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Open Discussion of Paper by J.H. Reichman

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OPEN DISCUSSION

PROFESSOR LANGE: This is so remarkably rich that it is hard to know how to begin to comment. Let me say two things that come at once to mind. The first is that the derivative works problem that you have in mind surely does play a major role in the problems that we are meeting here today to discuss. But it is not merely here that the derivative works right is a problem, or is it really merely the derivative works right itself? It also plays itself out in infringement theory, which would have to be changed correspondingly as well in order, were it to be addressed as the problem that it is, in order to bring about the change that you have in mind, because, of course, now we just have to borrow Mel Nimmer's language for it. We cannot continue to recognize comprehensive nonliteral similarity without encountering exactly the problem that you do have in mind. So it is a very comprehensive and recurring encounter in copyright law which could be corrected, no doubt, through a serious modification to the organic law that you have in mind and mean to propose. And I assume probably, reality being what it is, that in one fashion or another, we will move in the direction that you and Dennis [Karjala] and Ray [Patterson] and I think Jessica [Litman] envision. I do not have profound misgivings about that because it is, after all, a system that we have lived with for some time and we do have antecedents that we can use and that you have done a magnificent, really magnificent is not too strong a word to use, a magnificent job of elaborating how we might make that approach.

I just want to close my preliminary response, however, by saying that I think that we may underestimate the utility in the Coasean model as how to transact business among us too quickly when we prefer this increasing, and now newly elaborate, regulatory scheme to the kinds of examples that would begin to manifest themselves in a world ordered in this other fashion. Because when I think about contract law with its manifold problems and manifest problems, I nonetheless can envision no setting in which I would not prefer contract models to the regulatory model, so long as what usually happens when the contract model is followed in important settings were not permitted to happen, which is that the contract model would then become augmented at the instance of one pressure group or another by small change regulatory schemes that would then have the effect of actually nullifying the way in which contracts work in a very large way. Let me call into play the example that the motion picture industry faces in the rental market for its works. Now this may seem distant from our concern, but as an analog, I think it is not useless. The industry tries to make use in what is,

in any event, an almost utterly feckless way of contractual limitations on the reproduction of copies of works which are circulated through rental markets. It is an almost utterly feckless kind of limitation because, despite the fact that every time you put the cassette into your player and scroll up the credits you see first this FBI warning that assures you in solemn and absolutely empty tones that you will be investigated by the FBI should you copy the work, no one—well, I should not say no one because I actually know a few people that do—but very few people pay the least attention to that at all. And this is so, even though it is augmented by—the truth of the matter is that in contract terms, when you get down to them, where the terms do not make sense and that is the point I want to make, where they do not, in fact, make sense *inter partes*, what then arises is a canon of construction of contracts that had its origins in the late thirties when the studio system in Hollywood was at its heyday. It is the canon of construction that when you get down to it, a contract is something that we can renegotiate, and it has, in short, very little binding effect at all among parties who do not think themselves suitably served in a continuing way. It would be a hell of a cold day, for example, before Paul Sheils is able to pursue the contract in enough forums to make it work, except in those settings in which its effect plays itself out very nicely. I guess, in short, if I could choose, I would rather have that setting than the one you envision, though the one you envision is humane, intelligent, and brilliant, and well suited in regulatory terms to what the need appears to be.

PROFESSOR REICHMAN: David [Lange], the observation is really very well taken. I think that some of you know that Randy Davis, Mitchell Kapor, Pam Samuelson, and I are working on a practical model, and we would have to be prepared to show that it was better or as good as any other model influenced by a Coasean calculus. And one of the beauties of the modified copyright approach is that it does enable the market to determine value; it is a very soft form of protection. Therefore, it should interfere as little as possible with the overlay of Coasean thinking and the positive aspects of that approach. We do think, though, that a pure Coasean analysis would be insufficient, if you mean by that a market totally devoid of intellectual property protection. Most of the innovators' venture capital would not follow a pure Coasean system in our view.

