories may not be precisely the same, it is still inadequate. So that that sort of superficial look at substantial similarity will not work and it does not work with respect to any kind of work and I think it breaks down sooner with respect to works of compilation.

As an example, as I said earlier I think *Worth v. Selchow & Righter* was decided wrong, and the reason I think it was decided wrong was that recognizing what happened was Mr. Worth had a selection of four thousand facts. Now I do not know what criteria he used to select those facts. They may just be four thousand facts that titillated him and he hoped it would titillate his readers, but for whatever reason he engaged in selecting those facts, let's assume that that activity was sufficient to support copyrightability of that selection of four thousand.

One of the problems was that Selchow & Righter, although they took the four thousand facts, they articulated them differently thereafter. They were on the cards with colors and bells and whistles and all kinds of other things, but they expressed those facts somewhat differently, so it was easy for the court to say these are only four thousand and they do not even look the same.

What would have been required was the need to determine the essence of whatever the factual element was once and determine whether or not that would be retained in the Trivial Pursuit game. That is one point. And then look at and recognize that, likewise with respect to the compilations, copyrightability can emanate from selection. If his entire selection of four thousand facts was copyrightable because of whatever went on in that creative selection activity, that may be what happened, then if you decide that in the twelve hundred that they took there was still enough worth, peeling away all the extraneous expression and those twelve hundred of those four thousand were appropriate, then I think you have got copyright infringement.

And I think part of the problem is taking a superficial look at what was taken without recognizing what it is, in fact, that is subject to copyright.

MR. SCHATZ: I was going to respond to the effects on the facts in the telephone book situation. I was going to ask this question of Jack [McDonald] earlier, but frankly I thought it would be too nasty.

In the *BAPCO* case, the Court found this regarding coordination: "Secondly, BAPCO had to coordinate all the current informational components of a particular business into one complete business listing.

The name of the business had to be coordinated with the business' address and the business' phone number."

Now that is a pretty good description of the facts in the case and I think that little quote highlights exactly what I meant when I said that *Feist* is going to lead to some mighty unusual constructions by courts.

MR. CUTLER: Do you think that that is correct?

MR. SCHATZ: It is the law of the Eleventh Circuit.

MR. CUTLER: Do you think that is a smart decision?

MR. SCHATZ: Do I think that is a smart decision?

MR. CUTLER: Do you think that is copyrightable because they match the name of a business with its address?

MR. SCHATZ: Actually I was going to ask Jack that question, not try to answer the question.

MR. McDONALD: We have still got a motion before that circuit court.

MR. SCHATZ: You were not satisfied with that?

MR. McDONALD: You may not believe this, but the company authorized me to spend some more money to see if we could get that corrected. Like I said, I cannot see how that possibly matches up to the *Feist* decision as being correct even if they did substitute selection of coordination.

MR. SCHATZ: Basically, the Court discussed the coordination in that case and said that some coordination occurred.

MR. McDONALD: That is true. But when I went to law school the Supreme Court won out over the circuit court.

MR. SCHATZ: Right.

PROFESSOR KARJALA: I would like to ask Steve [Metalitz], John [Odozynski] and Jack [McDonald] a question on selection. Suppose someone has a copyright on the basis of selection. Steve [Metalitz] suggested that if you took—I cannot remember what the number was—if you took just a third or so, thirty percent, and added just a little more to it, I thought he implied that might be infringement. Correct me if that is wrong. Let me take a classic example. As I said, selection is a problem in many of these cases, because many selections are functional and when we are talking about things that go into a map or the *Kregos* forms, protection based upon originality of selection is a problem. But there are some selection cases I have no problem with. The classic example is one hundred of the best restaurants in Phoenix.

MR. ODOZYNSKI: That is ninety-eight too many.

PROFESSOR KARJALA: I am assuming there are a hundred good restaurants in Phoenix, which is probably questionable. Suppose somebody writes that book anyway and somebody else wants to write another. If she reads the first book she is stuck.

She goes around visiting all the restaurants in the first book plus others and ends up taking thirty (or forty or even fifty) from the first book and adding seventy more of her own. Her arrangement is different or else they are both in alphabetical order, or both adopt a standard arrangement by ethnicity or what have you. So there is no claim that she's taking any of the arrangement. It is only the selection that is at issue.

