PANEL IV: INTELLECTUAL AND INFORMATIONAL PROPERTY RIGHTS

INTRODUCTION: PROPERTY IN MASS MEDIA LAW

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This is the panel on intellectual and informational property rights. As you can see, there are three panelists other than myself: Ed Kitch, Stephen Carter, and Frank Easterbrook.

I want to begin with just a few thoughts on an area that I know something about: press and media law. I would like to say two things about the notion of property and how it arises in the context of a few problems in the area of mass media law.

First, the notion of property frequently is relied upon by courts, in the major cases especially, to help explain the results that the court wants to reach. You find it, for example, as a primary justification for attacking broadcast regulations, such as the Fairness Doctrine[1] and the like, on First Amendment grounds.[2] Another example of courts relying upon the notion of property is the idea that the government—but primarily the public—owns the airways and that the government's ownership justifies imposing licensing or public-access regulations on those institutions that use the airways.[3] On the other hand, when it came to thinking about public-access regulations in the context of newspapers, the concept of property was applied to reject public regulation.[4] The newspaper owns the pages of a newspaper, and what belongs to the newspaper cannot be infringed by government regulation.[5]

The idea of property surfaces in the defamation area with the concept that people have a property interest in their reputation. When that right is limited by constitutional rules, as in

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1. 47 U.S.C. § 315 (1988), and regulations promulgated thereunder.
2. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
3. *See id.*
4. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).
5. *See id. See generally* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 4-6, 10-12 (1976).

New York Times Co. v. Sullivan,[6] the theory is that political sovereignty belongs to the people and overrides the individual's private interest in reputation. Again, in the area of privacy, we find the courts frequently talking in terms of the individual owning information about himself. Facts that would be embarrassing to the reasonable person can be protected by the law from disclosure because they are owned by the individual.

In the area of press and public access to information held by the government, the emerging concept of ownership of the information is being debated. On the one hand the claim is made that the public really owns this information and therefore has a "right" to it. On the other hand it is said that the government owns the information, and if it is taken by anyone, including the press, that is a theft of property.

My first point is that the notion of property plays a prominent role in thinking about the First Amendment and the press. My second point is that the notion of property provides little assistance in thinking about these problems. That is to say, in every instance, you must plunge much deeper into the problem to identify the interests on both sides before you can solve it. The concept of property itself is of little use in answering the questions, particularly in a case like the broadcast regulation example I gave at the beginning. To say that broadcasting can be regulated because the government owns the airwaves is to use the idea of property in a way that does not at all advance the analysis. The notion of property in this area plays much the same role as the rhetoric of rights. That is, it is simply a notion, a language used to announce conclusions but really provides little in the way of justification.

6. 376 U.S. 255 (1964).