

CUSTOM, ADJUDICATION, AND PETRUSHEVSKY'S WATCH: SOME NOTES FROM THE INTELLECTUAL PROPERTY FRONT

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THE Russian absurdist writer Daniil Kharms told the following story about Pushkin:

Once Petrushevsky broke his watch and sent for Pushkin. Pushkin came, looked at Petrushevsky's watch, and put it back on the chair. "What do you say, Brother Pushkin?" Petrushevsky asked. "The wheels stopped going round," Pushkin said.¹

I sometimes share this story with my students in Contracts when we talk about the ability of courts to stand outside of an industry and to figure out what the custom of dealing is in order to imply terms in a contract. The courts, I explain, might be able to tell whether the wheels are turning, but I am not sure that they can tell why or why not.

The same story comes to mind when Richard Epstein suggests that the famous case of *International News Service v. Associated Press*² ("INS") was correctly decided if and only if the United States Supreme Court correctly understood the newspaper industry's norms on property rights in the news.³ In *INS*, the defendant, the International News Service, having been cut off for political reasons from gathering war news directly, copied news bulletins posted by its competitor, the Associated Press, which brought suit. The Supreme Court's opinion ruling for the plaintiff was short and to the point: "The transaction speaks for itself," wrote Justice Mahlon Pitney, "and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."⁴

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¹ Daniil Kharms, *Anecdotes About Pushkin's Life*, in *Russia's Lost Literature of the Absurd* 66, 66 (George Gibian ed., trans., 1971).

² 248 U.S. 215 (1918).

³ See Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 Va. L. Rev. 85 (1992).

⁴ *INS*, 248 U.S. at 240.

According to Epstein's theory, however, the case involved less a matter of unfair competition than a matter of theft. The International News Service's wrong, says Epstein, was its violation of an industry custom holding that one provider will not copy another's news.⁵ When a stable custom on property boundaries has evolved over repeat plays in an industry, Epstein argues, the Court should enforce that custom as law.⁶ I will refer to such a custom as the "local property rules," to capture Epstein's suggestion that there is more here than the work of informal norms; for what Epstein has in mind is using the power of the state to coerce parties to continue to operate according to evolved understandings of an industry. Instead of criticizing Epstein's idea, in this brief Comment I raise some puzzles and problems that come to mind, with special reference to intellectual property law, my own field of endeavor.

There is nothing unusual in calling upon the courts to ascertain industry practices. Investigation of custom has long been central to adjudicating disputes between private parties; as I have already mentioned, it is virtually a staple of contract law. Moreover, it is useful to be reminded from time to time that in the absence of regulation, parties will frequently work out a series of practices that are, as between them, efficient (which I use here in the sense of *welfare-maximizing*). One can call to mind a fairly substantial set of cases in which this is likely, particularly those regarding exchange of tangible goods or marking off the borders of real property.

Intellectual property cases are rarely thought of as being a part of the set, however, because the public goods problem is thought to be too dominant. When the next user can appropriate the fruit of intellectual development at a cost close to zero and without interfering with the prior user's enjoyment, it is not easy to see what suasion the prior user can bring to bear, in the absence of regulation, to make the next user stop. What one expects instead is that in the absence of regulation, the intangible goods involved will be underproduced.⁷

To the extent that Epstein's article is descriptive, one can hardly quarrel with its conclusion, for many industries have indeed evolved elaborate norms for deciding what counts as property and what

⁵ See Epstein, *supra* note 3, at 94-95, 97-98.

⁶ See *id.* at 126.

⁷ Of course, underproduction is not the inevitable result, as Epstein correctly concedes. See *id.* at 97.

counts as taking, and courts often do enforce these norms as though they are legally binding property rules. One need only consider the use of treatments for motion pictures and formal proposals for books. If what the industry counts as property is taken, a court often will decide that compensation is due—as the makers of the hit film *Coming to America* recently learned. To be sure, it is not clear how widespread the application of Epstein's proposal is likely to be, for the world of intellectual property is so heavily regulated that there is less and less space for private ordering to emerge (although, as I will shortly explain, less space is not the same as no space). Still, whatever its practical limits, the principle possesses an undeniable appeal.