Is it an infringement to take thirty or forty in this case and to add to it, and if not, what is the distinction between that and the telephone book? I gather that, with respect to a white pages book, we can take any percentage we want and use it all because there is no copyright in the white pages at all.

But let's take a similar factual compilation that shows some selection, say the garden store addresses in a case like *Schroeder*, and you take thirty percent and add a bunch to it. Do any of you think that is infringement?

MR. ODOZYNSKI: First of all, I do not know what relevance the adding to it has to the copyright infringement. It seems to me to be irrelevant how much additional.

PROFESSOR KARJALA: Fair use at least.

MR. ODOZYNSKI: Maybe at least in an initial view, it seems that you may have taken some portion of a copyrighted work and then added something to it as a defense to infringement or something, so I do not know how that is.

PROFESSOR KARJALA: Is it selection? If the other guy selected one hundred and you're taking thirty, are you taking his selection?

MR. ODOZYNSKI: My tests for those things, in the hypothetical where you pose a list of one hundred best restaurants, even in Phoenix, I think especially in Phoenix, if you stay with that hypothetical because the selection is entirely subjective, let's assume it is entirely subjective, one person might have a different view; I think there is functionality in that selection. But let's assume there isn't any because what I would argue is that entire selection is part of the copyright, the copyright covers that entire selection so that by taking thirty of it, assuming that thirty would itself be copyrightable, constitutes an infringement. In other contexts, for example, *Kregos*, if the argument would have been made in *Kregos* was: If you are going to take nine statistics, six of them would have been common to anybody knowing anything about baseball and would have selected win/loss ratio, the earned run average, and so on, and those six would be common in any compilation of statistics in baseball. So we can agree on that. Maybe that aspect taken alone would not have supported a copyright in Kregos' compilation because

they were typically done in writing, mechanical, not hobbies. No one putting together a compilation would have excluded those six. So if someone had taken only those six, then clearly that is not a copyright infringement.

On the other hand, if one imparted copyrightability to the Kregos compilation of nine oddball statistics that only he was aware of, for example, average men on base over the last three innings of a baseball game, how many times do you win when you are leading by one run going into the sixth inning, statistics that are uncommon, if those additional three were part that imparted the copyrightability to his compilation of nine, then someone taking those three, even though three is less than six, in my view would have engaged in copyright infringement.

PROFESSOR LANGE: It seems to me, Dennis [Karjala], you give away more than you need to when you say that you only give thirty. What about this? Let's take a case like the one you have in mind. You have got the book, the hundred best restaurants in Phoenix, and I read it and I say, hmm, nice idea commercially, I think I will do something with this. And the first thing I do is I go to all one hundred restaurants. I have a dinner there and in each case I say, wow, great dinner. Then I publish the list under the heading "100 Great Restaurants in Phoenix." Am I permitted to do that? It seems to me obviously that I am, because the only thing that I am doing is taking the fact that there are one hundred great restaurants in Phoenix. You would agree, would you not, that I am entitled to take the one hundred great restaurants in Phoenix?

PROFESSOR KARJALA: I think that is clearly a copyright violation.

PROFESSOR LANGE: It clearly is not a copyright violation.

PROFESSOR KARJALA: Tell me why it is not.

PROFESSOR LANGE: And that is why I want to get us squared off. How indeed could it possibly be a copyright violation for me to conclude independently, as I have just proposed that I have done, that there are one hundred great restaurants in Phoenix and to share the information which I have compiled and selected and coordinated and arranged with others? That I was driven to do so by reading your book in which you additionally contend judgment, that I do not have to challenge, that these are not just great restaurants but the best is a datum, but not a persuasive datum, of course, except in any court that I can think of, but not under any theory that I know in copyright.

What am I taking that belongs to you? I will tell you what I am taking is what I have to take in order to be able to make use of those facts, to deal with them in the fashion that I have in mind.

The problem with the position that you are defending, I think, is that it really seems to me to violate Locke's dictum, Locke's rule, the rule that justifies the recognition of property that sort of lies beneath all this discussion, which is that it is fair to appropriate property when what remains is sufficient and as good, and indeed that cannot be said in the case. I know I have been joined by my friend Wendy Gordon so I expect to hear from her momentarily. But it seems to me the Lockean requirement cannot be met in the case that we envision, and, therefore, the entire justification for copyright in this setting has to fail. I think it has to fail.

