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JEFFERSON'S MOOSE IN CYBERSPACE

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Speaker:

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TABLE OF CONTENTS

- 1) Speaker Biography
- 2) CLE Material: *Napster, Jefferson's Moose, and the Law of Cyberspace*

Speaker

DAVID G. POST is currently the I. Herman Stern Professor of Law at the Beasley School of Law at Temple University, where he teaches intellectual property law and the law of cyberspace. He is also a Fellow at the Center for Democracy and Technology, a Fellow of the Institute for Information Law and Policy at New York Law School, an Adjunct Scholar at the Cato Institute, and a contributor to "The Volokh Conspiracy" blog. His most recent book is "In Search of Jefferson's Moose: Notes on the State of Cyberspace" (Oxford, 2009) (see <http://jeffersonsmoose.org>), a Jeffersonian view of Internet law and policy -- "beautifully written [and] astonishing" (Lawrence Lessig), "brilliant, and a joy to read" (Jonathan Zittrain), and "an authentic work of genius, conceived and written in the finest Jeffersonian spirit" (Sean Wilentz).

Professor Post is also co-author of "Cyberlaw: Problems of Policy and Jurisprudence in the Information Age" (West, 2007) (with Paul Schiff Berman and Patricia Bellia), and numerous scholarly articles on intellectual property, the law of cyberspace, and complexity theory. He has been a regular columnist for "The American Lawyer" and "InformationWeek"; a commentator on the "Lehrer News Hour", Court TV's "Supreme Court Preview", NPR's "All Things Considered", and the BBC's "World"; and recently was featured in the PBS documentary, "The Supreme Court".

After receiving a Ph.D. in physical anthropology, Professor Post taught in the Anthropology Department at Columbia University before attending Georgetown Law Center, from which he graduated summa cum laude in 1986. After clerking with then-Judge Ruth Bader Ginsburg on the D.C. Circuit Court of Appeals, he spent 6 years at the Washington D.C. law firm of Wilmer, Cutler & Pickering, after which he clerked again for Justice Ginsburg during her first term at the Supreme Court (1993-1994), before joining the faculty of the Georgetown University Law Center (1994-1997) and then Temple University Law School (1997-present). Professor Post's writings can be accessed online at <http://www.davidpost.com>.

**NAPSTER, JEFFERSON'S MOOSE,
AND THE LAW OF CYBERSPACE**

David G. Post
June 8, 2000

I get asked a lot of questions about the “law of cyberspace” – how will personal privacy be protected? are software patents good or bad for the growth of the Internet? can I download pictures from a publicly-accessible web page and post them on my own? how does the First Amendment apply to offshore databases? -- and I often have the strange feeling that not only do I not know the answer to many of them, I don't even know how to think clearly about what the answer might be. Familiar frameworks that work quite well for thinking about and analyzing real-space legal problems don't seem to work very well, making it harder and harder to get a grip of what's going on out there.

Take Intellectual Property, for example. I don't know how to think about the role and meaning of intellectual property in a world in which information is instantly accessible, and equally accessible, to everyone, everywhere, at the same time; I don't know what it means that the patchwork world in which we live, where physical borders are critically important components of the legal landscape, is giving way to the network world where they're not (Paul Geller's nice metaphor); I don't know how to discover which of our existing laws make sense, and which don't, in a world that consists of nothing *but* information – binary digits, 1s and 0s – and in which “information law” is, in effect, the only body of law there is; I don't know how to assess the role of law in a world that is undergoing a massive scale-change, a world in which legal issues that might have been of concern to 5,000 people in the past – what are the laws governing the copying of newspaper articles in the United Kingdom? –now affect 50 million.

