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PROFESSOR KARJALA: I have very much enjoyed the discussion so far. Like most law professors, even more than most law professors, I cannot sit still and so you have heard my opinions on much of this stuff already, but I am glad to have the opportunity to re-emphasize some basic points.

Lenny Bruce used to ask in his nightclub act, "Is there anyone here I haven't offended?" and then try to offend anyone who raised a hand. I, like Jessica Litman, feared I might be doing the same thing with this paper. I told some of my colleagues that Ray Patterson and Leo Raskind were going to be here, and I was afraid that some of what I was going to say was going to get their hackles up. I am pleased to say that, having heard their excellent presentations, I do not think that there is a lot of disagreement. At least, I do not have a lot to disagree with in what they have said. They will be able to tell you how much they disagree with what I am proposing.

I was thinking of this general topic, copyright and misappropriation, for quite some time before the *Feist* case came down, and that made me think about it a little bit more. Then when Bob Kreiss called and asked if I wanted to participate in this symposium, I thought that would be a good opportunity to force myself to sit down and try to think through the problem. The idea has been percolating through my ever-decreasing memory, and I guess the thing that really got me going was the chance to show another side of my philosophy. To the extent I am known at all in this field, I am known as a minimalist. I am not a strong copyright protectionist. I keep telling Jack Brown, who is a lawyer in Phoenix who has very effectively represented any number of copyright plaintiffs successfully, that he must be one of the best lawyers in the country because I think he has been on the wrong policy side of every computer software case he has taken and has won every one of them. He accuses me of wanting to represent or support pirates all the time, and so now I have the chance to come out very directly in this paper against piracy. I can announce categorically that I am against piracy.

Now what got me going on this is the case of *Hearn v. Meyer*, which really does not have a direct bearing on the subject of our conference, but I would like you to think about it because it illustrates a gap in the traditional protection scheme. At least it seems that way to me.

Hearn v. Meyer was another *Wizard of Oz* case. We seem to have a lot of cases having to do with the *Wizard of Oz* for some reason. In this case, the plaintiff had gone to a very rare first edition of the *Wizard of Oz*, which was published around the turn of the century. Copies were available only in a few libraries around the country, and in those editions were some illustrations made by—I forget the fellow's name who was the original author of the illustrations.

In any event, the illustrations in the book were all in the public domain because they were published so long ago. And what the plaintiff did, for a new edition of *The Wizard of Oz*, was a very painstaking series of copies of these original-edition illustrations, using lots of complicated filtering techniques and even hand-painting blades of grass. The result was a set of very lovely reproductions of the reproductions. The original plates, or whatever they used to reproduce paintings in those days in printing, had long since disappeared. So, the only original, if you will, in this case was a copy in some library somewhere, and the plaintiff's version was another copy of that first edition copy.

The plaintiff published her reproduction in her new edition, and then, of course, the defendant in this case photocopied the plaintiff's work and began selling them in another version of the *Wizard of Oz*. The plaintiff sued, and the court denied plaintiff's copyright claim on the ground there was no originality in her reproduction.

Why isn't there originality? Because, well, that whole picture, the composition, the coloring, and all that is in the public domain, and the court was afraid that by recognizing a copyright, it would be removing the picture from the public domain.

It seems this is the kind of work we want to encourage. It is a valuable effort, the bringing of an important piece of Americana to many more people in a lovely form that we can all appreciate, and it is a kind of activity I think we want to encourage. If much of the effort in reproducing those paintings can be pirated away, no one is likely to do it again.

So it seems to me that some sort of limited protection, very limited protection, against the kind of direct copying that was present in this case would be useful and would probably not do a lot of harm. It would not remove the picture from the public domain, because anyone else could go back to those same libraries, make the same copies, do the same process, and not infringe. But photocopying what the plaintiff has done, it seems to me, ought to be held as some sort of an infringement and the question is how to get there.

It is very difficult to get there under state misappropriation law because this is clearly copyright subject matter, and the alleged wrong

is copying, a right protected by copyright. I think that state misappropriation law would be flatly preempted.