PROFESSOR KARJALA: All I can say is, if this claim fails, what do you mean by creativity of the selection? This is a classic case. If this one fails, it makes no sense to talk about the copyright of any compilation, at least a copyright based on creative selection.

PROFESSOR GORDON: I missed your example. He is not talking about arrangements. He is just titling his book there are a hundred great restaurants so that all he is doing is making his own decision that they're great and he can argue he is not taking your selectivity for he is not claiming that these are greater than anything else.

PROFESSOR LANGE: I am taking nothing for granted.

PROFESSOR KARJALA: Wendy, I am not assuming he is taking the title or anything else.

PROFESSOR GORDON: No, I am not talking about title. You are implicitly arguing that he is borrowing your selection. If he had indeed made the same claim as you, without performing the work as you, he would indeed arguably be taking the selection, if he did not go to all of restaurants and claimed essentially that he had, by making a value judgment as comparative. He is not claiming a value judgment as comparative. He is making a value judgment that is not comparative: "I've gone to these restaurants and they're good."

Now he may have learned that they were good from you, and, in fact, your book amounts to a statement that Dennis Karjala thinks they are good. That's fact. He went to find out if David Lange thinks they're good. He found that out. That's a fact.

And getting back to your own paper, you are concerned with the protection of piracy. The key to piracy implicit in—

PROFESSOR KARJALA: Protection against piracy.

PROFESSOR GORDON: Interesting distinction. Thank you. A key to the notion of piracy is low cost copying. That is what makes it tempting, that is what makes it profitable, and that is also what makes it possible for the copyist to undersell the original guy. If David Lange has really gone to all those restaurants, that is not cheap. It is no

longer piracy. There is not a clear case of it. Incentives are not so sharply—

PROFESSOR KARJALA: I do not say the copyright protects only against piracy and I am not saying this is piracy. I still say it infringes on the terms of the statute.

PROFESSOR GORDON: It arguably does not take selection and if it does not, it is not piracy under your own notion.

PROFESSOR KARJALA: We have someone a lot more capable.

MR. CARSON: We seem to be caught up in the example. Maybe we just have not explored enough facts in the example. But if, in fact, Dennis visited five hundred restaurants in Phoenix to come up with his list of one hundred, and if in fact you only visited the one hundred that he visited and published the same list, I think you have a problem.

If you visited five hundred restaurants in Phoenix and independently came to the same conclusion—yes, these one hundred restaurants are really the great restaurants in Phoenix—I think you have taken his selection. If all you have done is to go to the selection that he has published and republish it, I think you have infringed his copyright.

PROFESSOR LANGE: All I have done is said that there are one hundred great restaurants.

MR. CARSON: You changed the title. That is the only thing you did.

PROFESSOR GORDON: He [Karjala], is making a comparative claim.

PROFESSOR LANGE: I have changed everything about his book. I have change the premise of his book.

MR. CARSON: You have not changed the contents of the book. You have infringed the contents of his book one hundred percent.

PROFESSOR LANGE: It seems to me that it is hard to maintain that position since he claims that these are the best as to which you must visit five hundred, a thousand, I do not know how many there were. But all I need to know is where a hundred great restaurants are. I can rely on him for that as well as I can rely on myself running around to a thousand, and it seems to me that I am permitted exactly to do that both by the general theory of copyright, by the definition of compilation and the checks in sections 102 and 103 and by *Feist*.

MR. CARSON: I think you can rely on him for your dining choices but not for your authorship and publishing choices.

MR. ODOZYNSKI: I agree with the point made about if Dennis [Karjala] visited five hundred restaurants, assuming there are a hundred good ones, and I say that glibly, there are, then I think misappropriation has inadvertently occurred and maybe in a real subtle way if in fact the second comer does not visit the five hundred, but getting the

headstart of the reduced list down to a hundred. Okay. So I think that happened.

With respect to what you denominate the book, whether you call it the five hundred or one hundred or one hundred best in Phoenix, I am not really sure how that is relevant. What I thought would have been relevant was the fact having visited those restaurants, now ignoring the fact that you engaged in some misappropriation of selection by only visiting the hundred, that someone else's subjective judgment, that [Professor Karjala's] has been supplanted with someone else's, who may be, in fact, an author himself. Only he has, in fact, made a subjective judgment that those are the one hundred best restaurants in Phoenix, as implausible as that may be that two people would arrive at the same list of one hundred.