What I do know is that lots of what we *thought* we knew about intellectual property is wrong. We thought we knew that without legal protection for intellectual property there would be no incentive to produce intellectual property, and that without incentives to produce intellectual property there would be none (or virtually none) created. So the Net, with its (shall we say) “uncertain” legal protections for intellectual

property, should be nothing more than a vast wasteland. But it's not. We thought we knew that given a choice between taking something at no cost, and taking something only on a condition that you share what you have, people would always choose the former. The Napster experiment would, therefore, fail; since you can have access to the music files of Napster users *without* making your own personal files available to others, who would share? And if nobody shares, the system collapses. But it hasn't; 9 million people, by last count, are sharing the files on their hard disks without any "reason" to do so.

It seems that this place – "cyberspace" – is a place unlike any we have seen before; it's as if we've come across a hitherto undiscovered island – somewhere off the coast of Antarctica, say – that has some pretty strange features. We can travel to and from it in an instant; while we're there, we can move about completely unencumbered by geography, gravity, or the other inconveniences of the real, tangible world. We can engage in trade, form communities, and talk to one another there in new, sometimes bizarre, and occasionally unfathomable ways. It has strange new life forms -- bots, web-crawlers, cookies, spiders, viruses. It doesn't really seem to have much of a "there" (or a "here") there; the familiar lines on the map around which we organize so much of our lives don't seem to matter there at all. It is noplacelike, but somehow it seems to keep growing, and to have room for anyone and anything

To find ways to think about this new place, I have – perhaps oddly, perhaps not -- been spending considerable time recently with the writings of Thomas Jefferson. The American continent seemed as (or more) bizarre and unfathomable to Jefferson (and his contemporaries) as cyberspace does to us, and nobody thought as clearly, and as intelligently, about New Worlds, and about how to think about New Worlds, as Jefferson did.

There's one scene I've come across that I can't seem to get out of my mind. The story goes like this. It is 1787, shortly after Jefferson had taken up his post as the American Minister to France. 1787 was, of course, a truly remarkable year in human history. On one side of the Atlantic, delegates were gathering in Philadelphia to begin deliberating over a new Constitution for the recently-formed United States of America. And on the other side, the French Revolution was just beginning; bread riots in the streets

of Paris, and a beleaguered King's call for a gathering of the "Assembly of Notables" at Versailles, opened the first chapter in a complex and bloody chain of events that tore European society to pieces and fundamentally altered the course of the modern world.

In the midst of all of these earth-shaking events, Jefferson found the time to arrange for the display of the complete carcass of a moose, bones, skin and antlers attached and 7 feet tall at the shoulders, in the entrance hall of his residence, the elegant Hotel de Langeac in the center of Paris. This had been, as you might imagine, no small undertaking on his part; getting a moose from the American woods to Paris in 1787 was an almost unbelievably complicated business. [Come to think of it, getting a moose to Paris *today* would be no trivial task. You can't just shoot it, stuff it in an envelope, and send it off to France; it has to be skinned, dismembered, and cleaned; a preservative has to be applied to the skin to keep it from decomposing; the entire mess -- bones, skin, and antlers -- has to be placed in boxes strong (and watertight) enough to survive a long ocean journey in the hold of some sailing vessel; ocean transportation to Le Havre has to be secured, along with ground transportation from Le Havre to Paris; and finally, someone in Paris has to be available to re-assemble the whole damned thing.]

It's surely worth asking: What was the point of it all? This is not, after all, some randomly-chosen 18th-century eccentric we're talking about; this is the author of the Declaration of Independence and the Summary View of the Rights of British America, the soon-to-be Secretary of State, and later the third President, of the United States. Jefferson had *lots* of other things to occupy his time (and on which to spend his money) in Paris. Yet he spent his time and money on this, going so far as to call the moose carcass "*an acquisition more precious than you can imagine*" in a letter to a friend. What was going on?

TWO CYBERSPACE STORIES.