MR. SHEILS: Jerry [Reichman], I would just like to make an observation on behalf of the online database proprietors that may be in the room. I think that comments by Marybeth [Peters] this morning and you this morning and Jessica [Litman] yesterday pose an interesting dilemma for us. I think David Lange's comment was trying to get at: Should an online database proprietor, faced with the uncertainties

of registering of factual compilations in the Copyright Office and potentially disastrous results of having it rejected, and the problems you raised this morning with respect to charges of copyright abuse or copyright misuse in the form of license agreement, abandon copyright as a form of protection and simply rely on contract law?

PROFESSOR REICHMAN: My answer would vary depending on whether you want a theoretical or practical perspective. From a theoretical perspective, one need not assume that the state will continue to allow unlimited freedom of contract in this area. If I am not mistaken, the European Community will favor private and educational uses of noncopyrightable databases under its proposed Directive, for example.

As a practical matter, what would I advise the industry to do? I would not advise them to abandon copyright when they could get it, but I would advise them to exercise restraint and avoid the kind of abuses I heard about during the OTA Advisory Board meetings this year. We had a prominent librarian who was complaining about the number and magnitude of these abuses and the amount of time and resources and personnel it would take to negotiate license agreements if they were to resist them and not just sign on the dotted line. I would say, as I think David Lange or somebody pointed out yesterday, doing the things that you are doing is consistent with your job as lawyers, which is to protect the proprietary values of the gatherer of the information.

I do believe you ought to think a lot about the implications for research of what you are doing, however, and about blanket licensing in the libraries, for example, and about not going "per use" at every opportunity. In sum, do not extract all that the maximum bargaining power could temporarily yield, lest it boomerang against you when the librarians' protests reach the congressional committees. I have not seen enough of the present contracts to form a more detailed opinion, but I have seen some examples that suggest certain contractual clauses, if imposed on educational institution, will cause research costs to rise enormously.

MR. SHEILS: I understand the restrictions and obligations on the proprietors to create reasonable and fair restrictions. My concern is whether or not we have concluded that copyright is a dangerous thing for us to try to claim and that we should instead rely exclusively on contract and not try to copyright these databases.

PROFESSOR REICHMAN: If it is copyrightable, relying or not relying on the copyright will not change the public's rights under the copyright laws, so the tension is still there. If I can claim that your work is copyrightable and subject to my claim for fair use, I am going to assert it whether you registered it or not. This follows in part from

the changes under the 1976 Act, especially the automatic copyright principle. Now, you may try to impose other rights on me, and I would come back to you and say, look, this is copyrightable, the copyright laws give me this, and your clause is inconsistent with my rights—so what about it, Your Honor?

MR. SHEILS: I think that raises the issue though. To the extent that I am not copyrighting my work and do not claim a copyright on my work, do I have better protection for my use restrictions?

MS. PETERS: You have it. If it is copyrightable, you have got it. It does not matter whether you register it or not.

PROFESSOR REICHMAN: It is not like a patent.

MS. PETERS: As a practical matter, as I said, if you want to get to the Copyright Office, it is very easy to do that by adding additional material, and you know the magic words. The magic words are judgment. You know, you can play that game. I do not think that is the issue.

PROFESSOR REICHMAN: Your approach is very sound from the patent perspective. Often there are very good reasons not to go into patent law even when you can get the patent because there are all of these tricky hang-ups and you really can not avoid them. Provided you have got the contracts and you are controlling, there are very good reasons. This is very new area. We do not know the answer, but I do not think you can avoid somebody's claim for copyright. They are going to come in on their copyright rights whether you claimed it or not, because the statute's concept is that "copyright subsists from creation," you do not have to do anything to perfect it; you have got it, but so do we.

THE CHAIRMAN: Paul [Sheils], is your question one in an infringement context of whether you bring in a claim for copyright infringement?

