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Open Discussion of Copyright and Misappropriation

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OPEN DISCUSSION

PROFESSOR LITMAN: I have a whole slew of questions. Let me start with three of the works you mentioned, Dennis [Karjala], databases, computer programs, and CD-ROMs. It seemed to me those are works that you had to infringe fixation in order to use or analyze them at all. That if the fixation in the LEXIS database is in bits and bytes, then in order to make any use you have to infringe the fixation.

PROFESSOR KARJALA: By taking.

PROFESSOR LITMAN: Taking the fixation seems to be the gravamen of your paper so I guess I was wondering what provision you make for that.

PROFESSOR KARJALA: I suppose the same one that allows us to store our word processing programs in RAM, when we enter them from disk it is fair use.

PROFESSOR LITMAN: If I pull it up, to pull it up on my screen so that I can type it into my own database, I have got to have it in the computer in the bit and byte form that I took from LEXIS or WESTLAW.

PROFESSOR KARJALA: You have got the permission, I presume, to call it up on your screen. That is, I presume you are using the system lawfully from when you call a work to the screen, and now when you copy by hand from the screen to your own database, you are not taking anything of theirs because the only thing they did was put it in electronic form. You are using their electronic form to transmit the work to your house. You are using, but not taking, their electronic form. You are making your own electronic-form version. It seems a bit of a technicality, I admit. But what the hell, it gets you the right result. And the distinction seems pretty clear to me. The words on the screen are Shakespeare or whatever—maybe Justice O'Connor's judicial opinion—and those are the words on your screen. They got to your screen in a perfectly legal way and all you are taking now are those public domain words and putting them in your own database. You have not taken anything that was added to *Feist* by LEXIS. You are using it; you have not taken it.

PROFESSOR LITMAN: But if I press "Save," I have taken it.

PROFESSOR KARJALA: Sure. One case, I think, is fair use. Even LEXIS lets us do it. But to take the whole database, I believe, is not a usual case of fair use. Kurt [Steele] or Sara [Wolf] or maybe somebody else suggested or read my paper as saying that you can take the whole database as long as you do not use it for a competitive purpose. It is conceivable there is a fair use even in that kind of taking. I

am not going to say it can never be fair use, but I never intended to say that it clearly is fair use just because you are not going to go into competition.

PROFESSOR LITMAN: On the other end of the equation, if what you have to do not to infringe is set your own type, increasingly in today's technological universe, setting your own type is a question of scanning and digitizing and telling your machines to send the appropriate characters either to your disk or to your printer. If that is what setting your own type means, then to tell your computer program instead, oh, I can't use this digitized version, let me run a macro. You create one just like that and then send that to the printer. If that's what typesetting is about, then we get to infringe fairly easily.

PROFESSOR KARJALA: But if that is all that is involved in the typesetting, then I guess it is not a big problem. With technology like that it is not expensive for anybody to set type. Whether you protect it or not, it does not seem to make a big difference. There is no longer any danger of piracy at that point (unless the scanning machine is very expensive).

Again in Wendy's [Professor Gordon's] example, if it does not cost much to produce, there is no other artistry, and no other value in it except inexpensive effort because Kant already put the value into it and now it is in the public domain—there is nothing to pirate. So, if it does not cost the original person anything to put it in electronic form, I have no problem with others taking it in that form. But I went to a meeting at Arizona State this spring with a group of scholars who use computers in the humanities, and they were very worried about this problem. That is where I learned about this electronic text storage problem, and the publishers are very worried. Apparently, at the present time it is not cheap for them to get this stuff into electronic form. Maybe it is the verification process, I am not sure just where that cost is, but it is not cheap in any event. So there is a piracy problem in that case.

PROFESSOR LANGE: Dennis [Karjala], do we get a definition of piracy?

PROFESSOR KARJALA: Yes, it is in the first part.

PROFESSOR LANGE: Do we get a definition that goes beyond either an idiosyncratic personal ad hoc standard or an industry standard, but one that has reference to a generally accepted one?