Let's leave the moose standing in the Hotel de Langeac for the moment; I'll return to it presently. I want to describe two stories about cyberspace. The first is about "cybersquatting." You have no doubt heard about the fights that have broken out between the owners of trademarks and domain names over the "rightful" use of individual domain names (exxon-mobil.com, harvard.edu, plannedparenthood.org, etc.

etc. etc.). Scores of lawsuits have been filed around the world, and in the 6 months or so since ICANN instituted an alternative dispute resolution process for these disputes, over 600 individual cases have been filed.

Here's how I look at it. First off, everyone needs a homestead, a piece of their own real estate, if they're going to settle and start building a life for themselves in this new place. But real estate in cyberspace is a funny thing whose contours are not drawn by lines in physical space but by entries in a database of domain names.

This real estate is turning out to be very valuable – worth in the aggregate uncountable billions of dollars. Some folks looked out across the horizon and said: I have a deed, a legally-protected entitlement, to a chunk of that real estate. I already own some of that territory. I have *trademark rights* in my name, and that means that only I can use that piece of territory with my name on it. Exxon-mobil.com is *mine*, Exxon-Mobil, Inc. says.

But when these folks went out to stake their claim they found that their spots were already taken, that people were “squatting” on “their” domains. Fights, predictably, ensued.

How do we resolve these competing claims to the same patch of ground? Are these (trademark-based) “deeds” valid? Which ones? In what circumstances?

Story number two is about Napster. Napster is a clever little Internet application that has been receiving lots of attention, not all of it positive, of late. It was invented by a 19 year old college dropout by the name of Shawn Fanning, and it works more or less like this. First, you download a piece of software from Napster's web site. When you run the software, it looks around your hard disk for music files, and it compiles a directory listing the songs it has found. It then sends that directory -- not the songs, just the list of songs -- back to Napster's computer, where it is placed into a database along with the directories of all of the other Napster users.

Now, suppose that you find yourself desperate to hear, say, Bob Dylan's original acoustic version of “Moonshiner.” You don't happen to own a copy of that song yourself, so you log into the Napster database. That tells you, of the other **9 million** members of the “Napster community” – the other folks who have downloaded and run

the Napster software – does anyone this song on his hard disk? Are they currently logged on to the Internet?

If the answer is yes – if the database returns the answer “Oh, yes, Ricardo Ibarguen, in Sao Paolo, has a copy of this recording on his hard drive, and yes, he’s logged onto the Net right now – here’s his Internet address – the Napster software allows you to contact his computer and make a request for the file and to download a copy of that file onto your machine so that you can play it.

It’s pretty neat, don’t you think? All of a sudden, thanks to a little string of (free) software, the whole world is your hard drive. You agree to share a portion of your hard drive with others, in return for their reciprocal agreement to share a portion of theirs with you. A few years ago, there was lots of talk about the coming “celestial jukebox,” the instantly downloadable library of songs that would be available at the touch of a button. Who would have thought that it would come, not in the form of some gigantic machine housed in the basement of Time-Warner or Sony Music Corporation, but as a simple string of code written by a 19-year old?

And if you’re not terribly interested in music, and none of this floats your boat, consider, perhaps, a poetry Napster? Or a real estate listing Napster? Or a Napster for articles about law and cyberspace? Lawyer cartoons? Viola jokes? How about a Napster for information about the genetic sequences making up the human genome? [The latter is already in the planning stages, it turns out; see Declan Butler, “Music software to come to genome aid,” *Nature*, vol. 404, p. 694 (April 13 2000).] Or

So people on our newly-discovered little island, in addition to fighting over real estate, have this truly *extraordinary* sharing and copying device, a new way to move information around from one person to another. But it turns out that some people are “smuggling” things in across the border from real-space onto our island. They’re taking property created *here* and bringing it *there*. And that makes some people -- Metallica, many of the large music studios, the Recording Industry Association of America, who have filed suit and begun a massive lobbying campaign to stamp out Napster -- pretty unhappy, because they believe that copyright law protects them -- or, at least, that it *should* protect them -- from actions of this kind.