MR. SHEILS: No. It is trying to increase the validity and enforceability of my contract. I want it to be protected against copyright misuse claims.

THE CHAIRMAN: Did that not come up in the infringement context where you have a question of: Do I file a contract claim and a copyright claim or just a contract claim and because the latter is stronger because I do not have a copyright clouding the issue?

MR. SHEILS: It could be that, or it could be simply a response to someone objecting to the enforceability of the contract based upon my misuse of the copyright.

PROFESSOR LANGE: Could I just weigh in on Paul Sheils' side of this sort of unfolding hypothesis. If you are correct in your thinking, as I think you are that under 102 if you have it, you have got it, and

that then changes the contract picture, which is what I really have some doubt on. It seems to me that his out is simply formally abandon copyright which he is quite free to do, at which point he does not have it. So, that if indeed he concludes that he wants to be out of the copyright regime, in the way that you have in mind that continuing—

PROFESSOR REICHMAN: He dedicates it.

PROFESSOR LANGE: Right. He dedicates it. He dedicates it formally at the moment of its creation and continuously every morning as he goes to his office.

PROFESSOR LITMAN: Then he has dedicated it to the public domain.

PROFESSOR LANGE: Precisely, but that is exactly where we begin. Then we are dealing with public domain works as to which it happens. You understand he has to have some additional nexus in order to make his contract claim work at all, and that is precisely where his game begins.

PROFESSOR KARJALA: Possession.

PROFESSOR LANGE: Right. I think at that point the appearance of weight in, for example, the fair use claim. I mean you have got even more fair use; you have got the whole damn work. You cannot get it unless you will deal with him, and you will deal with him or not depending on whether or not his contract is fair, and so forth. If it is not, then somebody else, probably Kurt Steele I judge from hearing him, will come in and deal with it himself or somebody will and then I will do a deal with him. I do not know why in theory that is not—

PROFESSOR REICHMAN: Empirically is it going to turn out like that, anybody else can just up and do it? I doubt the market would be as open as that.

PROFESSOR LANGE: That is the problem, Jerry [Reichman], that I think you address, by implication when you say that you are engaged in an empirical inquiry to that question. I do not know the answer, but then I have never lived under anything but a copyright dominant regime. I do not know, in fact, whether that would happen, but certainly Ronald Coase would suggest that it would happen.

MR. SPIEGEL: I would like to extend that a little bit and ask Professor Reichman a question. You paint a picture in your talk which I think we can all imagine could be pretty frightening. If, in fact, the technology were used to limit access to huge amounts of information without an overriding scheme to ensure that that information were in some way, shape, manner, or form, made available to everyone, you could end up with a new type of class society—those with access and those without. Do you think that there is some underlying constitutional limitation to that restriction?

PROFESSOR REICHMAN: Professor Patterson would almost certainly believe there is. I do not know. I think we would like to believe there is. I am less sure, maybe because I went to law school in a legal realist period. I get nervous about the weight of older decisions on newer decisions. I think there is a lot of room there for manipulation so I am just less sure. I think it raises very serious constitutional problems that could lead to constitutionally manipulated solutions. Whether they are inevitable is something else. The fact remains that the empirical reality is exactly as you have described it. We have not faced this problem. Before we had the printing press, what did we have? There is actually a prize-winning French essay—I cannot remember the name—that goes back and looks at the origins of copyright law in Roman law.

PROFESSOR LANGE: I cannot remember her name but she talks about the scribal culture. Is that the work that you have in mind?

PROFESSOR REICHMAN: Scribal culture.

PROFESSOR LANGE: That is interesting that you should raise that, Jerry, because when she talks about—I cannot remember her name.

PROFESSOR GORDON: Is it the Red Roses copyright paper by Lacey?

PROFESSOR LANGE: No. That is sort of a narrow—

PROFESSOR REICHMAN: It is a French National Research Counsel prize-winning thesis.

