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More on indirect protections: piggyback damage claims - 1 -

One issue is whether indirect i/p protection should be allowed to, or encouraged to, piggyback on other forms of protection, like privacy & contract law. (This is the KEWANEE issue. It's a matter of general policy, and of preemption.). Another issue is whether, within federal i/p law, a cause of action based on limited statutory infringement should be handled any differently because other damage - damage which wouldn't be actionable alone under the relevant federal statute - is present. (This is raised by the NATION issue. It's a matter of legislative intent & general policy.) Although both issues involve piggybacking an interest which isn't explicitly a goal of protection onto a protected interest with which it serendipitously happens to be linked, they have different dimensions. We talk in this file about the latter issue: the extent to which a federal copyright action should take into account noncopyright damage.

Note: There's a third piggyback issue related to the latter: whether, within federal OR state law , plaintiffs' chances for success should be influenced by the court recognizing that the plaintiffs' "real" interests aren't what the basic cause of action had in mind, and that if premised on "real" interests, plaintiff would lose. Now this is a general jurisprudential issue; all I want to focus on is the cases where the "real" interests aren't supposed to be protected because of something related to free access of info.[1]

In addition to being an issue in THE NATION, piggybacking of noncopyright-type interest was also the issue in the DOW JONES copyright opinions of the SD NY; there the court held that damage coming from copying of noncopyrightable elements - and maybe, damage coming from noncopying (non106) use of copyrightable elements - shouldn't be taken into account in assessing "likely damage" for fair use purposes. This was also

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1. I have suggested elsewhere that there's a real problem in allowing i/p rights to be used to protect reputation, when libel actions wouldn't succeed. Example: The Here's Johnny case. Tmks usually don't convey anything except product identification. My real difficulty with HERE"S JOHNNY and related questions may be that I don't like tmk law, with its limited sensitivity to First Am concerns, to be used against SPEECH rather than against mere product identification. Usual tmks are fungible; "here's johnny" isn't.

This is yet another piggyback problem, and one that can exist even when the basic rights at issue are state-created.

an issue in the tobacco-recommendation case (HOLT v LIGGETT & MEYER), tho there protection of REPUTATION was at issue rather than protection of history & fact. In HOLT, the court DID allow its fair use holding to be influenced by the reputational injury and the sense that the copyist used bad faith.[2] Similarly, the new Copyright Reporter collects several cases recently which use tmk or copyright to protect against reputational injury. The SNDY decisions in DOW JONES might be squared with HOLT on the ground that there is an explicit Congressional decision AGAINST protection of things like the Dow average, but none against protection of reputation.[3]

Note the variables:

1. Strength of the Congressional position: Has Congress decided affirmatively that the taking of a certain kind of thing (facts) should not be actionable under copyright law[4], has it described actionable damage in such a way that the taking of this kind of thing probably wasn't expected or envisaged (eg, reputation) but there's no

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2. Protection against bad acts is a common form of pibbybacking. But if the bad acts aren't prohibited themselves, how does a ct decide whether to "stretch" an available cause of action? Presumably by asking why they aren't prohibited-- and if the reason is eg slippery s lope or some other consideration relaying to the dangers of making the thing actionable on its own, and the dangers aren't present in a piggyback situation, it'd seem ok for the court to protect.

Consider here the stretching of the rt of publicity in the ML KING case to account for nasty acts which were ALREADY REMEDIED; Holmes in INS saying "remedy the bad acts re lack of credit, and let the rest go". Also, recall that the MLK dissent said, why don;t we premise our result on the bad acts themselves and thus avoid the dangers of Rt of Public expansion. There was criticism of the MLK dissent on the ground that "bad acts" can't be made actionable on their own cuz its too vague, would chill to much behavior.

3. Indeed, as to a particular TYPE of reputation, namely, ~~the~~ how good an artist you are as affected by the quality of your work, the copyright act may have a bit of favorable attitude. See Note on "Moral Rts in the Copyright Act" in (?) Harvard. perceiving

4. If Cong decided affirmatively that such takings shdn't be actionable AT ALL, then we have a preemption issue. (~~The~~ If we were describing a true continuum, the strength of this possibility would come first.)

clear statement of policy against it[5]or is the statute completely silent, even as to implications, re that status of the interest.