There are various other kinds of works, I began thinking, that are also subject to piracy. Computer programs are a good example. The main reason that we elected to protect computer programs under copyright law is that, and this is essentially the thrust of the whole CONTU report, they are expensive to produce and easy to copy. That is about the extent of CONTU's empirical analysis, and, as someone pointed out this morning, empirical evidence of what kinds of works are subject to piracy is notoriously difficult to find. You will therefore not be surprised when I say I don't have any empirical evidence either, but I present several kinds of works in my paper that I believe are likely to be subject to piracy: works like the *Hearn* reproductions; new typesettings of public domain literary works; electronically stored public domain works; the LEXIS database is an example that we've used; or the movie database that Jerry Spiegel mentioned this morning those kinds of things are subject to piracy.

Certain kinds of maps are subject to piracy if somebody has to work hard to collect the information and someone else can just photocopy them. Works like computer programs and blank forms, things of this type, are all subject to some sort of piracy. What I am trying to do is identify the policy tensions that are involved in deciding the level of protection, if any, that we should afford to these different types of works.

I start from the proposition that misappropriation, or anti-misappropriation I guess, is a value that is at least implicit in copyright law. Much of copyright protection does protect against misappropriation. Now, misappropriation is not the only thing that copyright does or is intended to protect against. We do protect a number of other aspects of copyright works. For example, if an artist paints a painting, and somebody else makes a copy of that painting by hand, that would infringe the copyright. That would not be misappropriation or piracy as I use the term because the second artist has to invest the same amount of time and effort and cost of paint and all that kind of stuff as the first artist does, but it is still infringement. And the reason is that copyright protects against more than simple piracy, such as photographic reproduction. But implicitly, it does protect against misappropriation because the copyright in the original painting also protects, not just against hand-painted reproductions, but also against photographic reproductions, for example.

And so the broad copyright in the original painting extends to a number of acts that I would classify as piracy or misappropriation. The

same thing is true of a literary work. You would infringe by photocopying the book. That would be piracy and copyright protects against that.

So why do we need a misappropriation notion in copyright? Copyright seems automatically to protect against misappropriation. Well, it does in the vast percentage of works, but those are not the ones I am talking about. I am only talking about those few—there may be more of them after *Feist*, I am afraid—that are not protected in their content and nevertheless need some protection against piracy.

I do not quarrel here with Ray Patterson's depiction of the history of copyright, or its historical function. I am not even arguing against following his model, saying that copyright is an inappropriate mechanism for these kinds of works, and adopting a different kind of statute—some sort of unfair competition statute. I am certainly not arguing against what Jerry Reichman has proposed as a more comprehensive view of this whole know-how problem, although those are not the only kinds of works that I am trying to get within some limited degree of protection.

I am happy to investigate the possibilities for providing some protection to these works through means other than copyright, but there are a number of difficulties with relying on the legislative process to achieve it.

As Steve [Metalitz] pointed out this morning, until we have a consensus it is highly unlikely that we are going to get anywhere, at least at the national level. That would mean following the status quo, which in turn would leave these works sitting out in the cold and without any protection. And Jerry [Reichman] is not even going to give us his model statute until sometime next year, and then who knows how long it will take to get it adopted. I would doubt that it will be immediate. As brilliant as Jerry is, and as much confidence as I have that he will come up with a good statute, I think it is going take him a while to convince Congress. So I think legislative action at the national level is difficult, probably unlikely, and quite unpredictable.

Another modified legislative approach we could take would be to amend section 301 so that state misappropriation law could play a bigger role. We have hear much talk here about how facts are not federal copyright subject matter and, therefore, can be the subject of state regulation and protection. Even if true, however, which I doubt very much, many of the works that I am talking about still could not possibly be regulated by state law.