PROFESSOR LANGE: It is what Tom Palmer relies on in the Austrian economics derived piece that he did first as a working paper of George Mason and then published, if I remember right, in Hamline Law Review. I guess my point to you is as I read her work, I think she is talking about a system that transposed to our time would feel more like a contract system than a regulatory system. I think that, in fact, what was being reflected in those examples were deals.

PROFESSOR REICHMAN: That is an astute observation. Christine Carreau, is that it? Marite Edouard d'Artur, is that it? Etude sur Le Droit d'Auteur; that is the title, and it is very interesting. You are reading it from a Coasean perspective, and I am reading it from this perspective.

PROFESSOR LANGE: I am not really a Coasean exactly.

PROFESSOR REICHMAN: It was done by Connor.

PROFESSOR LANGE: I want a little help from my friends, that is all.

PROFESSOR REICHMAN: There you are, but she professes to see that there was quite a bit of help from rudimentary copyright law in Roman times. The point is that when the printing press arrives, all

this changes, and we have these five or six centuries during which we encounter exactly the opposite problem. After the printing press, the problem was not how you control the fruit of your creative labor; it was how do you prevent others from stealing it instantly because anybody who gets the copy has got the know-how. That is really what literary and artistic property law is all about. It is the know-how, the skilled effort, that is embodied on the face of the book.

That is why there are these strong parallels between design laws and artistic property law, not because they are true artistic parallels, rather they are both vulnerable to instant appropriation. Each type of creation bears its know-how on its face. Our whole world copyright system was built on this underlying empirical premise, and suddenly it begins to change at the end of the twenty-first century. Suddenly, we revert to a variant of the earlier, more primitive system. The electronic database that is of considerable scientific or industrial importance will be communicated all over the world. And yet, you can keep the source in your factory and build a wall around it, and unless somebody can cut into the line or into somebody else's line, they cannot get it.

PROFESSOR LANGE: I do not think that the fences can be maintained except in large settings, where contract law I think historically works pretty well. I think it will not be possible to fence off the small change uses in the world that lie ahead and that is really what I think is going to happen.

PROFESSOR REICHMAN: I hope you are right.

PROFESSOR RASKIND: Jerry [Reichman], I enjoyed your talk very much. Could I get you to address this question? Our only experience with modifying copyright protection is in the Chip Act. Would you characterize what you think that teaches us, if anything, that is relevant to this and would you tell what interests of the software providers would be served by their advocating such a thing?

PROFESSOR REICHMAN: Let me say first that what you are going to see in my paper on *Legal Hybrids* is that the Chip Act is one of nearly twenty legal hybrids. It may be less interesting than the treatment of the engineering projects in three different legal systems, the Italian system, the German system, and our own system. In the U.S., if you draw a project, say, a project for a boiler or a noncopyrightable building, and you reduce it to a drawing, the two-dimensional version of the drawing is protectible. But anybody can go and reverse engineer the building or the boiler. That is simply a codified version of *Baker v. Selden* directed at graphic works; I submit that the uncodified version applies to the verbal description as well. German law approaches it differently by imposing a very high standard of creativity. Italian law actually creates a hybrid regime, even puts a compulsory royalty on

third-party use of the project, but allows that use without prior authorization. So, Leo [Raskind], my point in saying this is, I do not think you should single out the Chip Act as more or less important than other hybrid regimes that are dealing imperfectly with a common family of problems.

Mort Goldberg would now be the first one to say the Chip Act is a disaster, but many others would disagree. To me, the Chip Act is important because it tries to develop a portable trade secret regime that will be valid against the world. The trouble is, it singles out one class of functional designs for preferential treatment for no justifiable reason. It is simply a step towards discovering the common denominator underlying all the hybrids, which I call "applied scientific know-how."

