

TOPIC ID. THE PROPERTY YOU CAN'T TOUCH

1. Mr. Locke and the labor theory
 - a. The constitution and copyright, patent, and trademark. Const. art. 1, sec. 8 [8] Congress has the 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” The Lanham Act (trademarks) is based on sec. 8[3], the commerce power.
 - b. Fundamental problems. Let me mention just two:
 - i. Copyright and digitization.
 - ii. The basic protection of copyright in the US is very long: Under international treaties, copyright must last for at least the life of the author plus 50 years. Some countries, including the United States, have extended the length to the life of the author plus 70 years. Under U.S. law, if a work was made as a “work made for hire,” such as a work created by an employee within the scope of employment, the copyright lasts for 120 years from creation if the work is unpublished or 95 years from the date of publication. The SCOTUS has recently decided that “limited Times” in the Constitution is almost totally within the discretion of Congress to determine. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).
 - c. The notion of “intellectual property.” In what sense is it really ‘property’.
2. *INS v. AP*
 - a. 1918 case, i.e., before *Erie RR v. Tomkins*, 304 U.S. 64 (1938), i.e., before the Supreme Court held that there is no such thing as ‘federal common law’. Today, if a federal court must apply common law, it must be a state’s common law.
 - b. The structure of the copyright act in 1918; you had to register a copyright. Today the wires would be copyrighted automatically. That doesn’t mean that *INS* would have won.
 - c. What does the case hold?
 - d. Is this a decision about property? “And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public” The curious

phrase “quasi-property.” pp. S147–8, among the murkiest paragraphs in the U.S. Reports, and the competition is stiff.

- e. What’s Holmes’s theory? A very narrow view of unfair competition: “I think that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated Press for ____ hours after publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and the form of acknowledgment to be settled by the District Court.”
- f. What’s Brandeis’s theory? P. S150 (this paragraph is crucial, though we will not parse it in class): “News is a report of recent occurrences. The business of the news agency is to gather systematically knowledge of such occurrences of interest and to distribute reports thereof. The Associated Press contended that knowledge so acquired is property, because it costs money and labor to produce and because it has value for which those who have it not are ready to pay; that it remains property and is entitled to protection as long as it has commercial value as news; and that to protect it effectively the defendant must be enjoined from making or causing to be made, any gainful use of it while it retains such value. An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery. But by no means all such are endowed with this attribute of property. The creations which are recognized as property by the common law are literary, dramatic, musical, and other artistic creations; and these have also protection under [p*130] the copyright statutes. The inventions and discoveries upon which this attribute of property is conferred only by statute, are the few comprised within the patent law. There are also many other cases in which courts interfere to prevent curtailment of plaintiff’s enjoyment of incorporeal productions; and in which the right to relief is often called a property right, but is such only in a special sense. In those cases, the plaintiff has no absolute right to the protection of his production; he has merely the qualified right to be protected as against the defendant’s acts, because of the special relation in which the latter stands or the wrongful method or means employed in acquiring the knowledge or the manner in which it is used. Protection of this character is afforded where the suit is based upon breach of contract or of trust or upon unfair competition.

“The knowledge for which protection is sought in the case at bar is not of a kind upon which the law has heretofore conferred the attributes of property; nor is the manner of its acquisition or use nor the purpose to which it is applied, such as has heretofore been recognized as entitling a plaintiff to relief. . . .”

P. S151: “They [INS] are merely using its product without making compensation. [Citations omitted.] That, they have a legal right to do; because the product is not property, and they do not stand in any relation to the Associated Press, either of contract or of trust, which otherwise precludes such use. The argument is not advanced by characterizing such taking and use a misappropriation.” Later on the same page he also excludes unfair competition.

Is Brandeis’s bottom line that copyright is the exclusive remedy?

- g. How is this case like *Keeble v. Hickeringill*; how is it different? It is sometimes said that the fundamental tension that surrounds property is that between property and competition.