2. Nature of the Congressional position: is Congress hostile to protecting a certain THING (eg ideas), or hostile to protecting against a certain USE (eg nonprofit private performances, ~~fair uses~~)[6], or hostile to protecting from a certain type of damage (eg damage to the market for the copyrighted work, damage to author's reputation as an artist (moral rt), damage to the author's reputation in other areas).

3. Ultimate v instrumental goals: If Congress is interested in INCENTIVES, then ANYthing you give an author as a result of creation aids in incentives. But there might be overproduction! (Calabresi's "what is a cost of what.") Should a court look to whether as a general matter the effort was worth encouraging (e.g., in the

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5. Remember, the court didn't let copyright be used for protection of privacy in ROSEMONT, but there Hughes was seeking to hide presumably true information. The cts might react diffly to efforts to use copyright to protect against the dissemination of false information- as in fact they did in HENRY HOLT v LIGGET & MEYERS.

6. Thus, Congress seems to have decided that it didn't want to give the copyright owner a right to prohibit noncopying REFERENCE TO his creation -- yet that was what was at issue in DOW JONES or NFL. Similarly, Cong didn't want to give the copyright owner a right to prohibit USE OF A SYSTEM IN CALCULATION (Baker v Selden)_ and that's arguable what's at issue in Data Max. Many misapp cases may involve claims to control over vague rights which are so expansive Congress wouldn't want them. The most extreme exclusive rt, which Cong clearly DIDN"T WANT to embrace, wd be a right against "receiving benefit" or "enrichment." (This may be what's at issue in NFL V DEL.) My article deals w that at some length.

Note that regular tangible law does allow SOME unjust enrichment claims despite the dangers. Are the dangers greater for i/p? Does Congress tell us we must TREAT i/p as if the dangers were greater? Should the tangible property's willingness to recognize SOME unjust enr claims- presumably those where slip slope isn't a danger- suggest that i/p law should allow the same?

Nation), or limit itself to incentives re creation of COPYRIGHTABLE EXPRESSION. (This query might resolve itself like so: effort is worth encouraging via property rights insofar as the property rights further the progress of science and the arts. The focus on "expression" in the copyright act and on "novelty" etc in the patent act suggests that it is only protecting THESE THINGS which aid the progress of science & art. Therefore, a court which takes it on itself to protect LABOR PER SE is doing something the federal acts have decided shouldn't be done, at least not in some circumstances, cuz, at least in some circumstances, the fedl acts suggest that Congress has decided protecting them DOESN'T FURTHER progress of sciences & arts, ~~because~~, e.g., such protection leads to more restriction in access then they're worth in terms of production incentives.)

DOW JONES provides a good illustration of one aspect of the preE issue: does 102 mean NO PROTECTION AT ALL is desired, or that Congress merely meant to withdraw copyright protection per se. The Dow JOnes decision shows that it can be meaningful to withdraw copyright protection per se.

The following is RE the DOW JONES case: Should copyright protect re noncopyrightable stuff ("indirect" protection)? This is what Brennan claimed was going on in THE NATION case.[7] One lower court case which said copyright courts SHOULDN"T take into account damage from noncopyright - infringing actions was the SDNY in the DOW JONES case. Note this isn't a preemption argument- the SDNY said nothing about whether or not Dow cd succeed in state ct (in fact, to the extent there's any implication at all , the ct's equanimity in mentioning the Illinois action suggests the preE didn't strike the ct as a serious problem.) It's just an arg that, as far as COPYRIGHT is concerned, damage that flows from noncopyright elements shouldn't be taken into account. (Both DOW and NATION involved fair use.)

Note: how does this fair use problem relate to market failure? I think it goes to the q of "substantial injury to incentives": what counts. But it's also impt to make clear that I recognize FORMS OF FAIR USE OTHER THAN market failure.

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7. Brennan says the majority in NATION said no fair use because of the damage done by the NATION's taking of noncopyrightable facts & labor, and that the fair use inquiry shouldn't be influenced by such. Was Brennan right?