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CASENOTES

ASSESSMENT TECHNOLOGIES OF WI, LLC V. WIREDATA, INC.: SEVENTH CIRCUIT DECISION REINFORCES THE NONCOPYRIGHTABILITY OF FACTS IN A DATABASE

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I. ABSTRACT

The Court of Appeals for the Seventh Circuit recently handed down a decision that squarely supports the Supreme Court holding in *Feist* that noncopyrightable facts contained in a database are not and cannot be protected by copyright. The decision, written by Judge Richard A. Posner, plainly states that such facts cannot be protected by copyright law no matter how far embedded or intertwined they may be with copyrightable portions of code or structure. While the facts in this case are almost as barren of originality as those in *Feist*, the strong opinion strikes a blow to those who would like to skirt the clear principles enunciated in *Feist*.

II. INTRODUCTION

In *Assessment Technologies of WI, LLC v. WIREdata, Inc.*,[1] the Seventh Circuit Court of Appeals refused to permit the copyright law to block access to raw data contained in an electronic database. The court held that the copying of the wholly unoriginal data, however extracted from the database, was not an infringement of copyright. The case provides a strong opinion in the tradition of *Feist*,[2]

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1. 350 F.3d 640 (7th Cir. 2003).

2. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

upholding the principles set forth by the Supreme Court that the data or facts contained in a database are not protected by copyright.

III. THE FACTS OF THE CASE

Municipalities in Wisconsin collect data about real property in order to assess the value of those properties for tax purposes. The data includes items like address, owner's name, age of the property, assessed valuation, and the number and type of rooms. Some of these municipalities (or their contractors) licensed a copyrighted database software program called Market Drive from Assessment Technologies ("AT"). The data collected by the assessors was entered into a database using this program.

WIREdata requested the raw data from several municipalities, but three of them refused. While Wisconsin's open-records law requires a municipality to furnish such data to any person willing to pay the costs of copying, the law contains an exception for copyrighted materials. The three municipalities feared that furnishing the requested information might violate a copyright in the data claimed by AT.

WIREdata sued the three municipalities in state court to force them to provide the requested data.[3] AT brought suit in federal court for copyright infringement and theft of trade secrets. The district court issued a permanent injunction against WIREdata on the copyright claim (without reaching the trade secret claim). This case focuses on the copyright claim.

IV. THE DATA

Tax assessors hired by the municipalities collected the raw data. Some of the assessors collected the information on paper, and later entered it into the database. Others entered the data directly into the electronic database using Market Drive. Thus it was impossible for the municipalities to provide all of the requested data in a pre-electronic, paper format. Once entered, the data was inserted into 456 fields within 34 tables in a Microsoft Access database.

3. As the court notes, it is somewhat ironic that WIREdata is the plaintiff in this case. It is owned by Multiple Listing Services, Inc., which has long been a proponent of protecting compilers of data from those who seek to "pirate" it. *Assessment Techs.*, 350 F.3d at 645. *See* Patricia Manson, *Court Unplugs Computer Code Copyright Case*, CHI. DAILY L. BULL., Nov. 26, 2003 at 1; Ron Eckstein, *The Database Debate*, LEGAL TIMES, Jan. 24, 2000 at 16.

V. THE COURT'S DECISION

The court held that AT had a valid copyright in its Market Drive program.[4] *Feist* requires a minimal originality in the selection, arrangement or organization of data.[5] The court held that the structure of the database, with its 456 fields of information organized into 34 tables, was sufficient to warrant protection under this standard. It observed that

> if WIREdata said to itself, "Market Drive is a nifty way of sorting real estate data and we want the municipalities to give us their data in the form in which it is organized in the database, that is, sorted into AT's 456 fields grouped into its 34 tables," and the municipalities obliged, they would be infringing AT's copyright.[6]

WIREdata, however, was not interested in copying AT's protected structure or organization. Rather, it merely wanted the raw data contained in the database.