3. *Feist*

- a. How does this case differ from *INS*?
 - i. We’re dealing here with an application of the copyright statute. *INS* did not.
 - ii. Then why is *INS* cited on p. S156–7? “Decisions of this Court applying the 1909 Act make clear that the statute did not permit the ‘sweat of the brow’ approach. The best example is *International News Service v. Associated Press*, 248 U.S. 215 (1918). In that decision, the Court stated unambiguously that the 1909 Act conferred copyright protection only on those elements of a work that were original to the author. *International News Service* had conceded taking news reported by Associated Press and publishing it in its own newspapers. Recognizing that § 5 of the Act specifically mentioned “‘periodicals, including newspapers,’” § 5(b), the Court acknowledged that news articles were copyrightable. *Id.*, at 234. It flatly rejected, however, the notion that the copyright in an article extended to the factual information it contained: ‘[T]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day’.” *Ibid.* 1 FN: “1. The Court ultimately rendered judgment for Associated Press on noncopyright grounds that are not relevant here. See 248 U.S., at 235, 241–242.”

(Court seems to be taking the purest of dictum, because AP had chosen not to copyright its wires. The statement in the case about *INS*’s holding comes perilously close to being flat-out wrong.)

- b. Case holds? — Note that this was unanimous. Note that it is at least arguably a constitutional ruling.
 - i. But it's closer than it looks. The 10th Circuit didn't even bother to write a published opinion.
 - ii. The “sweat of the brow” theory and Mr. Locke.
 - iii. What the Court is doing is emphasizing what in its view is Congress's and the Register's view of what the statute has always meant.

4. Some questions on the limitations of the statute.

- a. Is the following part of the copyright act consistent with *Feist*:

§106. Exclusive rights in copyrighted works

Subject to sections 107 through 122 [17 USC §§107 through 122], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ... (2) to prepare derivative works based upon the copyrighted work;

The case of the *Wind Done Gone* (2001). The difference between “facts” and “expression” in a post-modern world. The difference between “ideas” and “expression.”

(After the U.S. Court of Appeals for the Eleventh Circuit vacated a preliminary injunction against publishing the book in *Suntrust v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001), the *Wind Done Gone* case was settled in 2002 when Houghton Mifflin agreed to make an unspecified donation to Morehouse College in exchange for Mitchell's estate dropping the litigation.)

The curious application to application of the ideas/expression distinction to musical ideas.

(Nothing is quite so simple as it seems. The SCOTUS has held that there is no violation to use the opening baseline riff and the first line of the lyrics from a copyrighted song, where the use was intended to be a parody: *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).)

- b. After the *Feist* case are databases protected under the copyright act? See <http://carrollogos.blogspot.com/2009/02/copyright-in-databases.html>. The European position; the position of the Register; legislation has been introduced on this topic. At one point it passed the House and died in the Senate. The last testimony that I found on it was in 2003.

If databases are not protected, is there anyway that one can commercially exploit a database without running the risk that your competitors will just take the database and free ride on your effort? See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

- c. Preemption

After *Erie*, may a state change its common law or its statutory law to protect items that can't be copyrighted under the federal statute?

§301. Preemption with respect to other laws (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

State statutes or common law about "hot news." The most recent case that I know of about this is *Barclays Capital Inc. v. Theflyonthewall.com, Inc.* 650 F.3d 876 (2d Cir. 2011), which says that such state provisions are sometimes preempted.

- d. What about a manufacturer of widgets not protected by patent who is subject to a competitor who makes cheaper widgets of the same kind?

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)

See Vessel Hull Design Protection Act of 1998, codified in 17 U.S.C. ch. 13

Design protection is available under the patent act (which may cover things that are simply aesthetic), but the statute has stringent requirements of novelty and originality, and takes a long time to get.

- e. Fashion design. Proposed legislation on this topic did not pass in 2006. It was reintroduced in 2012 and made it as far as the Senate calendar, but has not been reintroduced, so far as I am aware, in any subsequent Congress.

The Supreme Court may or may not have made things easier for the designers in *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. ___, 137 S. Ct. 1002 (2017), which seems to hold that designs on clothing are copyrightable but designs of clothing are not. That basic proposition is not totally new, and seems, at least according to the majority opinion to rest on the statute.

- f. What wrong, if any, is the holder of patent or copyright committing if it attempts to extend that patent or copyright beyond its scope? See *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964)

- g. How does copyright protection differ from plagiarism?