I mentioned the LEXIS database yesterday. The cases in the LEXIS database lose protection not because they are facts, but because they are unprotected literary works that are in the public domain for other reasons. Literary works are copyright subject matter. When the

act of misappropriation is making a copy, section 301 wipes out state protection. It just is not available under the current statute and under the judicial interpretations. Now, I could be wrong on this tomorrow, as soon as some court changes its preemption analysis, and that may come as a result of *Feist*. Leo [Raskind] suggested that that might occur, but under the current language of the statute, I think these actions are almost entirely preempted.

But we could amend section 301. That would be a more limited kind of statutory reform, but there are also problems in relying on state misappropriation law. One reason is the obvious objection that whenever you go to state law, you create lack of uniformity. Sometimes nonuniformity may not be a bad idea, at least until we have some better idea or a consensus underlying view of what the policy goal is. The thing about this area, and that is what I am trying to show in this paper, is that we basically understand at least what the policy tensions are, if not what the single policy goal is. Federal courts have been wrestling with these tensions for quite a long time and are rather used to doing it under copyright law. I worry about relying on state courts to effectively draw the correct balances among these social policy tensions through their individual approaches to misappropriation, whatever they might be.

So I think there are problems with relying on legislation at the national level and other problems with relying on misappropriation at the state level, even if we could do it without preemption. So I think it is worth at least asking, until we get better legislation, what can we do with copyright. Is there a way to interpret copyright that does not do a lot of damage, that does not overprotect for the very long period of copyright, and that nevertheless does give some meaningful protection that provides an incentive for the creation of works that society desires and gives a decent prospect of return to their makers?

Let me then just mention what I think the policy tensions are that I want to try to balance. Too often, I think, when we start discussing copyright protection, we hear claims like, "Well, we need an incentive; more protection means a bigger incentive, so let's give more protection." The other side of the coin is, "No, if you give them protection, that is going to take stuff out of the public domain; we need free and open debate, and so we should not protect." And the classic copyright problem is trying to draw a balance between these kinds of things. We all know that, we do it everyday in our teaching and in our writing.

But there are other tensions, and it is important to articulate a little better what they are. One that does not get mentioned explicitly in much of the copyright discussion is this misappropriation notion,

probably because it is only implicit in so many of the works that are protected by copyright.

So, I want to say explicity that anti-misappropriation is a value, and ask whether there is a danger that some desirable works are going to be underproduced if we do not give them some form of protection. If there are such works, then we should try to find at least some limited protection for them.

Is there anything on the other side that argues against protection? Often there is and sometimes there is not. We have the standard tensions that are almost always implicit in copyright but are sometimes forgotten. These are limits on protection through the idea/expression distinction—we do not want to protect ideas. That is basically a policy decision that is going to vary with different kinds of works. Fair use also serves as a limitation on copyright protection.

Functionality raises yet another tension. We do protect some functionality under copyright law now. Some of it is deliberate, as in the case of computer programs. Some of it, I think, is by accident. I give in the paper the example of standardized test questions. Many may not have thought of those as functional works, but in fact they are. They are tools that seek to measure human psychology or intelligence or some similar trait. They probe with words instead of needles, but they are still tools and therefore useful articles.

We do not want to overprotect useful articles for the very long period of copyright because useful articles by their nature develop and are improved by incremental advances. Copyright is not really very good—in fact, it is often rather harmful—as a mode of protection for useful articles. That is why we have historically not protected very many useful articles under copyright.

Another limiting factor on protection is our desire to have free and open exchange of facts and information, and on that basis we often limit the scope of copyright protection.

What I try to do in the paper is take a series of works and show how the different policy tensions play out in the varying circumstances. I start with a set of examples of works that I think call for some protection on the misappropriation branch of this analysis and really do not meet any countervailing factors. One class is the reproduction of public domain art works, another is new typographical settings of public domain literary works, and a third—an increasingly important class of works that is very relevant to the things that we have been discussing here—is the electronic storage of public domain literary works.