The court addressed how the data could be extracted from the database without infringing the copyright. It stated that one solution was to use the tools within the Market Drive program to create a separate electronic file containing the raw data (presumably without organizing it into 456 fields in 34 tables). Another solution was to bypass Market Drive entirely and use Microsoft Access to create a similar separate file. "From the standpoint of copyright law all that matters is that the process of extracting the raw data from the database does not involve copying Market Drive."[7] The court declared that all WIREdata sought was "raw data, data created not by AT but by the assessors, data that are in the public domain."[8]

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4. *Assessment Techs.*, 350 F.3d at 643.
5. *Feist*, 499 U.S. at 345–64.
6. *Assessment Techs.*, 350 F.3d at 643.
7. *Id.* at 644.
8. *Id.*

The court likened the facts to those in the *Westlaw* cases.[9] It noted that a licensee of Westlaw could copy the text of a federal judicial opinion and give it to someone else as long as none of the copyrighted aspects of the database are included. The opinion itself is treated as non-copyrightable, public domain fact. This is the very essence of copyright law as it pertains to databases. Public domain facts can be extracted and copied. There is no copyright interest involved. It is only the original selection and arrangement of the facts that may be subject to copyright protection.

The court held that if the raw data were so entangled with the Market Drive program that it could not be extracted without copying the program, such copying would be permitted under the copyright law.[10] The court discussed the *Sega* case,[11] wherein the Ninth Circuit Court of Appeals permitted as a fair use the "intermediate copying" of copyrighted source code in order to reverse engineer some of the functionality of the program that was not protected by copyright (i.e., operating system compatibility).[12]

Furthermore, the court held that if the only way to obtain the raw data were to copy the entire database, complete with its copyrightable organization of data, such copying would be privileged.[13] The court warned AT that it would not be able to circumvent the force of this decision by reconfiguring the database so as to make it impossible for WIREdata to request raw data in any format other than that prescribed by the program. The court also warned AT against increasing the cost of data acquisition for WIREdata by using its copyright interest to

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9. Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 674 (2d Cir. 1998); Matthew Bender & Co. v. West Publishing Co., 158 F.3d 693 (2d Cir. 1998). In these cases, West Publishing sought copyright protection for its publication of court decisions.

> In the first case, the court held that only those elements that are original are entitled to copyright protection, and that originality is dependent upon a showing of a modicum of creativity. It stated that court opinions are themselves factual, and therefore part of the public domain. It held that while some of the information that West adds to the opinions is original, for example, the syllabus, the headnotes, and the key numbers, other information is not; for example, the attorney information, the subsequent procedural history, and the parallel citations. Thus, West cannot claim copyright protection in the latter. In the second case, the court held that West's star-pagination system was not creative enough to warrant protection under *Feist*.

Jordan M. Blanke, *Vincent van Gogh, "Sweat of the Brow," and Database Protection*, 39 AM. BUS. L.J. 645, 666 (2002) (footnotes omitted).

10. *Assessment Techs.*, 350 F.3d at 644.

11. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).

12. *Id.* at 1518–19.

13. *Assessment Techs.*, 350 F.3d at 644.

extend to otherwise uncopyrightable data in hope of extracting a license fee from WIREdata.[14]

The court pointed out that the case did not involve the typical *Feist*-rejected, "sweat of the brow" argument, where the compiler of the data finds it difficult to recoup the cost of creating a database because its contents are non-protectible public domain facts. Here, AT did not even collect the information itself. Rather, the municipalities and its assessors did the sweating, "the footwork, the heavy lifting."[15] AT merely created "an empty database, a bin that the tax assessors filled with the data."[16] The court cautioned that any attempt "by contract or otherwise to prevent the municipalities from revealing *their own* data . . . might constitute copyright misuse."[17] Copyright misuse "prevents copyright holders from leveraging their limited monopoly power to allow them control of areas outside the monopoly."[18] The court stated that the data in the municipalities' databases were beyond the scope of AT's copyright in its program.[19]

The court summarily rejected AT's attempt to enforce the terms of its license agreements with the municipalities against WIREdata since WIREdata was not a party to those agreements.[20] Accordingly, the court held as irrelevant the holding of *ProCD, Inc. v. Zeidenberg*,[21] another Seventh Circuit case and probably the most often-cited case for the proposition that contract terms can restrict copyright interests.[22]

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14. *Id.* at 645.