All of these legal hybrids, every single one of them, teaches us something new. Every one of them has something that others lack, something wonderful. If you could just get rid of the junk and select the good aspects of each of these fifteen or twenty hybrid regimes, you might find an ideal innovation law right there. But I do agree the Chip Act has a lot to teach us. I think you, Pam [Samuelson], and Richard Stern saw that already in the Minnesota symposium. But I do not want to isolate the lessons of the Chip Act from those of the other hybrid regimes.

Why should the copyright industries be eager to hear about these lessons? I think I have told Mort Goldberg a hundred times in different symposiums (if I could only reach his principals!) . . . I think he is wasting their time and money by not listening to the results of this inquiry because they are not going to get from copyright law what they want for very long. I think the sunset of *Whelan* is at hand, just as I predicted. I always said, when we met in Arizona, that we have to thank our lucky stars for *Whelan*. That decision accelerated the process of demistifying copyright law by ten or fifteen years. As soon as you read *Whelan*, you realize copyright law cannot work and will not work as a technology or innovation law. It will not work any more than the judicial attempt to protect functional designs in English copyright law worked in the period 1968-1988, for the reasons that I have told you. In the end, all the road builders will be arguing about who owns which bend in the road; all it will do for sure is protect against the clumsy infringer who takes the code wholesale.

I do not advocate rejecting copyright protection of computer programs if it prevents copying of the external code; we are not starting with a clean slate. But I think that the computer industry and the information processing industry, in general, share the very same problems that the biogenetic engineering industry faces today. A design problem is what you are really talking about. You are structuring these

components in a particular way, and there is no place to go to protect the truly valuable combination. And that is why I think Mort Goldberg and his people should be listening to this because we are trying to develop a type of protection—very short-term, very soft—that mediates and brokers between free competition and the stronger forms of monopoly extant within the intellectual property system.

We want a regime that allows innovators to recuperate their investment before, say, the other guy takes the cure for cancer in the form of a bug and duplicates it at little cost even though it has cost the innovator ten million man-hours. Yet, this innovator who cures concern may have added nothing to the historical concept of medicine. You have not added anything to the historical concept of medicine. You just went down another gene-splicing track. That is what is happening in digital processing, too. Think of where artificial intelligence is going, for example. In the long run—you can not do it very well now—you have got to standardize components, and you are going to have these advanced machines working on standardized databases with the standardized component. Are you going to allow anybody who has ever contributed to the history of computer science to claim derivative work rights in twenty-first century artificial intelligence?

That is what copyright protection of technological innovation leads to. And since courts will not do that, you will not get anything like the scope of protection that the pro-copyright camp really wants. Indeed, the other place where I think Mort Goldberg is making a very serious mistake is the belief that strong copyright protection of technology is going to be good for America. We heard in the 1950s that what was good for General Motors was good for America. Well, we all know where that got us—and General Motors. I fear it will be the same sort of thing here because in ten years or so, in order for us to remain competitive, we are going to have to copy the foreign innovations in computer technology. And we may not be able to do it because they are going to come over and try to shove *Whelan v. Jaslow* down our throats, if it is still law. They are going to say, very well, you guys wanted life plus fifty years of hard protection on very soft conditions, and that is what we want too, and that is what we are going to get because of the national treatment clause of the Berne Convention. That is what is going to happen, mark my words.

MR. METALITZ: If I could just put two cents worth in on the Chip Act. What happened with the Chip Act is that an issue that was conceived of in intellectual property terms has become a contract issue. The reason there have been no cases under the Chip Protection Act is because of cross licensing which did not exist when the Chip Act was first conceived of, but the time it was enacted, it was the industry norm.

So all of these disputes have been decided as contract disputes. I guess this is the area in which contracts do work. This is not consumers sitting at home redesigning the microchip.

PROFESSOR REICHMAN: But there is a happy possibility for us to correlate because the Japanese always said we will do whatever is "right." They said we had to decide whether to protect chip designs or not. If not protected, they are going to copy them. If protected, they could license them. So then we had to come up with a form of protection, but we do not use unfair competition law for this purpose, as in some European countries. Are we going to fashion a similar law for every technology? At the rate we are going, every new technology that comes up, we shall have to pass a new intellectual property law or adapt an old one, like copyright law. Somehow I have a feeling that is not a very elegant solution.