To the extent that Epstein means his proposal to be prescriptive, however, he is on shakier ground. One should be careful about insisting that a court *always* should enforce private customs regarding property rights, even if they have remained stable over time, or, as Epstein would have it, across repeat plays. There are many possible reasons for this caution. First, the private ordering—the evolved custom—might itself be inefficient. For example, the private ordering might create negative externalities that the parties to the ordering should be made to internalize, as would be the case if television news programs followed a custom of copying all of their news from the papers. Another good example of an inefficient set of customary property rules might involve restrictive licensing practices that in some circumstances might be aimed at cartelization.⁸

Second, enforcement of the private ordering might interfere with a larger state policy. An obvious example would be a suit by one drug dealer against another for intruding on the turf of the first. To take a third case, the private ordering might actually be immoral. Again, an obvious example makes the case: one might envision an emergent set of customs under which black people cannot own property or another under which women *are* property.⁹ Such risks as these, however, all can be resolved by the application of various meta-rules to trump

⁸ One might avoid this by adding a rule, as Epstein implies in his article, that only efficient orderings should be enforced. If this is the rule, of course, it is no longer the private custom *alone* that is doing the work.

⁹ One might respond that the main principle still holds because rules such as these are also inefficient. That objection is rather a frightening one, however, for it implies that an individual who is not convinced that forced slavery, for example, is less efficient than free sale of labor has no good reason to oppose it.

what one might think of as the local property rules. My more immediate concern is with the problem of Petrushevsky's watch. Even courts inclined to enforce private orderings might not be very good at anthropology. The judge, after all, is on the outside, looking in. Even assuming—and there is no reason to do so—that the parties tell the whole truth, it will not always be so easy for a court to discern an industry's customs. In ordinary adjudication, when the law is clear and what matters is the conduct of the two parties with respect to one another, it is reasonable to expect that the parties themselves will be the best sources of evidence, even given the natural tendency of the lawyers for both sides to distort the facts in ways favorable to their clients. What Epstein proposes, however, is similar to contracts cases, for example, in which the adjudicating court is called upon to work out not only the conduct or custom of the parties with respect to each other, but the custom of dealing within the industry. Although lawsuits in which industry customs come into question are, of course, quite common, I have always wondered, during my years of teaching first-year Contracts, whether the courts really know what they are talking about—not because the judges lack competence, but because the further beyond the facts of the case they go, the weaker their sources of information are likely to be.

Let me put aside, however, the problem of judicial competence to conduct these anthropological explorations and pursue instead some speculations on what a judicial investigation of a community's evolved norms of property—its local property rules—might uncover, with special reference to intellectual property. For if I were forced to point to a flaw in Epstein's fascinating article, I would note the absence of a full discussion of local property regimes that might work quite differently from the “this-is-mine, this-is-yours” model he presents.

Imagine, for example, a community that possesses a notion of private property but also has a very strong norm against seeking outside intervention to enforce it. The question of whether one can reasonably speak of property rights without a mechanism of enforcement is a large one, and one that Epstein quite properly addresses in his article. What I wonder about is the somewhat smaller question of whether a community can have a norm that says there will be no enforcement.

My colleague Robert Ellickson reports that among cattle ranchers in Shasta County, California, a very strong norm holds that absent the most egregious violations of the evolved local property rules, it is inappropriate to seek state enforcement of one's rights.¹⁰ Ranchers whose cattle do damage are expected to make amends, usually in kind rather than in cash, and most small damages are left to lie where they fall.¹¹ If a rancher does not comply with the norms requiring him to make amends, informal sanctions are applied by the community.¹² Calling in government to resolve disputes, however, is often seen as a violation of the rules of good neighborliness.

