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## Tenure Redux

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## TENURE REDUX

JACQUELINE D. LIPTON<sup>1</sup>

When Professor Bartow invited me to contribute a paper for the IP Redux Conference, my mind immediately turned to an article I'd published in the Berkeley Technology Law Journal in 2003 somewhat pretentiously titled: *Balancing Private Rights and Public Policies: Reconceptualizing Property in Databases*.<sup>2</sup> In a series of emails with Professor Bartow, I articulated why I'd chosen the piece, including the fact that it had seemed a fertile area of academic debate and scholarship at a time when the U.S. Congress decided not to enact new database protection legislation—legislation that would effectively create a property-like right in valuable database contents.

My idea for the conference was that we might glean some lessons from the database debate in terms of Congress's decisions to take, or not take, action when a new form of valuable proprietary information came to light. There was also an interesting international comparative angle, given that the European Union adopted a Directive on database protection in 1996 (the "Database Directive")<sup>3</sup> that

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<sup>1</sup> B.A., M.F.A., LL.B., LL.M., Ph.D., Visiting Professor of Law, University of Pittsburgh and Adjunct Professor of Law, University of New Hampshire. With gratitude to one of my oldest and dearest friends both within and outside U.S. academia, Professor Ann Bartow. I'd also like to thank Mr. Jon Cavicchi, Faculty Advisor for IDEA, for discussing ideas for this piece with me prior to drafting and publication.

<sup>2</sup> Jacqueline Lipton, *Balancing Private Rights and Public Policies: Reconceptualizing Property in Databases*, 18 BERKELEY TECH L. J. 773 (2003).

<sup>3</sup> Directive 96/9/EC, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77).

led to a number of intriguing judicial interpretations<sup>4</sup> and several sets of administrative reviews.<sup>5</sup>

However, when I thought about it afterward, none of those reasons were the real reason my mind had automatically gone to that piece when Professor Bartow invited me to participate in the conference. Rather, there was something about that article that spoke to who I was as a junior scholar recently transplanted to the United States from Australia by way of the United Kingdom. The article spoke more to who I was as a scholar—then and now—than to what I was interested in researching. That is not to say that I did not have an interest in the database debate. In fact, I continue to have an interest in that debate and still very much enjoy discussing aspects of it in my international intellectual property classes. However, the real significance of the piece to me had to do with where I was on the American tenure-track in terms of learning to “write like an American” and assimilate into my newly adopted scholarly community.

When the editors of the law review contacted me about the written version of the piece I presented at the conference, I begged their indulgence to write more of a personal essay about my tenure process and the role of the article in that context than about the substance of the article itself. I’m grateful that they agreed and now I beg your indulgence as I reflect on what this piece meant to my own growth and development as an American legal scholar.

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<sup>4</sup> Case C-203/02, *The British Horseracing Board v. William Hill*, 2004 E.C.R. I-10415.

<sup>5</sup> *See DG Internal Market Services and Working Paper: First Evaluation of Directive 96/9/EC on the Legal Protection of Databases* (Dec.12, 2005), [http://ec.europa.eu/internal\\_market/copyright/docs/databases/evaluation\\_report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf); *Summary Report of the Public Consultation on the Evaluation of Directive 96/9/EC on the Legal Protection of Databases* (Oct. 6, 2017), <https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-legal-protection-databases>.

I should start out by noting that this article was not my first attempt at a tenure piece, but it was the first that “felt” like a tenure piece, by which I mean it was received by my faculty colleagues as something approximating what they’d been asking me to do in my transition from Anglo-Australian legal scholarship to American legal scholarship.

While my entry into U.S. legal academia came from a place different from many of my colleagues who were educated in American law schools, in many ways it wasn’t so different in substance. We all had to learn how to write American-style legal scholarship, even those who may have been on law review at their own law schools. Being on the tenure track was different. There was more at stake for us as individuals and arguably also for the schools that hired us in terms of scholarly reputation, citation counts, the ability to attract good students to the school through solid hiring, and probably a bunch of other factors that escape me at present.