Jerry's [Professor Richman's] database on the movies is an example of that. But another example, dearer perhaps to the hearts of academics, is, for example, the electronic storage of the complete works of

Kant or of all the Greek philosophers or of the *Bible* or of Shakespeare, or what have you. Humanities scholars more and more are seeking to have these texts in guaranteed accurate electronic form that allows them to do comparisons and searches through literature that they are interested in studying in a way that was really impracticable before electronic searching was possible. A classic example, though, is the public domain literary work. If you store it on disks for distribution, what is to stop anybody from making a copy? Under traditional copyright principles, anyone would be free to make copies, even for distribution, and that is what I am suggesting we might consider changing. We can change it through an interpretation of the originality requirement that, in fact, does not do any disservice to current copyright law because we are doing essentially what I am suggesting with respect to other kinds of works. I know it will offend Ray Patterson, and it is not a traditional approach to originality, but the fact is we are doing it already for some kinds of works, and I am simply suggesting that we extend the notion to other works. And the bonus is just gives a little bit of protection, a thin veneer of protection, that prevents direct photographic type takings of the works but leaves the underlying work in the public domain.

Now with respect to the public domain art works, there is no functionality to worry about. Nor is there any factual information associated with this kind of artistic work. When we talk about protecting reproductions, the main goal is to insure that the underlying work remains in the public domain so that anybody who wants to can make copies of it. So, I am really talking about *method* of copying, and it is pretty much the *Bonito Boats* problem applied to art work. What Florida tried to do in *Bonito Boats* was to protect against a particular kind of misappropriative copying. They were unsuccessful because of the preemption analysis of *Bonito Boats*, but there is still a misappropriation problem that we ought to address.

What does copyright protect in the case of a movie of a public domain event, like a demonstration or the Zapruder film of the Kennedy assassination? None of the events shown in the movie are protected. It is just the film itself, the audiovisual work, that comes from setting the lens, adjusting the camera angle and that sort of thing.

Sound recordings are another example. Sound recordings of a public domain musical work, or as suggested in the House Report bird calls, include no authorship in the work recorded. The only copyright is in the sound recording itself, which comes from twiddling the knobs of the recording device. Given that we recognize copyright in these two kinds of works, which we do, we should try applying that same analy-

sis, for example, to a carefully made reproduction of a public domain painting.

What is original in such a painting? There is nothing original in the composition, in the color scheme, or whatever other elements of painting that the art critics use. But there is, even in the traditional terms, a lot of judgment involved in making such a work. You have got to mix paint, and you have got to decide what brush to use, you have to decide what elements of the composition go on first, and all that sort of thing. There is a lot more judgment involved in that than there is in taking a snapshot, and we protect snapshots. Yet, as *Hearn v. Meyer* indicates, we do not often protect these public domain art reproductions.

If you go to a museum, you see art students doing these reproductions, sometimes of public domain paintings. You can usually see a pretty clear difference, and these are good student artists. I could not come close. They are very skilled, and yet, you can see a pretty big difference between their work and what is hanging on the wall. But their goal is to reproduce what is hanging on the wall. They would like to do it perfectly. They do not wish to add a distinguishable variation to the *Mona Lisa*; that does not make sense. Anyone buying an oil copy of the *Mona Lisa* would like it to be as close to the original as possible. That is the socially desirable work. That is the socially desirable work in *Hearn v. Meyer*. That is the socially desirable work in the one case that did come out for protection, *Alva Studios v. Winninger*, Rodin's *Hand of God* sculpture case.

So, to encourage the dissemination of these kinds of reproductions, we might at the very least give the artists a limited copyright through—what I call for my students—the brush stroke theory of originality. And it follows from some of the interpretations of the *Alfred Bell* case.

The actual strokes on the canvas are what our reproducing artist contributes to her copy. If you, too, reproduce the original painting by looking at her copy and make another one by hand, all you are taking is the composition and the color scheme of the original, and that is not protected. But if you take a photograph, you are getting at least some of her brush strokes, and you are taking what the artist has added. The great thing about this approach is that it gets you exactly where you want to be; at least, it gets me where I want to be which is a little protection for the reproducer, who is protected against photographic copying, and the original remains in the public domain. I think it is a good result.