PROFESSOR KARJALA: I give you no more than CONTU or anybody else does on this. We have a piracy problem if a desirable work is likely to be underproduced if we do not give it some protection. I do not think that anybody has given anything but anecdotal data on any of this stuff as a basis for protection, so in this sense I am in bad

company, but it is no worse than what everyone else is using as a basis for policymaking.

PROFESSOR REICHMAN: There is kind of a world consensus that plug mold reproduction is unfair competition everywhere.

PROFESSOR LANGE: But I know there actually is a variance, but it really is an interesting thing for us because we actually have now a twenty-six or about twenty-five year, three times avowed profession of investment in a belief to the contrary at the hands the Supreme Court which has told us actually—and I realize that we are not permitted to pay attention to the Constitution because Justice O'Connor did not mean it, but just on the theory that she might inadvertently have done so—we have got a constitutional standard which is inconsistent with this general standard. And I think not for adventitious reasons, but rather for reasons which go very far back into our particular origin. How do we square ourselves with that? It happens that they do believe that and we do not.

PROFESSOR REICHMAN: I think that he is onto something. I think that Dennis [Karjala] is onto something, and the squaring, I will tell you where I think the squaring is. The Europeans earlier had to confront this problem with regard to sound recording on TV broadcasts and performances, and they said oh, no, there is not enough originality. They did not get into the constitutional element. They were all hung up on the fact you had production by equipes and by teams and Berne says you have to have an author, but Berne says you cannot have a corporate author, what Ray [Patterson] is talking about. Berne says you cannot have a corporate author historically, and this was a big constitutional hangup for them as much as the ones you are talking about.

So what did they do? They said, well, we will put this in the neighboring right and what we will do in that neighboring right, we will only protect it for twenty years and only against duplication. Now we, sitting over here, never went along with that. We said we are not interested in those neighboring rights, and we were great exporters of pirate sound recording. But when we saw the light because our own sound recording industry was now a worldwide exporter, we looked at it again.

And we said we are not going to go to neighboring rights. We are going to put it in copyright and then make it a second class copyright. We are going to make a neighboring right copyright, which England had sort of done before that. So I think it has happened.

So is that not where he's going? Can you not link the two universal consensuses against plug mold and the neighboring rights approach

and make it kind of a second class kind of copyright that would only do that?

PROFESSOR LANGE: You can, except I think that what I sense, and I cannot demonstrate this empirically at all, but what I sense is that in doing so we are failing to pay attention to what I think of as the Mahatma Gandhi imperative in public policy formation.

When something happens like *Feist*, the classic industry response is to figure out how to get out from behind whatever position has now had a roadblock put in the way of it and get back ahead of wherever the crowd is. It makes me think of Mahatma Gandhi's statement that there go my people and I must follow them for I am their leader. That is the usual way we come back.

But here they are going that way, and I have the sense that we, for reasons that have to do with our situation and this kind of thinking over a long period of time, are sort of going that way.

They are, in my analysis, people at the individual level who really are not going to pay attention whether you impose a low level system of protection of the Troller derivative sort, the sort that you were proposing, or the sort that Dennis [Karjala] has in mind, because they no longer, if they ever did, subscribe to this general presupposition that we brought to this room about what piracy is and what misappropriation amounts to.

They are the kids whose sister's boy friend's best friend's cousin has bought the latest example of whatever record is out there, and they are now busily trading it, and they are not listening to this kind of discussion. And I think my point to you is that they are never going to listen again.

If we are going to invent law in this field, I think we are going to have to invent law that will take place between companies like Jack McDonald's, Kurt Steele's, Paul Sheils' and Sara Wolf's, and so forth, where I think actually a number of options are opening but as to which those options may or may not require. But the level at which we are talking about, the street, and I am saying to you, Jerry [Reichman] and Dennis [Karjala] and others, the street is going to dominate more and more and more. I think that is Sara's [Ms. Wolf's] point. The miniaturization of this stuff and the ability of everybody to carry around what used to look like Dick Tracy stuff but now actually is there, I think is going to gut the heart of much of the more elaborate provisions that we have in mind.