My own early attempts at American scholarship were met with the criticism that my writing was too practical or doctrinal. The objections were that my work focused on the nuts and bolts of an issue with an eye to solving a discrete problem. In other words, my scholarship was insufficiently theoretical. Blame my practitioner roots for that. My later attempts, the ones that I count as my first attempts at real tenure pieces, were criticized for being too waffling and untethered, and for setting up “straw men” to knock down. Those pieces were the result of a growing intuition—fueled by discussions with my colleagues at my own, and other, schools—that I needed a grand theory of everything to offer to the academy. Of course, I quickly realized that I didn’t actually have a grand theory of everything—few on the tenure track do<sup>6</sup>—so I ended up using impressive words to say very little, a common problem for early stage scholars.

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<sup>6</sup> And if you’re one of them, my hat is off to you!

In any event, somewhere around 2001-2002, I was confronted with the need to write something “American,” that dealt with an issue of interest to “American legal scholars,” that was written in the “American way,” that sounded credibly theoretical, but that had sufficient concreteness so as not to be a “straw man.”

Enter the database debate.

This was an area of scholarship in which I felt comfortable having recently studied the issue in the United Kingdom first as part of my LL.M. degree at Cambridge University and later as faculty at the University of Nottingham. I also had a colleague in Australia who had written broadly on the comparative aspects of the issue and who had generously discussed his work, and my ideas, with me.

I was delighted to find, when I first took up an American faculty position, that the intellectual property (IP) sector was abuzz with concern about the relatively recently adopted Database Directive in the E.U.,<sup>7</sup> and the concern that the United States Congress would enact something similar. The main concerns about the Directive were that it created a new over-reaching *sui generis* IP right that had significant potential to interfere with the balance between IP and free access to information and ideas.<sup>8</sup> (You’ll be relieved to know that this is about as technical I need to get about the debate for the purposes of this essay).

The good news for me was that some of the leading scholars in the IP field were beginning to write about the database issue at the time, and it was possible I could join

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<sup>7</sup> See Directive 96/9/EC, *supra* note 2.

<sup>8</sup> See, e.g., Mary Maureen Brown et al., *Database Protection in a Digital World*, 6 RICH. J.L. & TECH. 2, 35 (1999); J.H. Reichman & Paul F. Uhler, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793, 809-10 (1999); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 49, 145-58 (1997).

their scholarly debates.<sup>9</sup> At my first ever U.S. intellectual property conference, one of the leading scholars in the field assured me that it was not a question of *if* Congress would act on the matter, but rather of *when*. At my second ever U.S. intellectual property conference, another leading scholar handed me a bundle of photocopied articles he thought I should read in preparation to present my own magnum opus in the area. I was definitely onto something!

I went all out with this one. I read all of those photocopied articles, consulted my old IP notes from my Cambridge days, made additional notes based on new reading and discussions with all the professors I could think of, and, by George, I thought I had it! Basically, my idea was simply to suggest that it's okay to create new *sui generis* IP rights (like the E.U. had done), provided that we all understood their limitations and boundaries. In other words, new rights were fine if they were clearly delineated and there was clarity as to how far they extended into areas like free access to information.

The problem was that this idea doesn't sound very theoretical or academic. Really it's quite pragmatic. Doctrinal. Nuts and bolts. The death knell for a tenure piece. So I had to spice it up a bit. (Oh, and if I could manage it, I also needed a killer title: preferably one with a colon.)

This is what my final abstract ended up looking like:

This Article presents a new paradigm for thinking about intangible property rights in response to recent criticism that information products such as databases should not be over-propriety. Analyzing the inherent problems with existing approaches, the Article concludes that creating private property rights in these intangible assets will not inevitably lead to commercial and social problems. On the contrary, legislatures can create private property rights that

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<sup>9</sup> Brown et al., *supra* note 8; Reichman & Uhler, *supra* note 8; Reichman & Samuelson, *supra* note 8.

when accompanied by appropriate oversight and monitoring will preserve commercial markets and the public domain of information. Indeed, a new database law can use the concept of property as an organizing tool to properly balance private rights and the public policies. In developing this new approach to database protection, this Article examines the international debate on the creation of private property rights in databases. Furthermore, unlike previous models for sui generis database protection law based on copyright or trade secret law, the model in this Article draws on the principles underlying trademark and patent law in reaching a new solution.

