

INTRODUCTION

REFLECTIONS ON THE CONFERENCE

Hon. Jon O. Newman and Craig Joyce***

Conference Co-Moderators

A JUDGE'S PERSPECTIVE

Hon. Jon O. Newman

As a Judge listening to five thoughtful presentations at the IPIL's 2016 National Conference in Santa Fe, New Mexico, this past June, I was once again reminded of the differing perspectives of the academy and the judiciary. Professors live in the realm of doctrines; for judges, it's mostly about results.

Of course, the doctrines that consume the academy often implicitly lead to results, and the results announced by the judiciary sometimes explicitly flow from doctrines. In the

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broadest sense, we're both engaged in a common enterprise—to apply our minds to the orderly development of a legal system that is fair, efficient, and respectful of the appropriately limited role of judges in “the least dangerous branch.”¹

But our approaches are different. The academy analyzes, often brilliantly, the doctrines that inform the development of law. Law reviews bulge with incisive analysis and criticism of appellate opinions. They parse our language meticulously. And why not? We all began our legal education reading opinions and hearing our professors point out the opinions' inadequacies. So it is not surprising that the top students who become professors continue that activity, in the process often making enormously useful contributions to the evolution of legal doctrine. Sadly, judges rarely see these articles. Lawyers rarely cite them in their briefs, and our own research is usually confined to prior opinions. This is our loss. I welcome receipt of a professor's reprint. It's an important channel of communication.

Judges are obliged to reach results. Sure, we pay attention to doctrine and sometimes make our own minor contributions to analysis and even development of legal principles. But our primary task is to decide, not to analyze. And usually it is a series of past results from which we take guidance in making the next decision.

The five papers presented in Santa Fe this year were outstanding, and the discussions they provoked were stimulating. But even as they expanded my understanding of significant areas of intellectual property law, they reminded me of the asymmetry in our roles. An example: several years ago, an appeal I heard alleged that George Kregos's pitching form—a compilation of several facts concerning the past performances of pitchers scheduled for the next day's games—was entitled to a copyright. The Associated Press had published a pitching form with a compilation of similar but not identical facts. The District Court dismissed the suit on motion for summary judgment, ruling, as a matter of law, that Kregos was not entitled to a copyright.² Our Court reversed.³ My opinion, citing results of prior compilation cases, ruled that Kregos's selection of facts displayed sufficient originality and creativity to survive a motion for summary judgment, i.e., to preclude a denial of copyright as a matter of law.

On remand, the District Court again entered judgment for the defendant, this time ruling, as a matter of law, that the AP's

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1. THE FEDERALIST NO. 23 (Alexander Hamilton).
 2. See *Kregos v. Associated Press*, 731 F. Supp. 113 (S.D.N.Y. 1990).
 3. See *Kregos v. Associated Press (Kregos II)*, 937 F. 2d 700 (2d Cir. 1991).

form was sufficiently different from Kregos's to preclude a claim of infringement.⁴ Our Court affirmed.⁵ The subsequent opinion (I was not on the panel) was unclear as to the scope of my earlier opinion. The Court wrote, "On [the prior] appeal, we held that remand was necessary, principally to determine *whether* Kregos's selection of pitching statistics reflected sufficient originality to be copyrightable as a compilation,"⁶ but also characterized the prior decision as "holding that Kregos's pitching form is entitled to copyright protection."⁷ The first statement is incomplete, and the second statement is incorrect. The remand was to determine whether Kregos's form displayed sufficient originality *and* the "somewhat closer question" whether his form displayed sufficient creativity.⁸ More important, I did not rule that the form was entitled to a copyright.

At Santa Fe, my *Kregos* opinion came in for some trenchant analysis. Had Kregos merely come up with an unprotectable method for his prediction of the outcomes of baseball games? Or was his selection of facts a protectable compilation for others to use in making their predictions? The discussion focused on doctrines—originality, creativity, merger of expression with idea. What was not mentioned was the result: the limited record assembled sufficed to defeat the defendant's motion for summary judgment. Of course, this was not a symposium on civil procedure. The copyright doctrines merited full discussion. The narrowness of the result was less important. But it deserved mention so that the case was considered in proper perspective.

Looking back on *Kregos II*, I think it was correctly decided even though, on a more fully developed record, the defendant prevailed. But I might have been wrong, even as to the narrow ruling that Kregos's form could not be denied a copyright as a matter of law. As I sometimes say to a professor who points out a deficiency in an opinion of mine, "You're lucky I wrote that. I'm supplying grist for your mill."

In any event, congratulations to the Institute for Intellectual Property & Information Law and to Craig Joyce for yet another splendid set of additions to the deeper understanding and future development of copyright law.

I was privileged to attend.

4. *Kregos v. Associated Press*, 795 F. Supp. 1325 (S.D.N.Y. 1992).

5. *See Kregos v. Associated Press*, 3 F.3d 656 (2d Cir. 1993).