PROFESSOR GORDON: This really follows up your point, Jerry [Spiegel]. He asked isn't there something a little bit bizarre about a world in which the rich and poor have differential access to information. I do not know what happened to Dennis [Karjala], but in Dennis' paper he gives an example of information access. He says only scholars deserve fair use. By implication, scholars are not going to need access to these databases immediately so what you can have is high protection in the short run to safeguard monetary value of databases, and then the scholars can come around later. And the natural question is this: Is it not just scholars we care about? There may be people out there who want to read, to react commercially, and are not rich enough to get the money together to buy the license to get the instantaneous access, and yet they may have judgments and abilities we want to use but we can only use if they have access.

So, getting back to Jerry Reichman's point, you have a problem of inequity between rich and poor having access to something that we might consider equal entitlement of us all, maybe, information as Americans. And, second, there is an economic and efficiency point. If you bar access to information only to those who have already been successful in the market, only those who already have a lot of money, you may be precluding us from getting the benefit of a lot of newcomers with innovative ideas and expertise. One little footnote to this is somebody says this is a brand new problem. There is nothing new under the sun, as we keep hearing about in intellectual property law, among other places. If Jerry [Reichman] is right, there are not going to be any market barriers, and if he is not right, we might have something like Jane Ginsburg's compulsory license fee to eliminate market barriers. You could end up in a world where a market in all this stuff is completely

Right now a lot of free use is protected or allowed because markets just do not work. If indeed markets are completely practicable, it may force us to bite the normative bullet. That is, are there some things we just do not want markets in? And that is not a new question.

The clearest example of the merit good is that we are all supposed to have equal access to the law. That is why we do not allow judges to buy and sell their votes on important cases. That is a market we do not allow. Other less important examples illustrate the range; we do not allow blackmail, which is the buying and selling of silence, and many states do not allow prostitution, which is the buying and selling of sexual favors. Some states do not allow surrogate mother contract, which is the buying and selling of ovarian services. I think a good argument can be made on several levels which echo the First Amendment but all are not limited to the First Amendment, that maybe there is something special about information that has a noneconomic dimension, which requires equal access on justice grounds. Now, in my own thinking I have not gotten to the bottom of that issue, but I do not think it is an issue that is just relegated to the legal question: Is it constitutional? I think it is a legitimate policy dimension of everything everyone is talking about.

PROFESSOR KARJALA: I really think that many of the issues you point out are not new. Certainly the economic access issue has long been with us. The rich have always had the same right to sleep under the bridge as the homeless have. But when we start talking about that, we have to do some hard thinking about the kinds of information we are going to protect, if we decide to protect any. On the question of the market efficiency, however, and who has to have access in order to make the market efficient, we have to remember—although I do not know whether the empirical line is drawn—that nobody gets information that is not created, and so we have to worry about information that is not going to get created if we do not give a return as you, I am sure, agree. And so the question is where to draw the line. If we do have to draw the line, some will not have the information because of protection; that may make the market less efficient than it would be if everyone had access to it, but on the other hand, it may be more efficient than if the information was not going to be created at all.

MR. CUTLER: I just want to make one point about the Chip Act. I guess being lawyers everybody thinks the Chip Act a failure because nobody sues anybody under it. If you look at the industry, the Chip Act is an enormous success, the reason why today that computers now fits on the table down there because of the significant advances in chips. And it did not come from IBM, Texas Instruments, or any of these people who wanted to defend their bastions from anything. It is be-

cause of the free dissemination of information and the industrial advancement under the Chip Act that significantly contributed to it. That is where all, almost all of the advances in the computer industry came from. It is a great success. It helped industry. It helped the world advance enormously. It may not have allowed lawyers to sue each other frequently.

