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Presentation by Professor Jessica Litman

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I am grateful to Robert Kreiss, Director of the Program in Law and Technology at the University of Dayton School of Law, for inviting me to ,participate in this symposium and for accommodating my erratic schedule. I would also like to thank Jonathan Weinberg, whose demanding editorial advice and substantive suggestions greatly improved this paper.

PRESENTATION BY PROFESSOR JESSICA LITMAN

PROFESSOR LITMAN: If we have got a world in which databases have no meaningful copyright protection in the sense that subscribers can take the data, leave the base and use their own algorithms to come out with a competing database, one possibility is no one would create databases in such a world, but I don't believe that one for a minute. We have got a voracious hunger for information in easily accessible form. People will step in to supply the demand. We don't give copyright protection to clothing designs and there's lots of clothing. We don't give copyright protection to recipes and there's plenty of food. We didn't give copyright protection to sound recordings until 1971 and there were lots of records.

So I think there will still be databases, but I think that the rational database proprietor will go increasingly to these contractual kinds of protections in order to minimize the risk that any user of the database is going to be a competitor tomorrow. Indeed, the rational way to proceed is to use contract law and to use trade secrecy law to ensure that no use of data in your database occurs without collectng the appropriate fee.

But how do you do that? Well, first of all, you have to be fairly careful about who you let subscribe to your database, and you might want to keep careful track of what data your subscribers are accessing. You would surely want to impose a variety of restrictions on what subscribers could do with the data that they access and you can try to monitor compliance with the restrictions and then enforce them under state laws in the event of violations. I don't like the picture of that world one bit. It's a world in which access to information is expensive and tightly controlled. It is a world in which records are kept of the information we seek and questions are asked about how we use that information. And if indeed, as some of us believe is happening, we are becoming a world that will rely increasingly on online and other digital media for all of the information that we have access to, the effect of that kind of monitoring and those kinds of restrictions on privacy and freedom is something I think we ought to view with a little bit of alarm. And the trouble is we have a world like that, or close to that, already.

When I sign onto WESTLAW I see this wonderful user screen that you've drafted that tells me I may not copy, download, transmit, reproduce, disseminate, transfer, or use what I am about to see in any form or by any means without West's prior written permission. West is

keeping track of what I choose to look at, partly to facilitate billing, partly to pay out royalties to copyright owners of other material that I access through its database, and presumably partly to monitor compliance with its subscriber's agreement. That experience is one that lots of us who subscribe to any kind of database encounter.

Now West has not yet called me up on the phone to inquire whether or not I am using the case that I downloaded last week for the casebook I am writing for West's competitor Little, Brown. It currently makes absolutely no economic sense for West to parse the data that it is capable of collecting that finely.

But, in a world after *Feist*, where West cannot rely on copyright protection for anything within its database that it did not originate, and reasonable people can differ about how much of the database gets covered, monitoring and enforcing the subscriber's agreement more rigorously makes a great deal of sense. Indeed, if West is trying to rely on the contractual restrictions in its subscriber's agreement and the protections of contracts and trade secrecy law to prevent its subscribers from using the uncopyrightable items in the database to generate a new database, it needs to take those restrictions more seriously. It needs to start looking towards enforcing them, otherwise consumers can say: "Oh, yeah, but after I signed that it was very, very clear that just didn't matter to anyone, no one takes that stuff seriously."

And so, that raised what for me was I think the only argument I found conceivably persuasive on why we might want a federal statute to fix what *Feist* is perceived to have broken. That is, one could make an argument that giving database proprietors some meaningful statutory intellectual property protection for the data in their databases might somehow forestall their using existing technology to restrict access to and use of the data they have compiled.

Could we offer intellectual property protection of the sort that *Feist* is seen as having eliminated for facts, as a sort of bribe to enhance public access to data and seduce database proprietors from relying on those sorts of restrictions and taking that sort of thing seriously? And where I came down is that *if* I thought that bribe would work, I think it would be a very difficult policy question.

I think it is a question we should answer by figuring out what kind of world we want to live in. The idea that nobody can own a fact is a fundamental one in both our intellectual property law and in our First Amendment jurisprudence. It's one of those axioms that underlies most of our ideas about self-expression and self-government. Under our current view of things if I run into a fact, I can use it in any way I choose. I can learn it, incorporate it into my world view; I can tell other people about it, I can use it in a book, or an argument, or a political cam-

paign, or even a database, without asking someone else's permission. But, if we start giving out property rights in facts, then we have to recognize the corollary that the owner of a fact is entitled to put restrictions on the uses people can make of that fact. That's a sort of frightening concept.

But I don't have to answer that difficult question, because I am absolutely convinced that, at least as a bribe, the strategy of coming up with federal intellectual property protection of some sort, in order to forestall this world, just isn't going to work. On the basis of history, cynicism about human nature, and great faith in the cleverness of lawyers, I predict that if we offer database proprietors quasi-copyright protection in their data, that they would be very grateful, they would use it, they would rely upon it, but they would also continue to use and rely on tight control of access and restrictive user agreements, and any lawyer who told them to do otherwise would not be doing her job.

Now for a historical precedent I am going to offer the case of computer software so that anyone in the room I haven't already offended is going to have an opportunity to be offended by what else I am going to say. Back in the sixties and the seventies when folks were considering whether computer programs should be protected by copyright, very few of the arguments that were being made then raised the incredible amount of creativity it takes to design software, or suggested that unless computer programs were protected by copyright no one would write them.

