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Foreword

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This symposium arose from collaboration with my fabulous colleagues Joe Liu and Larry Cunningham. Things began when Professor Cunningham, a superb scholar in corporate and business law, consulted Professor Liu and me about an article he was writing entitled *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting.*[1] Among other things, he was curious about the treatment of copyright claims by private entities in standards that had legal effects.

As Professor Cunningham explained, private entities such as the Financial Accounting Standards Board (the "FASB") author accounting standards to which auditors are legally required to adhere. The FASB claims copyright in these standards, a perfectly understandable position given well-established lenient standards for granting copyright.[2] These claims could, however, become controversial when an institution like the FASB uses that copyright to extract rent from those merely trying to conform to the standard. For example, an auditing firm might want to make copies of the FASB standards for distribution to its auditing staff. If the FASB were to prevail in a claim that such copying amounted to infringement, auditors would have to pay monopoly prices for the "privilege" of having a copy of the FASB's standards to read.

Professor Liu and I both study intellectual property, and we had often spoken about the challenges associated with the private ownership of standards, particularly with respect to technology. We were aware of cases involving legal standards, but we did not realize that these intellectual property issues were a "big deal" to people studying corporate law. When Professor Cunningham confirmed to us that debates about standards were important in his field, the idea for this

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[1] The article, which I highly recommend, is published at 104 MICH. L. REV. 291 (2005).

[2] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (noting that, generally, the copyright prerequisite of originality is a standard easily met, although an alphabetical compilation of telephone numbers failed to meet the standard); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 244 (1903) (expressing reluctance to deny copyright to a work simply because it lacks strong aesthetic merit).

symposium emerged. If intellectual property, antitrust, and corporate law scholars all think and write about standards, why not have them present their ideas together so that their diverse perspectives could be shared? We agreed that such a symposium would be both interesting and valuable, and proceeded to make plans.

And so it was that on March 31, 2006, some of the country's finest scholars gathered at Boston College Law School to present and discuss the articles that follow.[3] Individually, these articles are excellent pieces of scholarship. Together, they offer nuanced and sophisticated perspectives that broaden and strengthen our understanding of the problems associated with owning standards.

More than anything, these articles teach us that there are many ways in which standards can be "owned" and exploited. People can own standards by having property rights in them or by controlling their development and content. Both types of ownership show us that society must think carefully about how best to generate standards. Standards confer external benefits, but who will create standards if those benefits cannot be internalized? And, if standard setting requires collective action, who will take up that labor if those acting collectively become vulnerable to litigation from those unhappy with the standards set?

The attempts to answer questions like these become fascinatingly complex. From Mark Lemley and Herbert Hovenkamp, we learn that property rights in standards can create financial incentives to generate standards, and the astute application of antitrust laws can shield standard setters from vexatious litigation.[4] These incentives, however,

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[3] The first panel of the symposium was entitled "Technology Standards," and was moderated by Joe Liu of Boston College Law School. Mark Lemley of Stanford Law School presented a paper, and Herbert Hovenkamp of the University of Iowa College of Law was scheduled to present a paper but was absent because of illness; Stacey Dogan of Northeastern Law School presented Professor Hovenkamp's paper on his behalf and led the subsequent commentary. I was the moderator of the second panel, entitled "Government and Private Adoption of Standards." William Bratton of Georgetown University Law Center and A. Michael Froomkin of the University of Miami School of Law presented papers; Sidney Shapiro of Wake Forest University School of Law led the commentary. I also moderated the third panel, entitled "Standards and the Economy." F. Scott Kieff and Frank Partnoy presented papers, and Lawrence Cunningham led the subsequent commentary. The final panel was entitled "Opportunistic Behavior and Standards," and was moderated by Joe Liu. Pamela Samuelson of the University of California at Berkeley School of Law and Greg Vetter of the University of Houston Law Center presented papers; Michael Carroll of Villanova University School of Law led the subsequent commentary.

[4] *See generally* Herbert Hovenkamp, *Standards Ownership and Competition Policy*, 48 B.C. L. Rev. 87 (2007); Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One* Not *to)*, 48 B.C. L. Rev. 149 (2007).

also raise the possibility of socially undesirable behavior by standard setters. Pam Samuelson shows us how some standard owners try to extract monopoly rents or prevent competitors from entering the market.[5] Greg Vetter explains how certain participants in standard setting try to frame standards to gain lasting competitive advantages over rivals.[6] And, as Frank Partnoy describes, those with control over standards face moral hazards and conflicts of interest that threaten the public welfare.[7]

The articles published here show that many solutions to these problems are possible. Mark Lemley and Pam Samuelson discuss why society should consider limiting or even denying intellectual property rights in standards.[8] At the same time, Herbert Hovenkamp explores the proper purposes and limits of antitrust to remind us that law cannot fix all of the problems associated with standard setting.[9] Indeed, many of the articles review how wise private ordering may be enough to diminish incentives for antisocial behavior by standard setters or owners. For example, William Bratton describes how the FASB's design lessens the danger of capture and contributes to the independent design of reasonable accounting standards.[10] Similarly, Mark Lemley, Scott Kieff, and Troy Paredes suggest how proper structuring of private entities can increase the likelihood that people will contribute constructively to standard-setting efforts instead of gaming the system for rent.[11] Greg Vetter analyzes how open source licensing can defeat opportunistic behavior by making it hard for people to hide the details of what they have done.[12] Finally, Michael Froomkin offers a most intriguing case for using the opportunistic desires of standards users to achieve important public objectives.[13]

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[5] *See generally* Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193 (2007).

[6] *See generally* Greg R. Vetter, *Open Source Licensing and Scattering Opportunism in Software Standards*, 48 B.C. L. REV. 225 (2007).

[7] *See generally* Frank Partnoy, *Second-Order Benefits from Standards*, 48 B.C. L. REV. 169 (2007).

[8] *See generally* Lemley, *supra* note 4; Samuelson, *supra* note 5.

[9] *See generally* Hovenkamp, *supra* note 4.

[10] *See generally* William W. Bratton, *Private Standards, Public Governance: A New Look at the Financial Accounting Standards Board*, 48 B.C. L. REV. 5 (2007).

[11] *See generally* Bratton, *supra* note 10; F. Scott Kieff & Troy A. Paredes, *Engineering a Deal: Toward a Private Ordering Solution to the Anticommons Problem*, 48 B.C. L. REV. 111 (2007); Lemley, *supra* note 4.

[12] *See generally* Vetter, *supra* note 6.

[13] *See generally* A. Michael Froomkin, *Creating a Viral Federal Privacy Standard*, 48 B.C. L. REV. 55 (2007).

In closing, I would like to give special thanks to those whose support for this symposium has been invaluable. The symposium's authors and commentators deserve special recognition for their insight and willingness to trade ideas with those at the symposium. The *Boston College Law Review*'s entire staff, particularly Matt McGinnis, Kristie Tappan, David Cohen, and Luke Scheuer, have gone the extra mile to organize symposium events, edit the articles, and keep the publication schedule moving. Boston College Law School, particularly Dean John Garvey, supported the symposium financially directly and through the work of our Emerging Enterprises and Business Law Program. Finally, once again, I must thank Joe Liu and Larry Cunningham. Without their insight and colleagueship, none of this would have happened.