Sometimes the same norm might emerge for reasons of ideology rather than neighborliness. Back in the 1960s, this question was warmly debated within the Student Non-Violent Coordinating Committee ("SNCC"). One SNCC faction was accused of stealing from the group. An opposing faction called the police—and was promptly censured within SNCC for bringing outside authorities into the dispute, or, more precisely, for "calling a racist henchman cop of the white master . . . to settle an internal dispute."¹³ Again, it is not that SNCC did not believe in private property; it is, rather, that some of its members sufficiently distrusted the state that they tried to inculcate a very strong norm against seeking government enforcement of rights.

But one need not stretch quite so far back, for intellectual property provides more recent examples. Consider the recent case of *Lotus Development Corp. v. Paperback Software International*.¹⁴ In *Lotus*, the United States District Court for the District of Massachusetts adopted a variation of the so-called "look and feel" test, granting copyright protection for certain aspects of the user interface—the way the human operates with the software—of Lotus Development Corporation's popular spreadsheet program, LOTUS 1-2-3.¹⁵ Many programmers think that Lotus Development Corporation, in seeking judicial relief for the copying of aspects of its user interface, went

¹⁰ See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 59-64 (1991).

¹¹ *Id.* at 53-56.

¹² *Id.* at 56-59.

¹³ Cleveland Sellers, *The River of No Return* 186 (1973).

¹⁴ 740 F. Supp. 37 (D. Mass. 1990).

¹⁵ For the purposes of this analysis—indeed, for the purposes of this Comment—I do not address the question of whether the local customary property rules that Epstein exalts should be held preempted by appropriate federal statutes, like the 1976 Copyright Act.

outside the local property rules governing what aspects of software are protectible and what aspects can be freely copied.¹⁶ In fact, the *Lotus* result actually provoked a fairly significant public demonstration at its corporate headquarters—one chanted slogan was “HEY, HEY, HO, HO, LOOK AND FEEL HAS GOT TO GO”—which is not, shall we say, the usual response to intellectual property decisions, even quite controversial ones.

Obviously, Lotus Development Corporation did not think its resort to judicial process represented a move outside the local property rules (a defection), although, in Epstein’s analysis what matters is not one party’s self-serving opinion on any particular play, but rather the evolved industry custom over repeat plays.¹⁷ In the software industry, the custom of copying user interfaces has been undeniably widespread and might even be efficient.¹⁸ If the industry practices are as I have just described them, Lotus Development Corporation has defected, not by taking someone else’s local property, as the defendant did in *INS*, but by seeking government assistance in making property of what had previously been held in common. One challenge for Epstein’s test, then, is whether, in such a case, he is willing to protect the local property rules, including the norm against enforcement, by throwing the suit out of court. A related challenge for Epstein involves a breaking of local property rules that runs the other way—when the breach of customary rules involves a denial, rather than a grant, of access to property, should judicial enforcement be the same?

Consider once more the *INS* case. In that case, as Epstein points out, an argument of necessity was available to the International News Service, the defendant.¹⁹ Suppose, as Epstein does in his article, that the International News Service goes to the Associated Press for a

¹⁶ If the interface is protectible, other software firms cannot mimic its working, which means that they must design software that interacts with the user in a different way, which raises costs of entry because some skills are not then transferable from already existing software to the new software.

¹⁷ See Epstein, *supra* note 3, at 126.

¹⁸ On the possible efficiency of copying of user interfaces, see Stephen L. Carter, *Gaining Without Venturing: The New Section 337 and the New Software Protections*, in *Technology, Trade, and World Competition* 93, 115-17 (1990).

¹⁹ Epstein, *supra* note 3, at 117-19. We might want to debate whether “necessity” is the right word when the truth is that one party has made itself obnoxious, as they used to say, to a foreign state. But let us pass this point and take the necessity as given for the sake of argument.

license. If the Associated Press grants the license, there might be circumstances in which an antitrust problem would arise, especially if what seems to be cross-licensing ends up as cartelization.

Suppose, however, that the Associated Press sees the chance for (temporary) monopoly rents and says no, putting the International News Service out of business. Would it matter in this case if, along with the understanding of property rights in news, there was a more communal understanding of sharing with others in time of necessity? Note that if this local norm of sharing existed, it would be the Associated Press that first broke the frame of rights (that is, defected from the local property rules). In this circumstance, should the International News Service be able to sue the Associated Press for its violation of the customary property rules on sharing? Presumably, the answer must be yes; after all, if the goal is to enforce the local property rules because the parties most likely have reached efficient customs, there is no reason to enforce them only when they resemble the rules that are imposed by positive law.