Instead, folks argued that without copyright, the authors of computer software would conceal technical information from each other rather than disclosing it to the public, and that would lead to diminished access to computer programs, wasteful duplication of research, and very expensive software. Copyright protection, it was argued, would allow the proprietors of software to recoup their costs by charging each individual who desired to use the software a reasonable price but enable them to disclose their software to the world so that we could have synergistic program development and research without having to give up on the profits they could earn from writing the software. We reckoned without clever lawyers who have figured out a way to take advantage of both copyright and secrecy simultaneously. Software proprietors, in my view, have been pretty aggressive about exploiting the advantages of copyright protection in the courts and in the international arena, but meanwhile, they have continued to rely on trade secrecy as well. Software publishers have argued that the shrink-wrap license they enclose with copies of their programs not only prevents the purchase of software from triggering the first sale doctrine, but also binds the software purchasers to a trade secrecy agreement. Software

publishers have argued that their programs are, in fact, unpublished and therefore immune from fair use under *Harper & Row*, and, in a particularly clever rhetorical flourish, software publishers argue that the combination of copyright and trade secrecy makes it illegal for anyone to reverse-engineer software to figure out how it works. When historians and publishers recently pressed Congress to pass legislation to overrule the restrictions on quotations from unpublished works imposed by the Second Circuit in the Salinger case, software publishers blocked the bill on the ground it might threaten their asserted immunity from reverse engineering.

Now, I don't think there is anything morally culpable in this story. I think the software industry's copyright lawyers were doing precisely what we pay lawyers to do, devising a combination of strategies that will maximize our clients' competitive advantage. But the lesson the story has for us is, I think, that if we now say to database proprietors, "would you please accept a federal statute instead of relying on trade secrecy and contract law and restricting your subscribers access to and the use of data in the databases," the answer I would expect them to give is "thank you very much, we will take them both."

So, when we think about whether or not we want to enact a statute to repair the damage done in *Feist*, I think we need to think fairly carefully about why we are enacting it, what we want it to accomplish, and whether, in fact, it is likely to do the trick. Now, for some people the reason to enact a statute to give quasi-copyright protection or misappropriation-type protection to facts in databases and other factual compilations is that they believe without intellectual property protection to encourage people to compile facts, there won't be enough factual databases. Those people, I think, need to take a hard look at what database services were like in the areas of the country covered by the Second and Ninth Circuits before *Feist*, because *Feist* essentially adopted a position that the Second and Ninth Circuits had held for quite a while. For some, the reason to enact a statutory fix is that compilers of factual data *deserve* statutory protection as a reward for their compiling activities, and those people, I think, should be thinking hard about what the rewards should look like and what behavior should suffice to earn it.

But, for me, the only legitimate justification for conferring statutory protection on facts would be that I believed that it would somehow enhance public access to the factual compilations. And, if the mechanism of that enhancement is supposed to be that a federal statutory alternative will save us from the sort of *1984/—Brave New World* vision of database proprietors tracking the facts that we want to, see and the uses we put them to by relying on more restrictive solutions that

are supported by state contract and state trade secrecy law, I think we need to be somewhat cynical about how this regime would work in the real world. So—here is the really unpopular part—if the public's benefits from this bargain were supposed to be that database proprietors would not engage in the pursuit of tight restrictions on access and close monitoring of database use, I think the only way a federal statute could actually accomplish that is to flatly prohibit it. In return for some species of federal statutory protection, I think Congress should unequivocally preempt state law alternatives.

Now, that's an idea that will win no popularity contests. One legitimate objection to it is: "What about compilations of fact that are compiled for strictly internal use? Those compilations surely need the benefits of trade secrecy contract and breach of confidence doctrines," and I agree they do. I have no objection to retaining trade secrecy and trade secrecy's sisters to protect compilations of fact that are used exclusively in-house.

But to prevent that exception from swallowing up the rule, I draw a pretty hard and fast line between internal databases like a hospital's medical records of all of its patients and all databases that are sold, and I would base that on whether the owner of the database charged anyone access or subscription fees. That would differentiate the mailing list that is kept confidential from the customer mailing list that is rented to other concerns, but I am comfortable with that, with that distinction. And, I would suggest that one reason to think about a statute might be that it might enable us to accomplish that kind of preemption now.

Where I come down on this is I am still not happy with a statute that gives property protection to facts, because of the great symbolic weight that issue seems to have to me, but the more narrow the federal statutory protection begins to be, and the more directed it is to competitive injury and behavior between competitors, the more palatable that alternative starts to become.

The thing is that I think this has now become a terribly important issue. Back when copyright accorded relatively limited rights and applied to relatively few works, the precise contours of what copyright could protect were not so important. When copyright gave authors of maps, charts and books only the exclusive rights to print, reprint, publish, and vend, the question whether the facts in the work or the ideas in the work were protected by copyright made very little practical difference, even to most authors of maps, charts, and books. The bodily appropriation of somebody's map, chart, or book would infringe its author's copyright. What we would today call an unauthorized derivative work would not infringe anyone's copyright. And as some evidence of

just how unimportant this is, the first case to squarely answer the question whether copyright in factual works protected the facts themselves didn't arise in a federal court until 1919 and no one thought that decision worth reporting until 1970.

But now, in today's world, the scope of copyright rights and other intellectual property rights and other kinds of intellectual property have expanded enormously covering everything we run into in our daily lives, and that trend is only becoming more pronounced as we move to a society in which digital publishing of information becomes more common than publishing by means of the printing press.

So that what the limitations are on what is property and what is not property in these works takes on tremendous importance for all of us. They define the limits of how we can use and even think about the works that we encounter. I tell my students that it is indeed a technical infringement of copyright to imagine the movie you saw last night ending rather differently, since you needn't fix your version of the movie in tangible form to infringe the right to make derivative works. When we evaluate whether or not to put facts under the rubric of a copyright-like form of protection, we really have to think about what that says about the society that we are defining, and whether it is a world in which we want to live. Thank you.