Similarly, in the *Batlin* case, the Uncle Sam bank case, I would not have denied the copyright altogether as the court did. I would have

recognized a very limited copyright that protected essentially against plug mold copying. If you want to copy either the original or the new plastic version, it is okay as long as you are making your own molds. But why should we allow people simply to take that new plastic bank, put some Styrofoam around it, or whatever they use to make molds, and then churn out direct knockoff? I do not think there was plug mold copying in the actual *Batlin* case. I could not really tell from the opinion, but if there was not such copying in the case, non-infringement was probably correct, even under my analysis.

But the point is that a very thin copyright could have been recognized without doing a lot of damage to traditional principles. As a matter of fact, these are the kinds of works that are traditionally protected, and perhaps we can even classify copyright denials in these cases as a mistake—the courts are simply misconstruing how they should interpret copyright law with respect to these works.

I have a harder time, however, especially after *Feist*, in dealing with electronic storage of public domain text. There is no real judgment; it is just someone banging away at the typewriter and entering the stuff in electronic form. Probably even a photograph has more individual creativity than that.

So, if *Feist* applies outside of the area of factual compilations, this theory is not going to work. I do not know how broad *Feist* is. If the Court was serious about the constitutional analysis and they are going to stick with it, nothing of what I am suggesting here is perhaps possible.

But I am assuming that either Justice O'Connor was not serious about the constitutional analysis or that the holding is limited, if not to the specific facts, at least to factual compilations, for which there was a statutory answer to the problem. Justice O'Connor did not need to go to the Constitution, and to that extent the constitutional analysis is dictum.

Finally, if I have to, I will just say that Congress, notwithstanding any contrary language in *Feist* relating to the Patent and Copyright Clause, is authorized, under the Commerce Clause, to protect, at least, any published works of the kinds that I am talking about. Congress could do so under copyright law if it so chooses, and if it wants to write a new statute and call it misappropriation or unfair competition, it could do that too. I think *The Trademark Cases* and the validity and the constitutionality of the Lanham Act confirm this analysis. So, this issue largely remains one of congressional intent.

Now let us get back to electronic storage of texts. What can we do to protect those? What is the contribution here that calls for some protection? The contribution is taking the printed text and putting it into a

different form, going from the written word to the electronic one. The text itself is obviously not protected. Any of us could buy that compact disk, call the work to the screen, and retype it into our own database and we ought to be able to do that without infringing any intellectual property rights. But I do not see the social policy of allowing people to make copies for their friends, that is, disk-to-disk type copying. We can get to that result by recognizing a copyright in the process of entering the information.

Now I am stuck on another aspect of *Feist* which is this requirement for intellectual creativity. There is not any in my storage effort; there is not any in the storage of Jerry's movie database; there isn't any in the LEXIS database. We have got a lot of these things where the whole valuable contribution is effort, getting the thing in electronic form. There may be some judgment in verifying the form, but I am not sure that rises to the level of creativity that *Feist* had in mind.

But the requirement for intellectual creativity is pretty minimal anyway. We protect the descriptions on the labels of hair care products—at least one case says we do. This field is kind of a boomerang. You do not know exactly where the *Bleistein* analysis is going to take over and where it is not. We have denied, on creativity grounds, protection in some works, like the New York Arrows logo in the *John Muller* case, that strike me as reasonably creative.

But I do not see what purpose the intellectual creativity requirement is serving. I understand that it has been there. I understand the Europeans like to have it in their copyright law, but the fact is it was not a part of our copyright law in the early days. Jane Ginsburg elaborated on this at great length in her article last year, and I just refer to that and will not repeat all the historical analysis. She has done an admirable job.