15. *Id.* at 646.

16. *Id.*

17. *Id.* at 646–47 (emphasis in original).

18. *Id.* at 647 (quoting A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1026–27 (9th Cir. 2001)).

19. *Assessment Techs.*, 350 F.3d at 647.

20. *Id.* at 646.

21. 86 F.3d 1447 (7th Cir. 1996).

22. In *ProCD*, the court held that state contract law was not preempted by the Copyright Act and enforced the terms of a shrinkwrap license that restricted the use of data in a database to noncommercial purposes. Whether the Copyright Act preempts state contract law, and if not, to what extent a contract may limit access to noncopyrighted material is still greatly contested. *See* Wrench LLC v. Taco Bell Corp., 256 F.3d 446 (6th Cir. 2001) (state contract claim not preempted by federal copyright law); Lipscher v. LRP Publ'ns, Inc., 266 F.3d 1305 (11th Cir. 2001) (state contract claim preempted by federal copyright law); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 208–10 (2003); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 155–58 (2003); Dov Greenbaum, *Are We Legislating Away Our Scientific Future? The Database Debate*, 2003 DUKE L. & TECH. REV. 22 (2003); Nathan Smith, *Comment: The Shrinkwrap Snafu: Untangling the "Extra Element" in Breach of Contract Claims Based on Shrinkwrap Licenses*, 2003 BYU

In conclusion, the court held that there were at least four ways that WIREdata could obtain the requested data without violating AT's copyright. The municipalities can:

1. use Market Drive to extract the data and place it into an electronic file,
2. use Microsoft Access to create an electronic file,
3. allow WIREdata programmers to use their computers to extract the data from the database, or
4. copy the database file and give it to WIREdata to extract the data therefrom.

VI. ANALYSIS

This case does not provide an earth-shattering blow to those who seek to obtain greater protection for databases, either through copyright law or other means. It involved facts that were not even collected by the party seeking protection for them. It involved very basic demographic facts, like address, owner's name, age of the property, and number of bathrooms. And it involved facts that were required to be disclosed by state open-records law.

However, the case is still significant. It provides a clear, unequivocal holding in the tradition of *Feist*, *Westlaw*, *Sega* and others that raw data are public domain facts, and therefore not subject to copyright protection in and of themselves. The case is also significant because it comes from a circuit that has handed down arguably the most significant case to date for the protection of databases, albeit through contract law, and is authored by a very well respected judge, Richard A. Posner.[23]

L. REV. 1373 (2003); Deanna L. Kwong, *The Copyright-Contract Intersection: SoftMan Products Co. v. Adobe Systems, Inc. & Bowers v. Baystate Technologies, Inc.*, 18 BERKELEY TECH. L.J. 349 (2003). Judge Posner recently stated,

> [T]he federal copyright statute preempts not only state laws that seek to curtail the protection that the federal statute grants owners of intellectual property, but also state laws that provide protection that the copyright statute has deliberately withheld. By preempting the subject matter of copyright (namely works of authorship fixed in a tangible medium), the copyright statute has been interpreted to deny protection to ideas, facts, and other nonexpressive material embedded in expressive works, not as an oversight but as a deliberate federal policy to preserve a public domain consisting of the noncopyrightable contents (such as facts and ideas) of copyrightable works.

Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 631 (2003) (footnotes omitted).