PROFESSOR LANGE: Suppose I retitled the name of my book so it reads this way: A Treatise Wherein I Explore the Underlying Implicit Assumption in the List Purporting to be the One Hundred Best Restaurants in Phoenix, Which Is, To-wit: That There Are At Least One Hundred Good Restaurants; and then publish the list, endorsing in each case, your view that they, at least by implication, necessarily are good restaurants. Will then I be able to take your contents without doing anything more?

PROFESSOR KARJALA: It could be a review, couldn't it? Doctrine of fair use? I do not really want to stand or fall on this particular example. So I will let those who are more eager for protection defend the copyright here.

MR. STEELE: I would like to go back to something I said this morning. It seems to me that this analysis that we are undertaking is something much more than loosey-goosey and touch-and-feel, although it has that coloring to it. The point I made this morning is, I think, we need to look at both the selection, coordination, arrangement as well as type of "facts" or informational elements we are dealing with.

We started this discussion by talking about, in *Feist* parlance, raw facts. Let's not debate too long about how raw telephone listings are. Some of us will concede that they have a certain raw quality to them. The point is that there are different kinds of facts. Some are more value-added or contain more judgment or opinion than others.

A value-added example is bond credit ratings. Although XYZ company's bonds may have an "AA" credit rating, is that rating just a "fact." Although it is a fact that such rating was assigned to that company, behind that rating is an enormous amount of judgment and, I would argue, expression. I believe the more a fact is "clothed" with judgmental expression, the less important are the selection, coordination, and arrangement aspects.

MR. CUTLER: Is not the value—the problem with your example is nobody really wants to read in the paper that Baxter Labs is double A. If I said that, no one on earth would care. What matters is who says it and the fact that your organization does all this work, and all this research is what goes behind it and people paying them for the confidential reports and that is the only way to get it. But that is not a copyright issue.

MR. STEELE: I think the example you just raised is right. What happens, though, if a bond rating company that publishes thousands of ratings a year sells a database of them, and an information redistributor company comes along and wants to distribute the database or a subset of it using the company's trademark? Setting aside the trademark law issues, can they do that? I would argue they cannot, because there is a very high value-added expression even before we consider selection, coordination and arrangement.

MR. CUTLER: You have finally gotten over that level of expression, I know expression when I see it. Yes, that is expression.

MR. McDONALD: I think to a certain extent this whole discussion sort of illustrates one of the points I was trying to make in my talk, what your starting point post-*Feist* really has to be a discussion of.

In the example of the restaurants, what was the contributed authorship? Certainly the name of the restaurant and its address are facts that preexisted the publishing of the list, and the question you have to ask yourself is what is it the guy who published the first list contributed. What is his authorship? What did he bring to the table? Once you have tried to step up and address that, then you are capable of determining whether somebody has infringed him.

Since one of our companies does things that puts As and Bs, a real sensitive issue, and it is one that we work hard at. And the answer is, as Kurt [Steele] said, that is our expression. It represents judgments that we have imposed on to come up with, and that number is expression in its purest form. Certainly we and that other company, disagree from time to time.

MR. STEELE: What happens if your bond ratings are not very good, is that still a freedom of expression?

PROFESSOR REICHMAN: I just want to interject something, the inability of the microanalysis to solve the problem simply confirms that the problem is initially one of macroanalysis and the kind of economics that we are using.

The economics of copyright law makes a lot of sense if you are talking about personal expression and you are going to track that personal expression from market saving to market saving, because you are suspending the normal rules of competition and you are saying, well,

you cannot make me appear somewhere that I do not want to appear and you are going to have to pay me for that kind of appearance. That is a whacko system of economics that was put there because we agree we are not going to get in the way of the general products market and the subsidiary products market, and we have this new kind of product, it is an information product that we did not have before.

The problem is that you are always using these tools with the economics of copyright. When we are talking about tools, historically, something I am going to talk about tomorrow, historically the protection of tools operates on an entirely different concept of economics. It is an entirely different concept. It does not give you this broad derivative work right that's going to track you for market segment, it does not give you all kind of equivalents. It gives you a very narrow constant equivalent and it has a strong exhaustion principle, and so on.

I just think that you want to, before you get lost forever in these basic examples, you have got to think about what paradigms you are going to apply and what kind of economics you are going to reach with them. And when you say property, calling it property or saying it is not property does not solve the problem. What do you want to do with this property right or this trade regulation? What kind of economic result are you trying to achieve? You are not going solve it from the bottom up, I do not think.