PROFESSOR REICHMAN: What in the Chip Act in particular? Are you talking about the analytical use provision?

MR. CUTLER: Absolutely.

PROFESSOR KARJALA: Is there evidence that people are relying on that to design new chips and so forth?

MR. CUTLER: Absolutely. Yes. They have contractual rights which are also observed, but that particular process has led to a pace of innovation which to call it dizzying is an underestimate.

PROFESSOR REICHMAN: Certain companies, whose names I will not mention but whose presence is always with us, are going around the world suggesting that the Chip Act—and I am curious to hear Leo's reaction to this—that it was a monstrosity. Of course, there has been a failure to get an agreement on it internationally, but as I have explained in other forums, that had to do with larger tensions facing the GATT negotiations. The developing nations were not going to give anybody any illusions about what they faced down the road, so they were not going to make any concessions with respect to chips until the global negotiations produced reciprocal concessions to them, which still have yet to emerge. So I do not see that as a major flaw in the scheme.

Still, there is a lot of loose talk around the world that the Chip Act is a monstrosity, an example of what not to do. This is because the technological assumptions quickly became obsolete. Now, at the time of the Minnesota symposium, in which Richard Stern and Pam Samuelson participated, there was a lot of thinking about the Chip Act as a model for a sui generis law to regulate computer programs. Stern actually did a piece about what a sui generis law for software might include, which is quite ingenious. It is refreshing to hear someone say something good about the Chip Act as an operative law. What is your impression, Leo [Raskind], given that you asked the question about the Chip Act?

PROFESSOR RASKIND: I do not ask questions to which I know the answer. It is a complicated process. In part there is not much litigation in the process of replication, which was in place during the deliberations, has changed and so now it is not so readily at low cost copyable. So it is a complicated process.

PROFESSOR REICHMAN: You put your finger on what I think has led some to label it as a monstrosity. The law was obsolete in relation to the technology when it was enacted. Leo [Raskind], is not that a fair characterization of it?

PROFESSOR RASKIND: I do not think at the time the consensus emerged in the industry to seek legislation that the technology was there. The duration of the deliberate legislative process may have brought that about, but I think basically it set a framework in which everybody understands there are some limitations, and I think the industry does get some credit for having been innovative at a rapid rate. And what is cause and what is effect, I am not fully prepared to say.

PROFESSOR REICHMAN: The conclusion that certain quarters want to draw from this experience is that we should never have a sui generis law. My conclusion is completely different. Let's fashion a sui generis law for innovation that is not going to be so technology specific. Rather than develop a new law for each new technology, we need a general purpose technology law to which we can add a few postulates from time to time to refine the treatment of specific technologies.

Look at the Berne Convention, for example. You have a paradigm. It does not fully work for us; films were initially a big puzzle. But because we have a dominant paradigm that works, we solve puzzles with it. That is what paradigms do; they facilitate ordinary puzzle-solving. So we solve these puzzles with regard to other closer related works, such as films. Nobody thought all these Berne-protected subject matters were related at the beginning. The model was books and then gradually it expanded to include even films.

Similarly, if we have an innovation law, we may have to add a clause here and a clause there to accomodate the peculiarities of certain technologies, rather than trying to have a law for each technology. I guess that is what I have learned from my study of legal hybrids.

PROFESSOR RASKIND: I suppose you could respond to that another way. You could say given the rapid rate of technology maybe what you need to do is mobilize different resources. Maybe the Congress could delegate authority to the National Institute of Health to come up with a framework, through its administrative law and regulations promulgations, certain parameters of protection that would be flexible. Maybe you can learn that from the Chip Act. And so they would have to review and then the industry, the biotechnology industry, and the public interest people in that forum where you have the expertise would get together. Then they might promulgate a framework of regulations provisionally with maybe a sunset provision that might be what you might draw from the experience of the Chip Act.