6. *Id.* at 659 (emphasis added).

7. *Id.* at 663.

8. *Kregos II*, 937 F.2d at 704.

A PROFESSOR'S PERSPECTIVE

Craig Joyce

Each year, the University of Houston Law Center's Institute for Intellectual Property & Information Law (IPIL) brings together in Santa Fe, New Mexico, for the IPIL/HOUSTON National Conference, internationally recognized scholars to explore critical issues in the fascinating bodies of law that are copyright, patent, trademark, trade secret, and information law.

The goal of the conference is to provide a small-group, seminar-style discussion of a handful of papers by distinguished scholars in a physical setting that is both inspirational and enjoyable. Where better than Santa Fe? The participants' in-depth conversations regarding the scholarship under consideration have proven over the years to be uniquely intimate and collegial. In the present Symposium issue, *Houston Law Review* continues its highly productive collaboration with IPIL by publishing the fruits of the Institute's 2016 proceedings, held on June 3–5, 2016.

While today copyright is much in the news due to its importance to the American and world economies in the post-industrial era,⁹ this year's conference focused instead on one of copyright's foundational principles: "authorship" or, as it is commonly rendered in both statutory and case law in the United States, originality. Because authorship is a prerequisite for protection not only in this country¹⁰ but around the world, the conference theme was: "Authorship in America (and Beyond)." As

9. The information industries are critically important to the American economy. The numbers are staggering, as a report issued in late 2014 (covering data from 2009 through 2013) demonstrates. In 2013, in the recovery from the Great Recession, the core U.S. copyright industries—those industries whose primary purpose is to create, produce, distribute, or exhibit copyrighted materials, including computer software, videogames, books, newspapers, periodicals, motion pictures, recorded music, and radio and television broadcasting—accounted for 6.71% of the U.S. Gross Domestic Product, or more than \$1.1 trillion. Between 2009 and 2013, the core copyright industries achieved actual growth in excess of 3.9%, almost twice the 2.25% rate for the rest of the U.S. economy. Their importance to foreign trade is similarly dramatic. In 2013, the U.S. core copyright industries achieved estimated foreign exports of \$156.3 billion, leading other major export industry sectors, including aerospace, agriculture, food, pharmaceuticals and medicines, and chemicals. See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2014 Report* 1, 2 (2014), <http://www.iipaweb.com/pdf/2014CpyrtRptFull.PDF> [<https://perma.cc/8C92-YRJJ>].

10. The United States Constitution, in Article I, Section 8, Clause 8, provides: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

a final preliminary matter, I should note that the timing of the conference was prompted by the happy circumstance that 2016 is the twenty-fifth anniversary of the U.S. Supreme Court's landmark decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*,¹¹ argued on January 9, 1991 and decided on March 27, 1991.

The Presenters at the 2016 Conference represented the top tier of present-day scholars in U.S. and international copyright law: Shyamkrishna Balganesh, University of Pennsylvania; William W. Fisher III, Harvard University; Pamela Samuelson, University of California, Berkeley; Xinqiang (David) Sun, Beihang University, Beijing; and Molly Van Houweling, University of California, Berkeley.

Serving as Conference Fellows were several rising stars in the field: Rebecca Curtin, Suffolk University; Kristelia Garcia, University of Colorado; and Andres Sawicki, University of Miami.

I was delighted and privileged to co-moderate with the Honorable Jon O. Newman of the United States Court of Appeals for the Second Circuit, whom all of us in the copyright law business know to be one of the great judges of our time, both in our field and, apropos of the conference title, beyond.

In the barest summaries, what follows are brief evocations of the conference papers, now *Houston Law Review* articles, that follow:

In *Functional Compilations*, Pamela Samuelson leads off by addressing a particular aspect of the unfinished business of *Feist v. Rural*. She notes that, as large as *Feist* may loom on the landscape of authorship, in its opinion in the case the Supreme Court, while establishing that works of authorship must be "original" to qualify for copyright protection and that originality requires a "modicum of creativity," did not say how much or what kind of creativity would satisfy this standard. Samuelson intends to unify the underlying, if non-apparent, theory of originality embodied in a wide swath of cases involving compilations (the actual subject matter of *Feist*) by pointing out that, regardless of the doctrinal hooks or linguistic characteristics courts use, what limits copyright protection in these cases is *functionality*. She notes that, speaking generally, copyright aims to protect not originality per se, but *expressive* originality. Functionality, therefore, should and does limit the protectability of compilations. The author provides examples of four types of functionality that courts have identified in the compilation case law:

11. 499 U.S. 340 (1991). That decision and its back story are the subjects of the Historical Essay, which follows these Reflections.

mechanically derived compilations, compilations dictated by function, systematic or methodical compilations, and compilations whose selection and arrangement were constrained by external factors or efficiency. Professor Samuelson concludes that, even if protectable, the scope of copyright protection in functional compilations is and should be quite thin, requiring proof of exact or near-exact copying.