PROFESSOR REICHMAN: I think you are right. I think it is a very valid philosophy on Dennis Karjala's approach, that is, he is going to have to be careful in his approach and how he implements it, and in fact, if I were Dennis [Karjala], I would rush to them immediately and

see how I can avoid penalizing the street. We do not know. At the moment historically all we have got is the surtax on the equipment and the surtax on the blank tape, which everybody laughed at, and in the end everybody said that is all we can do, and we are going to do it. I think your point is brilliant, and anything you can do to work it into a second class copyright law or MA law or whatever you want to call it would be great.

PROFESSOR LANGE: I am struck by the fact that there has been no general open discussion of compulsory licensing here for example.

PROFESSOR REICHMAN: Jane [Ginsburg] has more than openly discussed it.

PROFESSOR LANGE: No. I mean here, among us.

PROFESSOR REICHMAN: I think it fits in very nicely. A one subject matter compulsory license does not make much sense, but a second class copyright that is really an MA law against duplication, which is really a neighboring rights law—even France will now apparently go along with the sound recording notice in copyright law, and if you add on a few of these restrictions—and Deist, Deist was just there in *Salamanca* saying, gee, I don't know, England had a second class copyright law. Why don't we think more about what he has? So I think you would find a lot of interest internationally actually in just such a solution.

PROFESSOR KARJALA: On this compulsory licensing point, I think I have a bit of a problem with Jane Ginsburg's proposals, primarily for the reasons that, as we have now discussed so many times here, there are different kinds of facts.

And I think the tensions that are involved and the trade-offs and the balances that we are drawing really are going to have to be tuned more finely than to say simply okay, facts are going to be protected. As I read her paper, we are going to protect them, that is all. Whatever they are, they are going to be protected, and there is going to be a compulsory license. I think that hides too much. I just do not see much room there for drawing the policy balances.

We have been drawing the fair use balance, as well as the idea/expression balance, using policy-based reasons for a long time. If we do not know what the doctrines mean in particular cases, we are at least generally comfortable in drawing the balances. We know what the factors are, and I think it may be easier to continue with what we are used to than to move radically in a different direction. But it is not that I feel strongly about this. I do not know the answer. I am just wondering what can we do today with today's statute and case law. Mine may not

be the best approach if we are writing on a clean slate, but maybe it is something that we can actually do today.

To tell you the truth, I never get that worried about people on the street who want to make copies. I think it is worthwhile making it unlawful for individuals to copy computer programs for personal use. Yet, I think it is done all the time, and I do not feel particularly sorry for the computer program manufacturers. They do not get every last penny from their copyright, but they get a pretty good return. The corporate buyers have to pay the full price or they are in danger of being turned in by a disgruntled employee. It is worth it for them to pay up.

So if someone in America makes personal copies, well, all right. It is like someone who sneaks into the movie. A few things always slip through the legal protective scheme. But as long as they are making a decent return, I do not feel all that sorry for them. I do not feel the need to go out and get every last person to pay up. That is not the overall goal. The goal is, in a global sense, to see if we can give some incentive to production incentives and start restoring a little bit of balance, if in fact the system is out of balance.

PROFESSOR REICHMAN: I am curious to know how Leo Raskind reacts to two proposals like this in view of his recent thinking about this.

PROFESSOR RASKIND: I do not know that I have an answer to that. I think what we heard today may be to put together two things. There is some utility in a wait-and-see policy. That is, this is a large scale impact item, that is the *Feist* opinion is, and experience teaches that sometimes haste is made slower, and I think that is the first thing.

Our system of legislating is a distinctive one, and it requires consensus, and we are not well equipped. In other words, contrast copyright or intellectual property legislation with federal income tax legislation.

In federal income tax legislation you have the executive branch who might make a proposal. Then there is the treasury and the executive branch who might each have a staff. Just think of the numbers of people—that is why I was asking Marybeth [Peters]—who get involved and how many points of view get vocalized. Then there is statute and then you have the budget office. There is a joint committee.

And there are think tanks like Brookings. I do not know if there is a counterpart or who or where in the society does somebody do what Brookings does for public policy, but they rarely deal with things like that. So our process of legislation does not so readily—that is the point of my story— identify the public interest.