Pretentious, right?

I mean, I could have said: “We could create a new database right by clarifying what it applies to, and maybe creating a registration system to put other people on notice of rights claimed.”<sup>10</sup>

Coulda. Woulda. Shoulda.

But I didn’t.

Instead, I made the much more spurious but philosophical-sounding claim that we should “draw on the principles underlying trademark and patent law in reaching a new solution”. Drawing on principles is a great way to sound theoretical. Also, no one knows what you really mean if you don’t say on which principles you’re actually drawing. In honesty, I was only drawing on patent law in as much as patent claims require a clear explanation of the information being claimed as a patentable invention, and I was only drawing on trademark law (and again patent law) in the sense

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<sup>10</sup> And, yes, I am aware that even this argument, simply put, has a number of inherent problems like, “*how* precisely do you clarify what the right applies to?” I discussed some of this at the conference (guess you literally had to be there). I’m certainly happy to admit that the final article as published didn’t contain the most pragmatic solutions to a complex problem, but that’s beside the point relating to the obfuscatory way I wrote the darn thing.

that both require registration of what is being claimed to put others on notice of prior rights, and to enable others to challenge the scope of the rights being claimed.

I shouldn't be too down on myself here, because it was actually a new idea at the time. The E.U. Database Directive, which had raised a lot of hackles at that point, did not have a registration or notice system. It was largely based on existing copyright systems which, for the most part in Europe, didn't require registration, notice, or any description of the exact rights being claimed. The Berne Convention did away with copyright formalities a long time prior to the enactment of the Database Directive, so any database property system derived from copyright in the European Union was likely to follow the same approach.<sup>11</sup>

In other words, my suggestion that the U.S. adopt a more formalized system for databases than the E.U., relying on notice, registration, and clear descriptions of the rights claimed, was arguably a contribution to the scholarship, however poorly worded. It's simply a contribution that could have been made more in a more straightforward manner if I hadn't been so bound up with the mentality of crafting theory as opposed to clearly articulating what I was trying to say. Sure, you can do both, but unfortunately that seemed to be beyond me at the time.

I'd probably make similar comments about the structure, organization and word length of the piece. This was an article that had a very simple argument, had a manageable handful of pre-existing authorities to cite, and could have been written in about half the length it took, and with a much less flowery vocabulary. It satisfied my tenure committee then (and to an extent myself as well, proving to

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<sup>11</sup> Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, revised at Paris July 24, 1971, 25 U.S.T. 1341, 1161 U.N.T.S. 3 ("The enjoyment and the exercise of these rights shall not be subject to any formality...").

myself that I could indeed “write like an American”), but I don’t think it’s how I’d write a similar piece today. In fact, I’m darn sure it isn’t.

Now, I’m not blaming anyone here but myself for the way I interpreted advice I was given, or my response to it. Over the years I found my own distinct scholarly voice—a voice that made me happy and ultimately satisfied my tenure committee and my outside reviewers. Some people are born with it, and some develop it over time. I could excuse myself by saying I come from a foreign system and it was harder for me, but I don’t think it was.

I do think many of us tie ourselves up in knots trying to satisfy multiple masters (sorry if that term is genderist, but it captures my meaning) while on the tenure track when we may be better off developing our own voices. Of course, there are standards and requirements, but usually there are different ways to fulfill them. That’s why the tenure track is longer than five minutes. Ideally, the allotted years should give you a chance to understand your obligations to your institution as well as to develop your own scholarly voice.