23. In his most recent book, Judge Posner and his co-author discuss the basic proposition that "[c]opyright does not protect fact." WILLIAM M. LANDES & RICHARD A. POSNER, THE

Judge Posner's language is often quite strong. His first sentence sets a clear tone for the rest of the opinion: "This is a case about the attempt of a copyright owner to use copyright law to block access to data that not only are neither copyrightable nor copyrighted, but were not created or obtained by the copyright owner."[24]

His second sentence implicitly introduces a greater problem often caused by digital technology—that the technology itself can dictate and sometimes override the relevant law (e.g., The Digital Millennium Copyright Act and fair use):[25] "The owner is trying to secrete the data in its copyrighted program—a program the existence of which reduced the likelihood that the data would be retained in a form in which they would have been readily accessible."[26] Had the assessors just taken notes on paper, the municipalities could simply have provided that data. But since technology now affords the ability to instantly transform that data into a digital medium, that data is no longer readily accessible, and, contended AT, therefore protected as part of its copyrighted work. Judge Posner concludes his introductory paragraph in no uncertain terms: "It would be appalling if such an attempt could succeed."[27]

It is also significant that Judge Posner rejects all attempts at "end-runs" around the basic copyright issue. While the district court did not decide the trade secret claim and, therefore, it was not involved in this appeal, Judge Posner addresses it anyway, quite emphatically. He calls the claim "incomprehensible" because a

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ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY 103–04 (2003). They discuss that the common law doctrine of misappropriation, as enunciated in Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918), may create a limited property right in facts. *See also* Posner, *supra* note 22.

24. *Assessment Techs.*, 350 F.3d at 641.

25. One of the most controversial aspects of the Digital Millennium Copyright Act is the effect that its anticircumvention provisions have on fair use. *See* Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095 (2003); L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 INTELL. PROP. L. 33 (2002); David Nimmer, *Appreciating Legislative History: The Sweet And Sour Spots of The DMCA's Commentary*, 23 CARDOZO L. REV. 909 (2002); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002); Jane C. Ginsburg, *Essay—How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61 (2002); Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, *available at* http://www.nytimes.com/2004/01/25/magazine/25COPYRIGHT.html (last visited Mar. 15, 2004). Much has been written about the interplay between code and law, but nothing better than Professor Lessig's classic works: LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) and LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001).

26. *Assessment Techs.*, 350 F.3d at 641–42.

27. *Id.* at 642.

demonstration version of AT's program, revealing the entire structure of the database, is freely distributed by AT for promotional purposes.[28]

Most important may be Judge Posner's discussion of *ProCD*. After determining that the case was irrelevant because WIREdata was not a party to any of the licensing agreements, Judge Posner, nonetheless, discusses the case's relevance to database protection. He states that while the scope of copyright law is determined by federal law, the scope of contract law is, "at least prima facie, whatever the parties to the contract agree[] to."[29] He notes that some commentators believe that the existence of these contract solutions may negate the need for legislative protection of databases.[30]

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28. *Id.*

29. *Id.* at 646.

30. *Id. See also* Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151 (1997); Richard L. Stone & John D. Pernick, *Protecting Online Databases: Copyright? We Don't Need No Stinkin' Copyright*, 10 CYBERSPACE LAW. 2 (1999). In one of Judge Posner's articles, he discusses an example of an electronic database in which the data are not arranged in any particular order, but are searchable by a search program:

> The database may have been very costly to compile, but if all it contains is noncopyrightable information, someone who downloaded the entire database into his computer would not have infringed copyright.
>
> This possibility has given rise to proposals for federal legislation to protect databases from unauthorized copying. Although the Supreme Court said in the *Feist* case that the Constitution's copyright clause does not permit Congress to grant copyright in facts because facts are not a product of authorship, this does not prevent Congress, operating under one of its other grants of legislative authority, such as the authority to regulate interstate and foreign commerce, from giving legal protection to fact gathering; it just would not be copyright protection. But it is unclear whether such legislation is necessary—and not because the owners may have the misappropriation doctrine to fall back on! Owners of databases can condition access to the database on contractual promises not to copy, or can install encryption software, or both—though, granted, neither solution is ideal from a social standpoint . . . .
>
> . . . [B]ecause there do not appear to be any "pure" digital databases in which the data are entered into the database with no selection, editing, arranging, or other interventions that would entitle the database to copyright protection, database owners can copyright at least some of the features of their databases. Not the data themselves, of course; yet free riding will still be reduced, because the copier will have to incur costs to do his own selecting, editing, and arranging in order to make his database attractive to the consumer.