In other words, tax legislation has an objective, dollar value to the treasury. There are groups of professionals who cost out who wins and

who loses. Usually it is the treasury or some other interest group or group of users.

And so, here is the standards point of view, and that is the second part of my argument, the wait-and-see, because in tax legislation you cannot say this will be the impact. Take the discussion about capital gains. It is now diffuse enough whether or not the short run transactions that will generate revenue would be more than undercut by the long run, and I think there is sort of a consensus that there will be, but that is not so good. I just use that as a basic comparison.

Who will be the winners and who will be the losers and how much more database creation will there be if we enact a sui generis statute that uses a misappropriation rationale? How could you testify as to how you would construct an experiment to know?

MR. SPIEGEL: I would like to react to that, but I want to get on with something else.

PROFESSOR RASKIND: Let me urge you to.

MR. SPIEGEL: I wonder, your analogy to tax law, at least in the twenty years or so that I have been practicing law and having lived through so many tax law changes, with all those people spending all that time trying to figure out what the impact of those laws is, whether they have any inkling of what the impact of those laws is, and I think the proof of the pudding has been that oftentimes what they project does not come to pass.

So, the process that we are going through here, and perhaps the process that a statute dealing with this problem might go through, I just wonder if there is any real significance to the fact that you will not have, might not have, that extensive amount of review.

The real thing I wanted to get to though was to get back to a point that Jessica [Litman] raised with Dennis [Karjala] about the typesetting issue. And I think you have to look at the nature of the database product and industry.

I think, Dennis [Karjala], your example was Kant's work and if it was as inexpensive or as expensive, for a copier to put it in an electronic form as it is for the person who initially puts it into the electronic form, then you do not care too much about it; and I would have to say I would tend to agree with that reaction.

But the reality is, I think, that that is not the case, at least about the sort of databases that I am particularly concerned about, and I am not really sure what the answer is. Let me explain why.

What I have seen develop over the last ten years as a result of the technology is the ability to compile in a single place on a machine that is capable of accessing and manipulating data of incredible proportions, previously unheard of in human culture, and when you talk about facts

that get collected into those databases, where do those facts come from?

If you talk about the issue of typesetting and you talk about piracy, do you prohibit a copier from copying the screen by hand, or do you permit him to do that? And if you do permit him to do that, aren't you compromising the investment that the original compiler made in collecting all that data, all those facts, into one place? Because in doing that, that person had to go out to many original sources to gather that information. It was very expensive and very time-consuming.

On the other hand, a lot of the materials that form the basis of the source for that data are themselves copyrighted materials. I think you see that there is a tension there in terms of what you permit and what you prohibit. I am not convinced of where the line should be drawn, but I do feel very strongly that there should be a line drawn, and I am just curious as to what your reaction might be.

PROFESSOR KARJALA: Well, you are talking about several different kinds of works, and I think I agree with you. I think we have to draw a line, and I think the line gets drawn in different places for different kinds of work. This is not new to copyright law. Copyright law has been doing that since long before *Feist*.

Now, as to the expense of collection and creation of the facts, if you will, that is of course the sweat of the brow doctrine or copyright in the method of fixation. But here is a major disagreement I had with Kurt [Steele]. I did not disagree with most of what he said, but he would protect raw facts, I gather, regardless. He did not say how he would relate protection to the expense of collecting them, but he would strongly protect the value-added authorship, what you call significant value of added authorship.

I think now of the John Dillinger murder case. He did not really die outside the movie theater in Chicago, but he lived in California and finally died in 1974 or something like that. Is that a fact or not? It is a theory, but the author of the book is presenting it as if it is true. A lot of effort went into creating the theory. The dirigible, the Hindenburg, blows up. Someone presents a theory as to how it happened. A lot of work, a lot of effort went into developing that theory, which purports to be historical, factual. I gather Kurt [Steele] would protect that more strongly than what he calls raw facts, although I will let him respond to that. I happen to think *Hoehling* is right and that we should not protect historical and biographical theories.

In the case of these creative facts, sure, they are creative, there is a lot of work involved, and it is all original with their creator, but I think the importance of public discussion of these issues—First Amendment and free speech notions—weighs more heavily and gives

just the very limited copyright to that book that the *Hoehling* decision gives.