This is in a sense the obverse of the cybersquatting dilemma. Cybersquatting involves newly discovered property *there* that people are crossing the border to claim; the “Napster problem” involves existing property *here* that people are bringing with them as they come across the border.

Does copyright law prohibit this? Should it? And who decides whether it does, or should? How should we think about that?

* * * * *

One of the reasons I have troubling thinking about these questions is that I’m not sure whether cyberspace is a “new place” or not. It makes a difference, for if it is, it is no longer so obvious that these “deeds” to cyberspace domains are valid, is it? Imposing “rights” on those who have never heard of them or consented to their validity smacks a little of colonialism, does it not? After all, Lord Baltimore, too, had a deed, a perfectly lawful instrument signed by the King of England giving him exclusive rights to a huge chunk of land, everything from the Chesapeake Bay to the headwaters of the Potomac. But because this was a new place, we asked: What gave the King the right to give away parts of it in that way? Did the inhabitants of America have to honor that deed? Have the “inhabitants” of cyberspace decided the extent to which they want to recognize these pre-existing rights? Where’d that happen?

And thinking about cyberspace as a “new place” makes one think about that “smuggling” a little differently, too. Just for a little perspective, “smuggling” copyrighted works into New places has a long and rather distinguished pedigree; indeed, we did a lot of it ourselves when we were a New Place. For the first 100 years of our existence, bringing copyrighted works in over the US border and redistributing to your heart’s content was *not* “smuggling” at all, because it violated no law. Dickens (and other British authors, especially) complained bitterly about the way their works could be freely copied and shared in the New World.

The US and Britain eventually worked that out, of course. In the mid- and late 19th century, American authors – Hawthorne, Melville, and Emerson foremost among them – began to complain that their livelihoods were threatened by the absence of protection of *their* works overseas. And thus, in 1891, the people of the US, acting through their elected representatives, came to express the view that it was no longer in

their interest to allow this free movement of works into the United States to go on, and the US Copyright Act was amended to provide, finally, for recognition of the rights of foreign authors (at least, the copyrights of authors from those countries that recognized the copyrights of *our* authors).

So if I'm trying to solve the "Napster" problem, my first thought is not "how can I make copyright law stronger so that I can stop this smuggling", but rather how might we get the inhabitants of cyberspace to see that it is in *their* interest to limit the movement of copyrighted works across their border with the real world? How we might build institutions *in cyberspace* through which those inhabitants might express and implement that view.

* * * * *

Jefferson brought the moose to Paris because there was a serious scientific debate raging in the 18th century about whether the New World was a *degenerate* place. The moose was a data point in this debate, ammunition in this intellectual war. The dominant scientific view at the time was that the native animals in the New World were smaller than those in the Old, that domestic animals actually got smaller if they were transported to the New World, and that the New World had smaller numbers of animal and plant species than the Old.

They didn't know what it was – the New World was too humid?? too cold?? – but there was *something* about the place that took away the Life Force.

So out comes the moose. The moose was part of Jefferson's campaign to show that this particular new world was *not* a degenerate place. Sometimes a picture -- or, better yet, a carcass -- is worth a thousand words. The moose is a big animal, larger by a considerable margin than its European counterparts (the reindeer and caribou). Its brooding presence in downtown Paris was intended to make observers think twice about the degeneracy theory. Degenerate animals in the New World? Just check out that moose!

Jefferson was no fool (now *there's* an understatement!); he knew full well that one data point does not settle the argument. His only published book, "Notes on the State of Virginia," was the first great scientific study of life in the New World, and contained a *detailed* refutation of the degeneracy theory, page after page of Jefferson's careful

analysis of the relative sizes of American and European animals; surely Jefferson was the only American President who knew (or cared) that the flying squirrel was heavier in America (4 lbs.) than in Europe (2.2 lbs.).

