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Conference Session II: Creation or Evolution: Can Copyright Bring the Peace? Presented by Kenneth D. Crews, attorney, Gipson Hoffman & Pancione.

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Conference Session II: Creation or Evolution: Can Copyright Bring the Peace?

Like the works it encompasses, copyright law has changed through both creation and evolution. At the 2017 Kraemer Copyright Conference, Dr. Kenneth D. Crews explored how creation and evolution have shaped U.S. copyright law. Dr. Crews is an attorney with Gipson Hoffman & Pancione with over 25 years of experience in copyright issues related to education and research, including faculty and administrative appointments at research universities. The program, titled “Creation or Evolution: Can Copyright Bring the Peace?” was the second plenary session.

Dr. Crews began by highlighting the intensity of the debate between creation and evolution. “There are strong feelings here,” he said. How we respond to this debate “tells us about how we respond to and accept change.” It was a fitting line to begin a session on change in copyright law.

Addressing creation, Dr. Crews pointed out its beauty, featuring public domain images from NASA. The universe blazed

behind Dr. Crews as he pointed out copyright lessons everywhere. “We look at this spectacle of creation and we can’t even take the first glimpse without reckoning with copyright,” he said. The images used by Dr. Crews were captured by telescopes and photography, but “the creation of humanity is something we depict with other tools.” Humanity is a part of copyright, Dr. Crews explained. When a work is created, its creator is making choices. Those choices are an act of creativity, and creativity is at the core of copyright.

“But what about evolution?” Dr. Crews asked. On the screen behind him, the universe was replaced with a cartoonish image depicting an exaggerated vision of evolution, an image many in the audience have seen before. The first figure was a stooped ape, the final figure an upright human. But even this image represents a choice. The choice of how to depict evolution leads to creativity, which leads to copyright protection. “There’s rarely a moment of pure creativity,” Dr. Crews said, bringing up the next image.

Here, the image of evolution had itself evolved, adding to the previous image. Several additional figures moved from upright to stooped, ending with Homer Simpson (“Homer Sapiens”). Here, a creator took two things, mashed them together, and “achieved creativity,” Dr. Crews explains. Yet, Dr. Crews reminded us, the law says only parts of this image belong to its creator. Some parts are public domain; some parts are owned by Fox TV; and some may be owned by yet another party. The evolution of a concept can lead to creativity. But evolution and the juxtaposition of elements to create those new concepts can also leave us wondering how much of a work its creator owns.

At this point, Dr. Crews indicated that we would be getting more “legalistic,” and he dove into the purpose and underpinnings of copyright. Dr. Crews sees copyright as inspiration, motivation, inducement, and reward to create and to share one’s creations. He stated that this form of creation is directly related to authorship, which has two parts: creativity and originality. “But we struggle to find a human aspect of creativity,” Dr. Crews said. At this point, he referred to the Bible as a case study: “In this instance, some aspects of the work we’re analyzing and discussing come from nature; they are theologically based, and they are not copyrightable.” However, the individual translations, the verses themselves, are human-created copyrightable expressions. With this example, I understood Dr. Crews to be referring to the idea/expression dichotomy. To use a more secular example, the idea of star-crossed lovers cannot be protected by copyright, but a particular expression of that story, such as *Romeo and Juliet*, could be.

Dr. Crews next discussed a “twist” on authorship: works made for hire and corporate ownership. Here, we see how the law has evolved from its original state. Corporations and other legal entities may own copyrights, largely on terms similar to the rights of individuals. Dr. Crews was quick to remind us, though, that some form of underlying human authorship almost always exists. The question is how far removed from the work that authorship is. Is there an author behind electronic music? Can elephants own the rights to their art? Can a monkey own a photograph? Dr. Crews indicated that while we may look to the idea of creation as an idea in the law, works have to be both creative and created by us, as humans.

This, for example, is why neither God nor Satan may own a copyright. Courts have found that people who believed their writings were guided by divine powers still owned the copyright to their work. “God,” Dr. Crews explains, “doesn’t get a copyright any more than an elephant does.” Copyright is a human and secular creation.

Dr. Crews then connected creation to acts of Congress: the legislative branch creates the laws that govern copyright in the United States. He connected evolution to the courts: interpretations of the law by the judicial branch have expanded and clarified copyright law. Dr. Crews’ next slide, titled “In the beginning ...” reviewed multiple beginnings in copyright law.

The City of Venice, in the first recorded copyright law, declared in 1486 that a particular book could not be printed without authorization. In Britain, the Statute of Anne was created in 1709 and later became the basis for U.S. copyright law. The United States did not enact a copyright law until 1790, and that law was fully revised in 1831, 1856, 1909, and 1976. The year 1870 marked a kind of new beginning in U.S. Copyright law, with the founding of the Copyright Office.

“In the creation story of copyright, we have set rules on what is protected, and for how long, and in what way.” Dr. Crews also indicated that, as in the story of Genesis, the story of copyright has a serpent. We came to know good and evil, and opinions formed on what constitutes good aspects of copyright. Dr. Crews listed author rights, choices, good cases, expression, rights of use, and careers as “good” on his slide. What constitutes the evil aspects of copyright? Dr. Crews listed expanding terms, messy exceptions, interpretations, guidelines, bad cases, and litigation. Who is at fault for all of these evils? Dr. Crews stated that, while we can blame Congress, courts, and the Copyright Office, the blame also falls on all of us for our ejection from copyright Eden. To return to the garden, Dr. Crews concludes, we need both creation and evolution. Creation must begin with Congress, which is currently interested in copy-

right reform, but it does not end there. Courts must also do their part to return us to the garden. But mostly, Dr. Crews says, a return to the garden is on our shoulders. “We have to be outspoken and advocate for the things we want to see. We should have opinions and judgments about the state of copyright law and ... have a sense of where the fix comes from.”

“We, as the folks relied upon to provide this knowledge, have to be thoughtful in our use of the law and in our protection and protest of the law.” Dr. Crews recommended that practitioners be selective in their assertions of their rights, liberal with how they grant permission. They should exercise the rights they have under Creative Commons licensing and negotiate their publication agreements.

Creation and evolution are big concepts and can be intimidating. Dr. Crews’ talk, with its galactic scope, almost seemed to reinforce that idea. However, his closing call to arms preached a different message: no matter who originally created the garden, we must be the ones to find the way back.