What I am suggesting is that for factual compilations it often does not cost us to recognize the anti-misappropriation policy branch of the scope-of-protection equation and thereby recognize some protection. After *Feist* we cannot drop the requirement of creativity of selection and arrangement because the statutory interpretation given in *Feist* applies directly to factual compilations. But, if we are just talking policy, then we should give some protection because of the expense of production. We are thus recognizing the misappropriation branch, and now we have got the line drawing problem on the other side. What kind of facts are they, how much protection do they need as a production incentive, how much and of what kind is all of that free speech interest, and how are we going to weigh?

The analysis is going to vary with the kinds of facts that we have and with the method of copying. The method of copying comes into the analysis because to the extent it is just as costly to take your collected facts and reproduce them somewhere else, then, at least, the misappropriation branch of the analysis is not really very strong, and we can think about the other factors.

I apologize to Kurt [Steele] for being vague. The trouble is that copyright law is not very clear, and there are lots of answers we just do not know concerning specific cases, and we have got, as Leo [Raskind] just said, vague rules here.

I am not really trying to revolutionize all of copyright. I am taking it as it comes. I am trying to live within its confines as best I can, and that leaves us with some vagueness. I agree with that. That is one of the things that worries me most about my own theory. I am known as a minimalist, and even though I am fighting against piracy, the fact is that I still worry about too much copyright protection.

And the copyright remedies are awesome, as somebody said yesterday. The in terrorem effect of waving copyright at someone is pretty frightening, and I think it chills, or has the potential to chill, a lot of valuable speech, and that worries me a lot. If everyone follows my theory, you will get very thin copyright for some of these works rather than none. Okay. I can live with that, but what I am afraid of is, once we unleash the courts into this, they are going to do to some of these works what they did to computer programs, at least until fairly recently. For anti-piracy reasons we gave them what should have been a thin scope of protection through copyright and then, boom, the scope of protection expands as if programs were novels, and all of a sudden you have got a lot of basic problems. So, I worry a lot about my own theory. I am suggesting that maybe we can get a little bit better results if

we do it this way and do it right, by recognizing a thin copyright for currently unprotected works that are vulnerable to piracy.

MR. CUTLER: Does originality or creativity fit at all in your scheme? I am just a little worried. I think LEXIS sort of software is great, and I think the headnotes in the West system are wonderful. The way that they organize that database is great. The mere plotting of having someone who can keypunch in all that stuff is just—I would rather provide incentives to someone to write some great search software than to go out and keypunch the rest of your life.

PROFESSOR KARJALA: I am not saying you have to deny protection to great search software, although I think you would want to be a little careful due to the functionality, but nothing I have said precludes protection for creative works. In fact, most copyright protected works do show a lot of, or at least some, intellectual creativity.

But I am just questioning whether we really need it, the intellectual property requirement. The point is, if we say these works deserve some protection because they are otherwise going to be in the prisoner's dilemma problem, if we agree that that is the policy, then it is only a question of whether we do it with copyright or with some other statute.

I can understand the argument, that says, "I just don't care about that stuff. I don't care if it is underproduced. It is just labor and the hell with it. I'll live in a society that has fewer of these things." That is a value judgment that you can make. We may disagree about that.

MR. STEELE: Dennis [Karjala], I would respond to your earlier comment that I think to a large degree we agree with each other. I acknowledge the point that factual compilation has and always will have limited protection. What we are talking about is how limited or thin it is. I think it is going to be thinner depending on what type of "facts" we are talking about. Unfortunately, both *Feist* and the post-*Feist* cases have not done a very good job of giving us guidance beyond some relatively mechanical discussions of selection, coordination, and arrangement. I think your paper is helpful in discussing some of the other factors that should be discussed in the context of figuring out what the scope of protection should be.

MR. CUTLER: What about the compilation of everyone's bond ratings, S&P and Best?

MR. STEELE: That sounds to me like you would be depriving a copyright owner of its right to control the compilation of its own data.

MR. CUTLER: Not enough value added?

MR. STEELE: If you take something verbatim and it is competitive, I think you have a real difficult burden to overcome.