But it was not just a debate about the relative sizes of the quadrupeds that brought the moose to Paris. *The degeneracy of animals in America is indeed within one step of the degeneracy of the man of Europe transplanted to America.* There were, in other words, serious *political* implications of the degeneracy theory. To Jefferson, the boundaries between “science” and “politics” were never sharp, anyway; Jefferson understood – better, perhaps, than anyone before or since -- that natural history and politics are linked together at the deepest level, that social systems *are* natural systems, and that you cannot talk sensibly about how best to govern in a place until you understand the kind of life that can be lived there. If the New World really were a degenerate place, people would have a hard time building viable societies there. If forces “contrary to the enlargement of animal nature” in the New World were producing degenerated men and women in the New World, then surely those men and women were incapable of managing their own affairs, and would need guidance from the more vigorous inhabitants of the Old World to make their way in the New.

The degeneracy theory was, in Jefferson’s view, just one part of a general campaign in the Old World to discredit the New World’s claims to self-government, and to discourage emigration of European peasants to the New World to help build the new society that would flourish there. “The real motive,” he wrote,

“... is to discourage Emigrations. One half of Germany and more than half of England, Scotland, and Ireland would be soon on tiptoe, and no inconsiderable Part of France, to fly to America for relief from that intolerable load which they now carry on their shoulders, if they knew the true state of facts in America. The English Ministers and the whole hierarchy of their dependents are aware of this, and there is an incredible number of persons constantly employed in preparing paragraphs to represent the United States to be in a state of anarchy and misery.”

So the moose was a kind of *advertisement* for New World. It had, figuratively speaking, a sign hanging around its neck: "Come to America – see for yourself how degenerate life is there."

But in the final analysis the moose was more than this, too. Jefferson used the moose to get his French friends to stand back, to gasp, and to say: There really *is* a new world out there, one that has things in it that we can hardly imagine. He wanted them to have an aha! moment in regard to that New World from out of which Jefferson (and his moose) had emerged, to share in his excitement about the possibilities inherent in this astounding new place. *That the New World had these strange new beings was, to Jefferson, the good news*, for it meant that it was a place where we could think the unthinkable, re-evaluate the Received Wisdom, and re-think the world in which we were to live. New Worlds present opportunities -- more than opportunities, imperatives -- to *explore*, to try to understand the ways in which they really are "new," to *make* them new. Later in his life Jefferson wrote:

We can no longer say there is nothing new under the sun.
For this whole chapter in the history of man is new. The
great extent of our Republic is new. Its sparse habitation is
new. The mighty wave of public opinion which has rolled
over it is new.

It's an attitude we need a lot more of in cyberspace. Our first reaction to new things is often very different -- fear. It was true then – lots of people, respectable and intelligent people, were genuinely fearful about what they'd find in the New World, and, once they were there, about what might lie in waiting on the other side of the Alleghenies. And it's true now.

Sadly, we, as lawyers, are often the chosen instrument for expressing that fear, for exterminating the New in the name of serving the Old. It's an understandable reaction, it's even a very valuable one at times. But it was surely not Jefferson's reaction. The first thing he would ask, and the first thing we should ask, about Napster is not whether it constitutes an infringement of copyright under Section 512 of the US Copyright Act; instead, it is whether, and how, it opens up new possibilities and new horizons for the human species and how we might help it do so.

Napster can be our moose. It can and should tempt us to explore this new place, to try to understand the ways in which it is different than (and the ways in which it is the same as) more familiar terrain; it can show us that there are new and wonderfully exciting things out there. It can and should remind us that we don't know everything there is to know about how life can be lived and about how societies can be built, that we, too, can always re-think Received Wisdom.

"Doubt," Jefferson wrote in connection with his moose escapade, "is wisdom. He is closer to the truth who believes nothing than he who believes what is wrong." He was right. We need more doubt about law in cyberspace, fewer "answers" and more questions, fewer fences against, and more roads to, the lands lying on the other side of the Allegheny Mountains. We cannot seriously hope to govern wisely here without it.