

Problem Set 1

Cybercity is a newly independent state north of Shetland Islands in the Norwegian Sea. Rumors had it that the early inhabitants of Cybercity belonged to a techlaw reading group based in Berkeley that was heavily traumatized by the regulability of the Internet after the group discussed Larry Lessig's *Code and Other Laws of Cyberspace*. Shortly after Cybercity was founded, the country passed the Information Wants to Be Free Act, prohibiting any form of intellectual property protection on materials published or distributed on the Internet. Specifically, section 102(b) of the statute states that "Nothing published or distributed on the Internet is eligible for copyright protection." Music, video products, and software available on the Internet—even products that have been copyrighted in other countries—are therefore freely distributed.

One day, Freedom62, a citizen of Cybercity, met Roberta Smith, a professor of anthropology at New York University, in an AOL chat room. They talked about how the New York Knicks were playing worse and worse and how excited they are about the upcoming opening of *Mamma Mia!* in the Winter Garden Theater. Freedom62 asked Smith if she had ever listened to the songs of Johnny Elephant, a Mega Music artist whose album has recently risen to No. 4 in the Billboard® chart. (Johnny Elephant has big ears and a long nose and is very popular in Cybercity.) Freedom62 told Smith that he was not able to find Elephant's new song, "Go Sentimental," on the Internet. Smith happened to have an mp3 file of Elephant's new song and sent him the file immediately via ICQ, an instant messenger.

In return, Freedom62 sent Smith an unpublished manuscript he downloaded from the Pre-Revolutionary French Society. The manuscript contains data concerning the population of selected French villages in the late 16th century. The data are very helpful to Smith, and she published the data in her anthropology course website. Smith also included the data in a 100-page appendix of her new book, *Villages in 16th-century France*, to be published in Spring 2002 by Mega Publishing, the U.S. parent of Mega Music.

Shortly after Mega Publishing advertised Smith's book in France, Jean LeBon, the French anthropologist who collected the data and wrote the manuscript, contacted Mega Publishing about its infringement upon his rights to the data he industriously collected from archival records in France, Germany, and Poland in the past ten years. The complaint cited the EU Directive on the Legal Protection of Databases, which afford protection to databases created as a result of substantial investment by the database producers. Under the EU Directive, databases are protected against unauthorized extraction and reutilization for a term of 15 years regardless of their eligibility for copyright protection.

Mega Publishing contacted Smith and learned that she had obtained the data on 16th-century France from Freedom62, a citizen of Cybercity. The executives of Mega Publishing have never heard of this newly independent state. Curious about whether Cybercity would provide a market for its products, Mega Publishing sent a team of marketing people to Cybercity. The marketing team was appalled when it found that thousands of sound recordings published by

Mega Music, including those of its top star, Johnny Elephant, were distributed for free on the Internet among Cybercity citizens.

As an expert in international copyright law, you are retained by Mega Publishing to advise the publishing house on the following issues:

1. In a lawsuit against Freedom62 litigated in a U.S. court over the alleged infringement of the copyright in Mega Music's sound recordings, what law would the U.S. court apply? Does it matter if Freedom62 uses a Norwegian Internet Service Provider? (The Nordic countries, including Norway, have a catalogue rule that protects nonoriginal compilation of information.) Would the court apply different laws to determine the question of copyright ownership and that of copyright infringement? (Johnny Elephant, who wrote "Go Sentimental" all by himself, conceived of the melody on a flight from Geneva to Venice and wrote the music and lyrics when he returned to his apartment in Paris. The song was recorded in a fancy studio in London, and the single was sold all around the world, including Europe, Japan, and the United States.) Would Mega Publishing prevail on the lawsuit? What defenses, if any, does Freedom62 have? Would the outcome of the case be different if the claims were litigated in Cybercity?
2. In a lawsuit against LeBon instituted in a U.S. court, what law would the U.S. court apply? Would Mega Publishing be subject to the EU Database Directive? Does it matter that the U.S. Supreme Court has held in *Feist* that a compilation does not qualify for copyright protection unless information is selected, coordinated, or arranged in an original manner. (In *Feist*, the U.S. Supreme Court denied copyright protection to the white pages of a telephone directory.)
3. If Mega Publishing prevailed in its lawsuit against LeBon in the United States, would the publishing house be able to use collateral estoppel to prevent LeBon from relitigating the lawsuit in France under French copyright and database laws? (Assume France and the United States have similar laws concerning collateral estoppel.)
4. Frustrated by the conflicting intellectual property laws around the world, the executives of Mega Publishing would like to lobby the U.S. government for actions that help protect the interests of the U.S. publishing industry. (Mega Publishing has recently succeeded in lobbying the government for the Sonny Bono "However Long We Want" Copyright Term Extension Act.) What type of actions would you advise your client to lobby the U.S. government for? Unilateral sanctions? Trade tariffs? Subsidies to the U.S. publishing industry? Bilateral treaties? Or international conventions? Would it be different if the European Union and the United States were members of the WTO (and were abided by an international agreement that mandates the use of the WTO dispute settlement mechanism to resolve intellectual property disputes) whereas Cybercity is not?

Note: There will be no right or wrong answers to the above questions. You are free to consult any materials, but such consultation is not encouraged or required.