One can generalize the point. Suppose that *A*, *B*, and *C* are all farmers in a community with extensive local property rules, including rules prohibiting theft and rules requiring sharing when another's crop fails.²⁰ We can assume that the rules have evolved over the years, through repeat plays, with *A*, *B*, and *C* each sharing when called upon to help. Then one year *A* has a bumper crop, but *B* and *C* are both struck by blight. Blight is so widespread that *A* decides to take more crops to market that year at a higher price and thus has fewer crops to share with *B* and *C*. *B* then buys *A*'s remaining crops. *C*, who is penniless, now risks starvation—or at least shutdown. Should *C* have a cause of action against *A* (and possibly *B*) for interfering with its local rights, provided by custom, in *A*'s crop?

Under Epstein's theory, one would assume that the answer is yes, because all that has changed is the definition of property (that is, the local rules). But then the case begins to sound more like the flip side of *INS*: Suppose that *C* breaks into *A*'s barn and steals what it needs? Now *C*, too, has broken the frame. Is *C*'s defection actionable by *A*? Or, to make it more like *INS*, suppose that *C*'s crop failure has noth-

²⁰ There is no necessary reason to think of this example as involving altruism; the crop-sharing arrangement, which is analogous to potlatch custom among some Pacific Coast Indian tribes, might just as accurately be characterized as a form of insurance. See Ellickson, *supra* note 10, at 176-77, for a discussion of norms of "charity" in this context.

ing to do with the quality of what it has grown. Rather, the government has shut down *C*'s farm for violations of the Occupational Safety and Health Act. Now *C*'s crop has "failed" in the sense that *C* is not permitted to harvest it. Can *C* now steal from *A*?

Here, too, the battle over intellectual property rights in the computer software industry provides a concrete example. The recent case of *Lasercomb America v. Job Reynolds*²¹ raises the question of whether defecting from the local property rules should, in effect, lead to loss of one's negative property rights. The *Lasercomb* facts can be summarized as follows: Job Reynolds sought a license to use certain software that was the subject of Lasercomb's copyrights. Lasercomb declined to license the software except on terms that Job Reynolds considered outrageous. Instead of taking the license, Job Reynolds simply copied the software without payment. In Lasercomb's action for infringement, the United States Court of Appeals for the Fourth Circuit ruled for Job Reynolds, on the ground that Lasercomb's demand for an "unreasonable" license fee constituted copyright misuse.²²

Lasercomb is, in many ways, a troubling case, but only, I think, if one has a view of property that is limited to negative property rights—rights of exclusion. Local customary rules, however, can instead be positive—rights of access. Suppose that the *Lasercomb* outcome rests on the court's understanding of the local property rules of the software industry and that among the local rules is one requiring all players to grant licenses on reasonable terms, terms no harsher than some optimal term *X*. *A* now seeks to use its copyright lever, which grants it exclusive control over the software in issue, to impose term *Y* instead. If *Y* violates the local rules (that is, if *Y* is harsher than *X*), however, then one who is interested in enforcing the local

²¹ 911 F.2d 970 (4th Cir. 1990).

²² *Id.* at 979. The doctrine of copyright misuse, which is by no means universally accepted by courts or by commentators, is modeled on the better established doctrine of patent misuse, under which a patent holder faces the loss of some of its rights if it makes certain anticompetitive uses of its patent. The patent misuse doctrine, like the copyright misuse doctrine, is essentially judge-made law and originated in the late nineteenth century, during an era of judicial hostility to the monopoly that patents were said to convey. Congress, in the Patent Misuse Reform Act of 1988, 35 U.S.C. § 271(d) (1988), has restricted the availability of the patent misuse defense, and the United States Court of Appeals for the Federal Circuit, although denying that it has done so, has essentially limited the doctrine to situations in which the actions of the patentee would amount to violations of federal antitrust law.

rules would presumably hold that *A*'s violation of emergent customary norms provides a defense for *B*—essentially the *Lasercomb* result.