In any event, intellectual creativity is not a line that really divides the kinds of intellectual property protection very well. There is intellectual creativity in lots of patentable inventions, probably most, but we do not require it. It is not a necessary condition nor is it sufficient. It is not a sufficient condition of copyright either. I give the example again of Einstein's theory of relativity. That is not protected by either patent or copyright law, but it is very creative. So intellectual creativity is not a sufficient condition of protection. It is neither necessary nor sufficient in trade secret law. I do not see any reason for having it in copyright law, and, especially given the difficulty of getting new legislation, it seems to me that the time has come, contrary to the spirit of *Feist*, to drop this requirement to zero. It is clearly pretty close to zero now anyway.

If we do that, then we can protect these electronically stored texts. We can also protect databases, at least databases whose contents are literary works, such as Jerry's [Professor Richman's] movie database. We could protect those, although perhaps not factual compilations themselves. New typography of public domain works follows the same kind of analysis and would get limited protection.

In all these kinds of works the theory works out really nicely. You have got limited protection, very thin protection against essentially piratical copying—copying by mechanical means. When you copy the CD-ROM, you are taking precisely what the author has contributed, which is the new electronic form of the work. If you copy from the screen, all you are taking is what Kant wrote a century or two ago. So that works nicely. At least as far as these works are concerned, I do not see much social policy on the other side of the problem for denying this level of protection, and I see some value, at least in terms of the incentive rationale.

Okay. Now we go on to a middle class of works that are a little more difficult because we have some anti-protective policies as well as the anti-misappropriation protective policy coming into the balance. The best example here is maps, and, in particular, I would like to call your attention to the maps in the *Rockford Map* case.

That one, you will recall, is the case where the plaintiff went to the deed recorder's office and read the dusty books of legal jargon, as the court said, and translated that metes and bounds information into a picture showing a square block of some county somewhere, all the individual land plots and the names of the owners.

These were plain vanilla maps. There was no color scheme; there was not a lot of filigree, none of the lovely dragons you find on a medieval map. None of that stuff was there. It was just a straightforward map, purely factual information, hard to get, hard to coax out of those records, a lot of work. Not much creativity was involved, but these was a lot of work. It seems to me that those maps are deserving of at least some protection. And we are not going to get those maps, I think, unless we offer some protection, or, at least I think there is that danger.

How do you get there? Again, we have got to get rid of this intellectual creativity requirement or we have one of two bad results. First, we may pick an artificial requirement like you were trying to get Jerry [Richman] to do in his database, which would add a whole bunch of stuff no one really wants but is just stuck in there so you can get a copyright. Okay. That is fine. You are going to get a copyright, but it still does not help the mapmaker because anyone is still free to copy the rest of the map without taking that added fluff. It is not necessary for the user; the user does not even want it. It is cluttering up the map.

They just want to hang it on the wall in the real estate office so they can quickly tell who lives where. They do not want a lot of that other stuff in there. So the value of this map is the factual information that is portrayed in a bare bones fashion. I still say that is deserving of some protection, but you do not get that through a copyright based on creative add-on fluff.

The second bad result follows from an argument we have heard a number of times today, which is that selection of the information ought to be protected. I think that is a disastrous approach. *Feist* is forcing us in that direction, and that is what I am encouraging you to resist. Because what is the selection? Somebody has chosen to show every square block in the city or the county. That kind of selection is idea, or at least it is functional in the sense that that is what the users want. They want all the information, not a series of isolated square blocks.

I do not think creativity of selection is a very good rationale for protection. It can overprotect, as I have argued several times, and it can underprotect because there might not be any selection when you have a complete set of information, for example, when you show a whole county in this form. We really need some other notion.

Now, the problem with protected maps, as I argue in my paper, is drawing the line. Do we limit the scope of protection to photocopying and tracing or should we extend the copyright a little and say you can not even take your compass and protractor, or whatever the equivalent tools are these days, measure the lines and shapes and then draw your own map? My guess is that even that second activity, where you do not photocopy but simply measure all the distances and draw your own map from that, probably would undercut a good deal of the original mapmaker's effort and act as a disincentive to original production.

So there is an argument that we might protect against a little more than what I call pure piracy. The problem is that many maps contain nothing but the factual information. How do we draw the scope-of-protection line? I will not try to elaborate here. I try to deal with that at some length in the paper, probably not entirely successfully, but I will not try to develop it here.

