

# **UCLA**

## **Pacific Basin Law Journal**

### **Title**

Foreword

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### **Journal**

Pacific Basin Law Journal, 9(1-2)

### **Author**

Karjala, Dennis S.

### **Publication Date**

1991

Peer reviewed

## FOREWORD

It is a pleasure for me to introduce this issue of the UCLA Pacific Basin Law Journal focusing on intellectual property problems in Pacific Rim countries.

Intellectual property issues are playing an increasingly important role in international trade and therefore in bilateral and multilateral trade negotiations. Some of these problems, such as piracy of book, film, and record piracy, have been with us for quite some time. The advent in the last decade of widely distributed information-based technology in the form of computer programs, however, has given new impetus and new immediacy to movements to better regulate intellectual property piracy on an international scale. Moreover, the term "piracy" does not fully capture all of the issues involved in the international debate. One country's "piracy" may be another's legitimate "technology transfer," and isolation of the question from politics in the midst of often dramatic political change may be impossible. This issue of the Journal is a praiseworthy contribution to the ongoing debate on how best to attack these problems through law.

No single symposium can deal in adequate detail with the full range of legal questions involved, and before taking up the specific contributions to this issue of the Journal, I would like to attempt a brief reflection on some broader aspects of the international protection of intellectual property. In particular, it may be helpful to bear in mind several points that sometimes get buried in the heat of the immediate debate. First, protective legal rules are only as good as our technological ability to detect infringements. Digital technology permits making pirated copies that may be difficult or impossible to distinguish from legitimate copies. The detection of piracy often depends on careful recordkeeping by lawful distributors. Where this approach proves insufficient, there will be pressure to liberalize search and seizure laws and to heavily increase penalties against proven infringers. We should perhaps be cautious about encouraging developing nations, many of which are new to western notions of civil rights and liberties, to allocate heavy police powers to the detection of intellectual property infringements, for fear that the other

valuable individual rights will be sacrificed in the process.<sup>1</sup> Moreover, where there is a legitimate debate concerning the scope of protection, such as the protection of non-literal elements of computer programs, extremely heavy penalties can chill legitimate competition and can unfairly punish persons who have sincerely tried to comply with the requirements of law.<sup>2</sup>

Second, we might also be a bit skeptical about some of the claims that are made concerning the dollar value of piracy that occurs and especially about using these claims as a basis for international trade negotiations. There is no doubt that piracy is a serious problem and that efforts should be made to stop it, but the dangers of overenforcement mentioned above caution that we proceed on a firm factual foundation concerning the degree of the problem. Presumably, the estimated losses are based on an assessment of the number of works pirated multiplied by the retail price, but no one really knows how many copies of works are made illegally. Even more important, the implicit assumption that every illegally made copy would, but for the copying, have been purchased at full retail price is obviously wrong. It is wrong even in relatively wealthy countries like the United States, where many people keep libraries of pirated programs they rarely if ever use. It is clearly wrong in developing countries where there is simply not enough wealth available for broad purchase of expensive computer programs. In framing our demands for more protection in other countries, we should proceed on a firmer factual foundation. This will help avoid making unnecessary demands, which have a cost in the form of other tradeoffs and often less cordial relations with countries that really ought to be our friends.

Finally, in criticizing developing nations for their low levels of intellectual property protection, we should recall

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1. See Shannon, *Computer Law Developments in Hong Kong*, paper presented at the Computer Law Association's 1991 Pacific Rim Computer Law Conference, February 14-15, 1991, Newport Beach, California (unpublished manuscript on file at the office of the UCLA Pacific Basin Law Journal). Mr. Shannon describes the United Kingdom's so-called "Anton Piller" order, which is basically an *ex parte* court order permitting a plaintiff to raid the business premises of the defendant. He relates that Hong Kong judges grant these orders much more readily than do judges in the U.K.