Unless one has a previous bias in favor of forms of property that are traditionally recognized in our law (and because we are, by hypothesis, rejecting the labor theory of property²³), there is no particular reason that we should reject local rules giving more than one person a claim on what one alone has created through labor, whether the Associated Press's news, farmer *A*'s produce, Lotus' user interfaces, or Lasercomb's software.

These challenges are, I think, important ones, and I hope that Epstein will take them up as he develops his theory further. They do not, of course, invalidate his theory, and his theory does, as I have said, possess an undeniable appeal. Still, it is interesting to note that there are important judicial precedents, especially in copyright, that arguably stand at variance with Epstein's approach because they seem to ignore, or even to devastate, regimes of local informal rules. For example, when the United States Court of Appeals for the Second Circuit, in *Salinger v. Random House*,²⁴ held that a biographer's extensive quotations from unpublished copyrighted letters of the subject constituted copyright infringement, the decision shook the publishing industry.²⁵ Perhaps one reason that the industry was so shaken was that an implicit understanding—the local property rules—had been overturned by *force majeure*.²⁶

Equally interesting is the Supreme Court's recent decision in *Feist Publications v. Rural Telephone Service Co.*,²⁷ handed down after Epstein completed his article. In *Feist*, the justices decided that alphabetized white page listings in a telephone directory lack originality and that (depending on how one reads Justice Sandra Day O'Connor's opinion for the Court), either the white page listings are not copyrightable or copying all the information that they contain, in

²³ See Epstein, *supra* note 3, at 108. For the classic articulation of the labor theory, see John Locke, *Two Treatises of Government* 133-46 (Thomas I. Cook ed., 1947) (6th ed. 1764).

²⁴ 811 F.2d 90 (2d Cir.), reh'g denied, 818 F.2d 252 (2d Cir.), cert. denied, 484 U.S. 890 (1987).

²⁵ One editor at a commercial publishing house has suggested to me that, for safety's sake, it is now best for authors not to quote *any* unpublished letters to or from anybody.

²⁶ The court's only attention to industry practice was an oblique one, in its suggestion that authors might, in the future, use paraphrases to report facts rather than quotes containing "expressive content." *Salinger*, 811 F.2d at 100.

²⁷ 111 S. Ct. 1282 (1991).

the same order, is not infringement. In either case, the Court's route to its conclusion was the unequivocal rejection of what has come to be called the "sweat-of-the-brow" rule—the understanding that copyright law rewards the author for the labor and effort that produced the work.²⁸ Copyright law, said Justice O'Connor, rewards only originality;²⁹ consequently, if a work is not original, the fact that the author has put lots of effort into it will not, in Judge Benjamin Kaplan's fine phrase, "make the copyright turnstile revolve."³⁰

As it happens, I think *Feist* was rightly decided and that the sweat-of-the-brow rule was never anything but wretched law. At the same time, it is worth being alert to the possibility that the sweat-of-the-brow rule rested on a judicial understanding of local property rules across a variety of industries. Perhaps there are widespread norms holding it inappropriate to copy the work of one who has put a great deal of effort into it, without regard to the vagaries of federal intellectual property law.

This last point is worth emphasizing. I suspect that local property rules have evolved just about everywhere where there is no regulation and in quite a few places where there is. But not all local property rights will be enforceable in the same way and not all will be enforceable at low cost; on the other hand, many local property rights will be enforced without resort to law. This is less likely in the field of intellectual property, for the public goods reasons that I previously mentioned.³¹ One would predict that the public goods problem would make defections more likely in the realm of intellectual endeavor and that local rules are therefore less likely to survive. Consequently, despite Richard Epstein's entreaties, it should scarcely come as a surprise when the courts upset local rules governing *intellectual* property.

