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Presentation by Sara Straight Wolf, Esq.

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PRESENTATION BY SARA STRAIGHT WOLF, ESQ.

MS. WOLF: First, I would like to say, as the other speakers from corporations have said, that the views I express are views of my own and not of my corporation. However, of course, I will be influenced by the fact that I work for a corporation with a very substantial interest in this subject.

My *Comment*, on Professor Karjala's work is like a book review by somebody who works for a monthly book club. You finish reading the monthly book club news and you say: "Which one should I buy? They all sound so good."

At Mead Data Central, of course, we publish or redistribute either public domain works or works that have been authored by others. We are not authors ourselves. So while we have the protection of the copyright laws for the materials that we license from other authors or other publishers, we may not have much protection under the copyright laws for the materials that are in the public domain or for the materials that are factual that we do publish.

So I came to this seminar excited about thinking of all these new theories of protection that might be available, but also thinking about the hindrances that some of these theories might put on the collection of information that our company does. While I would, in some ways, like to lower the costs of data acquisition that *Feist* in its broadest reading would give to Mead Data Central, I also fear the piracy of MDC-provided materials that low cost machine copying would permit.

I am drawn to Professor Raskind's arguments in his work, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, and to Professor Karjala's work built on those ideas. As a distributor of works authored by others as a business, I want to be able to assure our suppliers that putting their stuff on our system will not decrease the value of their works, that it will not open the door to rip-offs by others who might redistribute the works without compensating them.

So I read Professor Karjala's paper in a very interested way, influenced, of course, by my business position. His theory is a new one for me but based on traditional concepts of misappropriation and traditional economic theories, and I thought that his theory was an interesting way to acknowledge the contributions of technology to original works of authors of intellectual property.

Of course, one of the major values of computer-assisted research services such as a LEXIS/NEXIS service is its use as a finding system

and the fact that you can do your research in a shorter period of time than you can by consulting a myriad of indices, including the index for legal periodicals. In that way our technology, the search and retrieval systems that we use, is a barrier to people coming in and ripping-off our system.

But as technology increases, the time periods between the increases in technology are rapidly becoming shorter and shorter, and there are today, in fact, very few word processing systems that do not use a search and retrieval system. Almost every word processing package that is commercially available today uses a simple search and retrieval mechanism to scan data that is in someone's computer.

Someday there is not going to be a big technology barrier to companies who want to take data in the bits and bytes form that someone else created, and that barrier of not having the technology to use the data in a meaningful way will be eliminated.

I would like to speak a little bit about Professor Karjala's theory of originality in the method of fixation; it has, quite an appeal. Someone earlier talked about, I think it was Ms. Peters, that compilations and derivative works are treated the same by the Copyright Office, and in some ways electronically stored information is more a derivative work than not because the information is not stored in the familiar print form in which it is sold by the book publishers. It is stored and accessed in the bits and bytes form, and its utility is in that form. However, when it is expressed to the user, it is retranslated into the original form, or something near the original form, of the original publisher.

If we look at originality in the method of fixation as Professor Karjala suggests, we have some protection, maybe some thin protection, but some protection for the abilities of corporations to use new technology to disseminate materials. It also gives some encouragement to database producers to collect materials without fear that their collections of public domain information or factual information will be pirated.

One of the interesting things about Professor Karjala's paper, that I do not think he expanded on a lot today, is that in his infringement analysis, if you would use his theory of originality in the method of fixation, you would look to how the copier copied the underlying work. He talked today about the painting in the *Hearn* case; I believe it is from the *Wizard of Oz*. That same theory, if you use originality in the method of fixation, would also apply to downloading databases because they are originally fixed in bits and bytes. So copying them in their bits and bytes form would be infringement, whereas copying them in another manner or reprinting them without the bits and bytes form would not be

In some ways that is somewhat like Professor Raskind's idea that different types of work have different levels of originality, require different types of protection, and the type of protection, value or level of protection that the copyright laws give should be commensurate with the value and originality contributed by the author.

After *Feist*, database producers are in a quandary. We all think our business is collecting and compiling, and we feel that the copyright laws are in a state of transition. We feel piracy is a big threat, but we also feel that the access to more sources that the *Feist* decision gives is a benefit to us. So we are watching the copyright laws and wondering: What is the best way to protect our information without requiring or encouraging the copyright laws to go too far in the type of protection that they give?

Other commentators have taken different approaches to the misappropriation theory. Professor Patterson, of course, has argued forcefully that while misappropriation has a role in copyright law enforcement analysis, it has to be balanced by the public's need for dissemination. This is the central worry of *Feist*; there is a tension of dissemination and protection that has been upset.

Professor Ginsburg argued in her paper last year that copyright law cannot be applied in a unitary scheme at all, that works that are predominantly fact works, low authorship works as she calls them, merely cry for a different kind of protection; the copyright laws are just too protective for this type of work and we need a statutory amendment and compulsory licensing scheme to protect these low authorship works.

Advances in technology and the public's desire for information have created a favorable climate for information products over many formats and different delivery systems. I am sure we have not seen the last of these products. While reading the newspaper yesterday, I saw some advertisements for small calendars and computers that you can handle in your pocket with all kinds of information on them. Who knows when we will see even smaller sized types of products that contain such information?

Technology is leapfrogging and copyright law is not really keeping up. Beginning with the photocopy machine and progressing to the computer with its ability to download information in electronic form to other computers or to fax machines and printers, we have technically easy ways to copy and not very good ways of protecting some of this data.

One thing I worry about with Professor Karjala's theory is that we would begin a new framework of legal reasoning that is not applicable to all copyrighted works or all functional or fact-intensive works. And while he is trying to restore the balance between property rights and

dissemination that he feels that the Court and *Feist* unbalanced somewhat, I wonder if starting a new method of analysis might muddy the waters even more.

Most database producers, as was talked about yesterday by Paul Sheils, do not rely totally on copyright law for their protection. They rely on contract law and in some cases on the state misappropriation theories for their protection. If copyright law is ever to be a vehicle of protection for fact works after *Feist*, there has to be some analysis of the originality concept; a statutory amendment may be necessary, however, as was observed yesterday, a statutory amendment, especially at the federal level, is a very long and laborious process. It is hard to get agreement among those who have an interest in the legislation, and difficult to get the legislation moving.

Most database producers rely on contract protection and state misappropriation theories, but as has been raised several times in the last two days, state misappropriation theories might not survive the preemption challenge. Consequently, it is going to be interesting over the next few years to see whether misappropriation theories survive *Feist* or whether they are preempted at all. Since *Feist* said copyright law does not apply to facts (facts are not protectable under copyright law), does that mean then that the protection is left to the states? We will have to see.

In all, I thought Professor Karjala's paper gave us an interesting and challenging theory to think about. It is a method of attempting to mold copyright law, the existing law that we have today with its various interpretations by the courts, into something that fits technology and fits the progress of information products today without resorting to extraordinary remedies. These remedies might include getting new legislation or dividing our existing body of copyright law into our fact-intensive works versus high authorship works and starting a whole new framework. Thank you.