In *Authors Versus Owners*, Molly Van Houweling observes that, throughout its history, the hallmark of Anglo-American copyright (up to and including *Feist v. Rural*) has been its nominal veneration of the author. She begins by locating the place of the author, historically, in that body of law and practice, commenting on how well or poorly copyright has served authorial interests. Van Houweling identifies specific authorial interests which may come into conflict with the interests of owners, typically after initial dissemination when the author of the copyright in the work (who is not necessarily its owner at that point in time) wants to *revive* a work that is no longer being disseminated, *revise* a work that the author thinks can be improved, or *revisit* the substance and/or style of a prior work in a new work. She argues that the normative justification for copyright protection supports authorial interests in such instances, even when the author is not the copyright owner. Professor Van Houweling concludes by suggesting several ways in which U.S. copyright law could better empower authors who want to revive, revise, or revisit their prior works.

In *The Folklore and Symbolism of Authorship in American Copyright Law*, Shyamkrishna Balganesh continues the focus on U.S. copyright law by noting preliminarily that originality, modern copyright's proxy for authorship, has come to assume a life of its own, with little regard for the system's supposed ideals of authorship. He argues that, in fact, authorship is best understood as a form of folklore and symbolism in copyright law. Drawing on the anthropological strand of Legal Realism advanced and developed by Thurman Arnold, Balganesh argues that authorship serves an important symbolic purpose in copyright thinking, enabling the institution to develop around idealized accounts of individual creativity even when those accounts are hard to anchor in reality. Thus, legal rules and devices enable the folklore of authorship to mediate between copyright law's practical manifestations and society's beliefs about the proper objectives of that body of law's institutional framework. Taking as his premise that authorship is the real sine qua non of copyright law historically (and as emphatically reiterated by the Supreme Court in *Feist*), Professor Balganesh

develops a symbolic account of authorship and shows how it allows copyright law and jurisprudence to make sense of various anomalies within the system.

In *Recalibrating Originality*, William W. Fisher III begins with the premise that the principal purpose of what we in the United States call copyright law is, around the world, to foster a diverse and stimulating culture that, in turn, enhances the ability of all persons to live fulfilling lives. From this, he reasons to a determination that copyright doctrine should be modified to require a significant degree of novelty as a precondition for copyright protection—a proposition that would exclude from copyright, and add to the public domain, a great many more works than does the law as it presently stands, in the United States and beyond. Beginning with an acknowledgment of Justice Sandra Day O'Connor's “deservedly famous opinion” in *Feist v. Rural* (“the decision around which this symposium revolves”),¹² Fisher's argument proceeds in logical steps. He first surveys the ways in which various countries have recently interpreted originality for the purpose of copyright law, and then distills from that survey a taxonomy of possible meanings of originality. He next summarizes the cultural theory of copyright, namely, that the law should foster a rich and diversified culture that offers all persons opportunities for human flourishing, which provides the normative beacon for the remainder of the essay. From there, he proceeds to identify the institutional constraints that might limit substantial reform of the originality doctrine. Finally, Professor Fisher proposes a reinterpretation of originality, compatible with those constraints, which would improve the alignment between the copyright system and the cultural theory.

Lastly, in *Authorship in China (and Beyond): Authorship and Related Issues Under the Chinese Copyright Law of 1990*, Xinqiang (David) Sun provides a window into the law of copyright in China as it relates, in unique ways, to similar bodies of law elsewhere. He begins with a brief history of Chinese copyright law, starting with China's first exposure to civil law-based “copyright law” (or “authors law”) from Japan and Germany in 1910. He then traces the development of laws regarding authorship (not defined, as he notes, in *Feist*) in the United States and Europe, beginning with the Statute of Anne in the juridical antecedent to the United States but reflecting also on subsequent developments under the Berne Convention, with a

12. William W. Fisher III, *Recalibrating Originality*, 54 HOUS. L. REV. 437, 439 (2016).

focus on what U.S. law terms the “work made for hire” doctrine.¹³ The analysis proceeds to the adoption of the Chinese Copyright Law of 1990, which fatally conflated that doctrine, known as the “deemed to be author” rule in China, with the civil law-based “creator as author” rule. The output of adopting a “copyright law” unlike any other in the world was, the author notes, deep doctrinal confusion. Having guided the reader through the development of a statute that was “born defective,” the analysis turns to the proposed draft of a major revision to the 1990 Law begun in 2014. Professor Sun concludes that the revision effort offers China a significant opportunity to clarify and improve its copyright law but that, as the proposed draft currently stands, the issues discussed have not been well addressed, so that disputes of the sort encountered under prior law will continue to arise in the future.

So much for previews. The banquet is prepared. But before you begin consuming the feast in earnest, read on for an historical essay on *Feist v. Rural* to further whet your appetite!

13. That case law-based doctrine is now codified in 17 U.S.C. § 201(b) (2012).