2. For example, Taiwan law apparently provides for minimum damages in an amount of 500 times the retail price of infringed works. Chen, *Taiwan Copyright Laws Relating to Computer Software*, paper presented at the Computer Law Association's 1991 Pacific Rim Computer Law Conference, February 14-15, 1991, Newport Beach, California (unpublished manuscript on file at the office of the UCLA Pacific Basin Law Journal). One might at least question whether this type of provision deters more piracy than it chills legitimate reliance on prior works.

our own history. The United States essentially gave no copyright protection to foreign works for the first 100 years of its existence, and there was widespread piracy of the works of foreign, especially British, authors.<sup>3</sup> We now admit that this was wrong, but having succumbed to the temptation ourselves, we might at least try to understand the motives of developing nations who feel that they cannot afford to pay our prices for intellectual property and yet that they must have it for the kind of technological advancement they desire. At the very least, the demands of United States software producers who are making a good return on their investment through sales in advanced countries where their products are adequately protected should not be the sole determinant of our foreign policy toward countries in which infringement occurs.

We should also try to take a longer term view of the problem of international protection of intellectual property than our trade negotiators sometimes appear to have. Countries whose protection for computer software seems too weak today because they have few producers but many consumers of it may well become major producers of software tomorrow. These countries will soon learn that it is in their own interest to protect against piracy and are likely to take measures in that direction without United States prodding. Indeed, just a few years ago when Japan was considering *sui generis* legislation rather than copyright for the protection of computer programs, many United States producers protested that their aim was confiscatory.<sup>4</sup> This argument made no sense even then, as Japan had already recognized software as a major developing industry, and now there are reports that the Japanese may be close to surpassing the United States in their approach to software production.<sup>5</sup> There was and is no reason for the Japanese to adopt a statutory scheme that permits piracy of software. Nor will there be any such reason for other countries that see software as an important industry in which their citizens can compete.

The comparison with Japan is useful for another reason. Although Japan agreed, under United States pressure, to use copyright law to protect computer programs, its statutory protection scheme is much more detailed than that of the

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3. *E.g.*, R. BROWN & R. DENICOLA, *COPYRIGHT* 725-29 (5th ed. 1990).

4. See Karjala, *Lessons from the Computer Software Protection Debate in Japan*, 1984 ARIZ. ST. L.J. 53, 79-80.

5. Schlesinger, *Japan Makes Strides in Software Design*, Wall St. J., Feb. 8, 1991, at 7B, col 1. (discussing a "factory" approach to software creation that may result in higher productivity and fewer defects).

United States and includes explicit limitations on the scope of protection.<sup>6</sup> While the nature of these limitations will only become fully known through judicial interpretation, they appear to be well-designed not to permit piracy, which they clearly do not, but to balance the reward to the creator of a technological work against the social desirability of permitting subsequent technologists to learn from and improve upon it. It is interesting to note that Korea, a country whose technological advance is very rapid, has adopted a separate Computer Program Protection Act related to but separate from copyright. The Act adopts a protection scheme very similar in its statutory language to that of Japan.<sup>7</sup> The experimentation of these countries should be encouraged and their experience closely followed, as it may be that they end up with a protective scheme more closely attuned to the technological realities of computer software than we have ourselves. If so, we can fruitfully learn from them.

With this brief introduction, I now turn you over to the contributors to this Pacific Basin intellectual property issue. The editors of the Journal have made summaries of the articles appearing herein to which I commend you as well as to the articles themselves.

DENNIS S. KARJALA  
PROFESSOR OF LAW  
ARIZONA STATE UNIVERSITY  
SPECIAL GUEST EDITOR

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6. For a detailed analysis of the Japanese statutory scheme and the cases that have interpreted it thus far, see Karjala, *Japanese Courts Interpret the "Algorithm" Limitation on the Copyright Protection of Computer Programs*, 31 JURIMETRICS J. 233 (1991); also published in 12 EUR. INTELL. PROP. REV. 235 (1990); Karjala, *The First Case on Protection of Operating Systems and Reverse Engineering of Programs in Japan*, 10 EUR. INTELL. PROP. REV. 172 (1988); Karjala, *Protection of Computer Programs Under Japanese Copyright Law*, 8 EUR. INTELL. PROP. REV. 105 (1986); Karjala, *Protection of Computer Databases Under Japanese Law*, 8 EUR. INTELL. PROP. REV. 267 (1986).

7. Anderson, *Protection of Computer Software in Korea*, paper presented at the Computer Law Association's 1991 Pacific Rim Computer Law Conference, February 14-15, 1991, Newport Beach, California (unpublished manuscript on file at the office of the UCLA Pacific Basin Law Journal).