The important point is that this is not a pure misappropriation case. We are not going to throw copyright at it just because we have the danger of misappropriation. We have another tension pulling from the other side—the danger of protecting factual information—that we have to think about when we are trying to formulate the scope of protection. I do think we can handle it within the traditional copyright framework, however, especially with a careful application of the fair use standard.

There is yet another class of works whose protection does not require any change in the intellectual creativity standard, in other words, they do not meet the originality requirement of a traditional copyright, even in a *Feist* sense and they are subject to piracy. On the other hand, these works also invoke some anti-protective policies that we want to make sure we deal with explicitly. These are works that involve some functionality.

The examples I give in the paper are, first, computer programs. I have written about this program at length—some people think too much length—in the past. The problem with overprotecting programs and treating them as if they are novels is that you end up protecting function too strongly. Consequently, we again need to balance. Anti-misappropriation policy calls for protection of programs against disk-to-disk, ROM-to-ROM, and similar electronic copying, perhaps also against simple translations from one language to another, but I do not think we need much more than that in order to give the appropriate production incentives. To protect more also runs the risk of protecting simple technological advances for the very long period of copyright.

Another kind of functional work is one I mentioned earlier, standardized test questions. Those I think are an interesting example because the kind of piracy to which they are subject is not the kind that we normally think of in the case of literary works. It is not the fact that you have taken the expressive language of the question.

The reason that you need protection against piracy is that these tests have to be validated and that is a very expensive process. What happens is the testmakers make up a whole bunch of questions. They do not really know which ones are going to work and which ones are not. They just make up a whole bunch. And when they get done, they have got to validate them. That is the hard, expensive part. They end up throwing out half of them or so because they do not measure what they want to measure, and they keep the ones that work. It is that effort of validation that I think argues for protection. If it were not for that, I would say these things are functional and we should not protect them at all. But we do have a danger of misappropriation of the validation effort here, and I think that might call for some protection.

But the interesting question is how these balances work out. If somebody could come along and offer the same test by copying the questions and selling the whole test, he would easily defeat the primary market for the original testmaker which comprised the inducement to make the test in the first place. So I think the questions deserve some protection against copying for competition in the primary market.

But some cases are like *ETS v. Katzman,* where the competition was in the secondary market, review courses for these tests. Katzman

was copying ETS' questions. Why? Because he could not make one up and score his own questions? Of course not. He could make one up, but he does not know whether it works. That is, anybody can write substantive questions involving, say, the square root of three, but he was not trying to test that. He was trying to test how well the students were going to do on their college entrance tests. As for success in college itself, he might have had a better test than ETS, but no one was going to use his test because ETS had the primary market monopoly.

So, the students are going to take ETS' test, and if they are going to practice to take ETS tests, they are going to have to use ETS questions, and *that* is the reason Katzman wanted to use their questions. Not to allow him to do so is to allow ETS' primary market copyright to also control the secondary market for a functional work. I do not think we should not give so much protection to works that are essentially functional.

Finally, and I will end up here, we have the question of blank forms. Again, *Baker v. Selden* tells us those are functional. I've always thought they were functional, or at least section 102(b) unprotected systems for presenting information. I still think *Kregos* is wrong for that reason.

But I will concede a little bit. Consider, for example, in the *Bibbero* case, involving a medical form, the court actually denied the copyright. I basically applaud that result, except when you read the facts carefully you find that the *Bibbero* defendant did not just copy the form but rather photocopied it and was selling photocopies by the thousands.

It seems to me that we can and should give to form-makers such minimal protection as flows from a requirement that any competitor that is going to copy the form set its own type. It takes a little more time to get into competition and involves at least a little extra expense before others can start competing. It may not be much protection, but I think it has some meaning and perhaps should be considered. But functionality considerations mean that we do not want to give it too much. The question is one of balancing anti-misappropriation policy against noncopyrightability of function and systems. So with that, I will stop. Thank you very much.