And what about those other issues that crop up on the tenure track; the ones that aren’t about voice or growth as a scholar, but are more whimsical, like titling your article and placing it. Ah, placement is a whole other game and one I also had to learn in America. For this game, I have to say, it did make a difference that I came from another country with no experience in the student-edited law journal system. With peer-reviewed journals, as in the Anglo-Australian system with which I was familiar, you submit to one journal at a time, and you usually start with the one you most hope will publish you. It takes some time (often two to three months or more) for the reviewers to get to your piece, and then you get a final answer which goes something along the following continuum: accept, accept subject to revisions, reject but encourage resubmission, reject. Once you have this response from the journal, your next move becomes

relatively clear: move on to the next journal in the list or continue with the first one and work with their response.

I'm not comparing the merits of that system with the merits of the U.S. system at all. I've had those debates elsewhere and have come to the ultimate fence-sitting opinion that no system is perfect. However, I am saying that when I first received an acceptance from one of the eighty-or-so journals my colleagues suggested I send my manuscript to, it simply didn't feel right to do what my mentor then instructed me to do. She said: "now you thank them for the offer, and ask them how much time you have to expedite."

Expedite? Say, what? And wasn't that incredibly rude? When a journal asks you if you want to publish with them, you say "yes."<sup>12</sup> You don't mess around. You don't go back to them and say "how much time will you give me to expedite?" (And "expedite" was a whole new word and a whole new world to me in this context.)

Sure enough, when I sent the email to the editors, they didn't bat a virtual eyelid. They just told me they could give me up to two weeks if I needed it. They had absolutely expected me to ask, and it would have seemed weird to them if I hadn't. It took me years to get comfortable with this system. Again, I'm not saying there's anything wrong with it; just saying it was kind of like learning a foreign language.

My database piece, as I mentioned, was ultimately published in the Berkeley Technology Law Journal, and that particular placement brought a whole new world of angst to my tenure-track life. That was back in the days when "specialty" journals were relatively new, or at least relatively new in my field, and definitely relatively new in terms of tenurable scholarship requirements at some schools. While specialty journals were accepted fare in some fields, like

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<sup>12</sup> Much like the advice Bill Murray gives Dan Aykroyd at the end of the original *Ghostbusters* (ten points if you got the reference).

international law which has a longer history of publishing in specialty reviews, the rules weren't so clear for IP journals in the early aughts, let alone journals branded as "law and technology" journals. Who knew if this new-fangled Internet thing would even last?

Over and over I confronted the question of specialty versus general journals. This question actually broke down into a series of sub-questions, raised by a number of my colleagues. Was my work more likely to be read in a specialty journal or a general journal? (Remember, this was the early 2000s, so not everything was online yet. Even SSRN wasn't a big thing in legal academic publishing at the time.) Were law journal editors at schools with a specialty IP journal less likely to take IP articles, and more likely to pass them on to the editors of their specialty journal? In other words, was it getting harder to publish specialty pieces in general journals? Some of the "law and technology" journals published online only: did this make them "lesser" journals? Did it give their articles more of an ephemeral or transient quality? How did you compare the ranking of, say, a Top 50 general journal with a Top 20 specialty journal? In other words, was it better to publish in the specialty journal at a higher ranked school than a general journal at a lower ranked school, or did general journals automatically get more street cred because there was more competition to place articles there?

Oh, the wringing of hands and the gnashing of teeth!

Okay, so that's an exaggeration, but it didn't feel like it back on the tenure track. I'm pleased to say that a number of specialty journals, in my field and in others, quickly established themselves as leading fora to place articles and I'm proud to have published a number of times in BTLJ as well as other terrific specialty journals, with smart, hard-working, and engaged editors.

At the end of the day, my tenure package was a combination of articles in specialty journals and articles in

general journals and, at the time, in case anyone is interested, my highest “placed” general journals were those at schools that didn’t have specialty IP journals. That may be coincidence, or it may answer at least one of those angsty questions above. I don’t pretend to have the answers to many of those questions, and, honestly, I don’t pretend to care all that much now. After enough angst to sink a ship (and again I have to say I take full responsibility for aforementioned angst), I don’t much care anymore. Now I publish in venues that I like, usually when I’m given a chance— like this one—to write something that interests me regardless of whether it pleases or displeases anyone else. But then again, I’m not on the tenure track anymore.