PROFESSOR LANGE: Could I just add one thing to that? I think added to that, with which I agree entirely, I would offer this proposition as well. That at the macro level you have got to decide how you are going to resolve issues of margin when you do not know which way you want to go. That is why I think there is such utility in Jack McDonald's point that *Feist*, what *Feist* may have done, that is pregnant with meaning yet to be experienced, is reverse or shift the burden of proof.

In general in this field we suppose that burden of proof is going to be on the defendant once something looking like striking similarity is established. Actually, I think it may now be the other way or may be moving in the other direction. And that is an important issue to address and to decide as to how you want it to run.

For my own part, I would be willing to address the prospect of thin copyright that appeals to Kurt Steele, I think. If you bore his benefit of the burden of proof, it would be more on you to show what that thin copyright consisted of and why, persuasively, with clear delineation of it I have taken it. I tend to think that would not be a bad or unjust system. But I would know then.

I would be content, I think, to know that in cases where the outcome was in doubt, where, in effect, you really could not show what it

was that I had taken because of the very thinness, you would lose, and I would be free to go ahead and express my take on the whatever, because at this point the copyright could work across the board that way. I think that would be a perfectly satisfactory system, one that in a long-term would respond to a lot of the problems that you really face when you get down into these microanalyses.

PROFESSOR GORDON: I found the double A bond rating example very intriguing. Let me just give you some preliminary thoughts about that.

First, I think it is important to distinguish legal doctrine from economics. There are two different places, at least, where the question of whether or not something is "fact" can be important. One is the main issue of copyrightability, but the second is in the question of what counts as an infringing use.

Remember Judge Leval stated he felt like salami on the cutting edge of the law. Well, the thing that got him into trouble with the Second Circuit, anyway, was that he had argued that when you're quoting somebody else's work as a fact, for example, where a biographer is quoting L. Ron Hubbard's diary for the purpose of letting the world know Hubbard wrote something that itself reflects on Hubbard's character, such quotation should be allowed. That is: if you are using something as fact, even though in another context it might be copyrightable expression, you should be allowed to do so; that issue should be treated differently than quoting language and using it for the same purposes as the original author did.

The thing I find intriguing about the double A rating example is that you went pretty far in convincing me that it was indeed expression. You did not go very far in convincing me that such a characterization is going to do you much good, however, because most persons who quote the rating will be doing it for the point of saying, it is a fact that Kurt Steele's company rates this double A. So I am not sure exactly how to handle that—I do admit that Judge Leval's view did not prevail, but I think it is important to recognize that there is a difference between replicating authorship for the same purpose as the original author and making a comment about, or a report about, what had happened previously. And just one example before I turn it back to you.

In music it has long been a practice to quote from prior works of all kinds; usually, but not always, they are public domain. Anybody listening knows what is being quoted, or at least that seems to be the intent in classical music.

Where a composer or author is using something in a context where she is saying to a listener or reader, "remember this?," that is a little different from presenting the material without that *frame* of context.

And similarly when David [Lange] says, "this is Dennis Karjala's judgment and I happen to agree with it, or when I say "this bond company is rated double A, Kurt Steele told me," we are pointing to something that exists in the world. The distinction is a little bit like one that is important in the operation of the hearsay rule.

Heresay doctrine recognizes a very fundamental distinction between testifying as to what somebody said for the purpose of proving the truth of the matter asserted—something you are not allowed to do, unless you have got a hearsay exception—and, on the other hand, reporting what somebody said merely to show that it was said, to explain a reaction or a sequence of events on the day in question. The second kind of testimony is not hearsay at all. It is reporting a fact and that distinction is a real one. That is the problem I see with the contention you are raising. I do not have a solution.

MR. STEELE: I agree with what you are saying.

The example I was using was a bond rating in a compilation context. An individual rating is either in the public domain or can be "fairly" used.

That should be contrasted to a compilation of, for example, four thousand ratings published in 1990. Can someone redistribute them for commercial purposes? Can they redistribute two thousand or one thousand ratings? As I have said before, I believe you have to look at both the individual informational elements in the compilation in terms of how much value-added expression there is as well as selection, coordination, and arrangement of the compilation. Clearly, individual informational elements have very little or no protectability.