Posner, *supra* note 22, at 635–36. The House Judiciary Committee recently approved a proposed bill that would prohibit making "available in commerce to others a quantitatively substantial part of the information in a database" without authorization. Database and Collections of Information Misappropriations Act, H.R. 3261, 108th Cong. (2003), *available at*

Judge Posner then suggests that AT's attempt to prevent by contract the municipalities from revealing "*their own*" data might constitute copyright misuse.[31] Quoting from *Napster*,[32] he states that the doctrine of misuse "prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly."[33] One might interpret this as a possible limitation to contractual attempts that severely limit the scope of copyright protection.[34]

VII. CONCLUSION

The debate concerning how information contained in databases should be protected is far from over. There is controversial legislation pending at both the federal and state levels.[35] This

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http://thomas.loc.gov (last visited Mar. 17, 2004). *See* Declan McCullagh, *Tech Firms Fail to Squelch Database Bill*, CNET NEWS.COM, Jan. 21, 2004, *at* http://news.com.com/2100-1028_3-5145040.html; Roy Mark, *House Panel Sparks Database Controversy*, INTERNETNEWS.COM, Jan. 23, 2004, *at* http://www.internetnews.com/bus-news/article.php/3302931.

31. *Assessment Techs.*, 350 F.3d at 646–47.

32. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

33. *Assessment Techs.*, 350 F.3d at 647.

34. Of the two Seventh Circuit cases that Judge Posner references in this context, one is written by him and the other by Judge Easterbrook, the author of the *ProCD* opinion. In the former case, *Saturday Evening Post v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987), the defendant licensed the right to manufacture porcelain dolls derived from Norman Rockwell illustrations appearing in the plaintiff's magazine. Plaintiff had copyrighted its magazine, but a question arose as to whether the illustrations were part of that copyright. The license agreement contained a no-contest clause with respect to that issue. The court rejected a copyright misuse claim, upholding the validity of the no-contest clause. It emphasized that it was a negotiated clause, as opposed to a standard clause included in every licensing agreement. *Id.* at 1200. In the case heard by Judge Easterbrook, *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909 (7th Cir. 1996), the court dealt with a case involving similar television commercials. The court rejected the misuse of copyright defense in the case, but acknowledged that "[m]isuse of copyright in pursuit of an anticompetitive end may be a defense to a suit for infringement . . . . We do not say that it is (an open issue in this court); copyrights do not exclude independent expression and therefore create less market power than patents." *Id.* at 913. *See also* Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512 (7th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003) (Judge Posner briefly referred to copyright misuse, but did not address it in detail).

35. Database and Collections of Information Misappropriations Act, H.R. 3261, 108th Cong. (2003), *supra* note 30. Georgia is considering a bill that would "provide for limited protections for the owners of databases against unauthorized commercialization." Georgia Database Protection and Economic Development Act of 2003, SB38 (2003), *available at* http://www.legis.state.ga.us/legis/2003_04/fulltext/sb38.htm (last visited Mar. 17, 2004). The bill would provide for civil and criminal sanctions for anyone other than the owner of a database to commercialize the database. Commercialize means "to extract for use in commerce, or to use in commerce, all or a substantial part, measured either quantitatively or qualitatively." *Id.* A database is "a collection of data, information, observations, intellectual works, or other such items." *Id.* One would be hard pressed to come up with a definition broader than this. It is

decision, however, provides strong support for the position that facts and public domain materials do not gain protection under the copyright law by mere inclusion within a database. If data are noncopyrightable to begin with, a compiler cannot bootstrap protection for them no matter how deeply they are imbedded in code or a database.

highly unlikely that such a statute could ever withstand a preemption challenge under the Copyright Act.