But even if local rules governing intellectual property are less likely than others to survive, they will sometimes turn out to be fairly stable—generally, one would predict, when there is a stronger sanction than tit-for-tat available to use against defectors. For example, one may think of the development of chess knowledge (the best move in

²⁸ *Id.* at 1295 (holding that "originality, not 'sweat of the brow,' is the touchstone of copyright protection" in fact-based works).

²⁹ *Id.* at 1289-90.

³⁰ Benjamin Kaplan, *An Unhurried View of Copyright* 46 (1966).

³¹ See *supra* text accompanying note 7.

particular situations) as a species of intellectual property, even though it does not fall cleanly within the major headings of copyright or patent. The field of chess writing, it turns out, does have informal norms that might be thought of as local property rules, and they govern principally the matter of citation. Basically, a theorist is expected to acknowledge the giants on whose shoulders key bits of analysis rest: "Richard Epstein was the first to develop this brilliant line of play," the analyst must write; or "This analysis is based on a masterful suggestion by Lloyd Weinreb." Obviously, there is no formal sanction available should an analyst violate these rules, but the informal sanctions of peer (and consumer) disapproval can severely damage one's reputation and hence one's career, much as evidence of plagiarism can severely damage an academic career.

Along the same line, my colleague Bob Ellickson argues that the informal norms governing citation and copying in academia might amount to such local property rules, existing, as it were, in the interstices of copyright.³² According to Ellickson, it is widely understood among writers in academic journals that others will reproduce their work for classroom use without permission (even in excess of the amount allowed under the self-proclaimed "guidelines" that appear in the legislative history of section 107 of the 1976 Copyright Act³³), and that they may do the same. That this amounts to a zero-price license is not a problem, says Ellickson, because the rewards for successful academic publishing are found not in royalties but in promotion, higher salary, and enhanced status.³⁴ Although I am not sure whether a court, in analyzing a "fair use" defense to a claim of infringement, would consider itself bound by the local rules that Ellickson describes, his explanation has the virtue of making sense of the informal advice that I and many others who teach copyright law have been giving worried colleagues for years.

³² Ellickson, *supra* note 10, at 258-64. Ellickson prefers the term "norm" to refer to informal understandings of the sort that I have been describing, but my preference for "rule," as I have explained, rests on Epstein's vision of the understandings as binding and enforceable rights in property. See *supra* note 6 and accompanying text.

³³ See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66-72 (1976), *reprinted in* 1976 U.S.C.A.N. 5659, 5679-5686; see also H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. 72 (1976), *reprinted in* 1976 U.S.C.A.N. 5810, 5813 (endorsing the House Report).

³⁴ Ellickson excepts commercially published works from his theory, on the ground that the publishers have a financial stake in the production of copies. See Ellickson, *supra* note 10, at 262-63.

Moreover, a similar idea might help unpack one of the enduring puzzles of the fair use exception to copyright: Why it is that reviewers should have a privilege to quote liberally from the works they criticize, even when writing harsh and unfavorable reviews? William Landes and Richard Posner, in their thoughtful article on the economics of copyright, suggest that the privilege of critics to quote from the works they criticize might be traced to a sort of hypothetical contract within the community of writers and critics, under which the quotation is permitted because the writers are better off in the long run.³⁵ Perhaps a better model is not contract but property; perhaps there is a local property rule under which the rights of authors do not extend to the prevention of criticism.

Still, note my qualifier—I use the term “perhaps,” and I do so intentionally. All of my examples speculate on what the local property rules *might* be. Thus, at the end, I am back at the beginning. I suppose that I am something of a formalist, or at least a positivist, in these matters, although these are terms that at Yale and perhaps elsewhere are nowadays considered pejorative. But there are reasons for my caution. It often is useful for courts to work out what customs and practices have evolved to govern property in particular local situations, and maybe, as Epstein suggests, they should even be bound by what they discover. As I said before, however, I am suspicious of judicial forays into anthropology, and I am reluctant to concede that adjudication is the right forum for building up thick descriptions of industry. I am worried, in short, about whether courts really have the capacity to tell us what makes Petrushevsky’s watch tick—or whether their best expertise is simply in noting, with Pushkin, that the wheels have stopped going round.

³⁵ William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325, 358-59 (1989).