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PRESENTATION BY PROFESSOR LEO J. RASKIND

PROFESSOR RASKIND: I will assume that those who the gods seek to punish, they put first on the program, and it is 8:30 in Dayton, Ohio. I will try to send this as a wake-up call rather than bore you with tedious professorial disquisition.

Most of you have read the *Feist* opinion and have thought about it; so I would point out, first, that I think it is a major copyright event; it is a big deal. I was thinking what the scientific counterpart would be. And I suppose for the people in particle physics if they found a quark that would cause a series of papers and a lot of fluttering into the dovecoats and laboratories. It would be like a biochemist finding a new enzyme.

I think we are at a point of some significant doctrinal development. For years the courts have been saying, in the *Miller* case and the Fifth Circuit, for example, that directories are special. Generations of copyright teachers always found themselves in the classroom hemming and hawing when an intelligent student would say, "wait a minute, how is it that you can protect these things?"

So it is not surprising or remarkable that in the end the Supreme Court has said they are not protectible, and, moreover, the method that some courts did use to protect it, the so-called sweat of the brow, is no longer an acceptable doctrine.

And I suppose another factor that tells you it was in the prospect is the fact of the law review articles were always at pains to explain why this group of material had special treatment. The topic became sort of an academic fixture. No one wrote a tenure piece without explaining why facts are protected.

I thought it would be interesting to put to this a draft of the opinion to edit. How would it have looked? Well, I think it would have been covered with a lot of red ink and there would have been a lot of people who would say: "I think among other things, do not place so much stress on originality nor give it a constitutional gloss; that is not going to be very appropriate or helpful in the long term. Do not cite *The Trademark Cases* to underscore the doctrine of originality. It is not about originality; you are muddling up originality, creativity, and authorship. What is it you really want to focus on here? What do you want to tell the lower court judges to do in the protection of fact works?"

I think, among other things, most of us would have said, do not use that example of the census taker, that is not a very helpful exam-

ple. Tell the lower court judges about a doctrinal basis for protecting data on a CD-ROM, or an electronic database. That is where the problems are. Yours is an inept example. Then if data is not protected under copyright, how would data fare under state law, or under one of your old cases of misappropriation? Do not introduce misappropriation the way you did it. In other words, do not say in an unnumbered footnote, where you misstate which party won in *INS* v. *AP*, do not just say it is not relevant and then within the same paragraph cite Nimmer's treatise without more. That treatise says there is some scope for this doctrine.

What does it mean to all of us now that we have to face up to this decision? Well, I think several things follow, and I end up being quite optimistic. I think we should look at this as an opportunity in the following way.

First, I think we will have to say what is going to happen to data base protection in the future. How are the lower courts likely to react to this case? Some courts will make out as though it really is not there. I think *Bellsouth* might be an example of how courts might begin to do that. And then it might begin to be distinguished on its facts, so it might end up being the case about white pages telephone books in the jurisdiction where the state law required the book to be published and the people who published it got the material from their billing receipts. So that is a special case, and it really does not have any radiations. So that would be one kind of response.

Then I think in some instances courts who have before them screen display cases, computer software protection cases, and the line of the cases that start with *Whelan*—I think that in this matter courts will begin to say: "Well, if you read *Whelan* narrowly, SSO implies protection of investment, of enterprise, and of initiative sweat of the brow and maybe that doctrine is truncated to some degree by *Feist*."

And I expect there will be some reflection of *Feist* in the map cases. I guess the map people will find that some of the language of the *Rockford* case of the Seventh Circuit, the discussions about the extent to which protected material cannot be used as a template for making competing maps, will no longer be followed.

This subject matter is like a glass jar full of steel balls, and the *Feist* case took one of those steel balls and moved it by holding this area is no longer protected. And it is not a big surprise if by forces of gravity, the other balls in the jar move around a little bit, so there will be adjustments of that sort.

I think a larger issue emerges: What is fair competition? And all of us know, as some wit observed, the copyright bar practices technical copyright law, but the judges practice unfair competition. After all, the

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federal courts have equitable jurisdiction. I am predicting that there will be a new development of a body of unfair competition law. This may develop under the rubric of section 107(4), that is, the fair use market impact—judges are not going to give up their power to address commercial immorality.

When they hear before them something they think is grossly unfair, socially undesirable, they will find a label to treat and to rationalize the result. I am thinking of cases like *Wainwright* in the Second Circuit. You all remember the facts. There was protected financial information in a very extended forty-page format sold in one specialized market. The defendant came along and made summaries of that material and distributed it in newsletter form in a different market. There was a defense of fair use, and the principal opinion could have been written in those terms. Instead, the court foreshortened most of that discussion and said: "This is chiseling for profit." So there you have an expression of judicial outrage. I think that sense is not going to go away, and it should not go away.

So the courts will be receptive to these kinds of pressures and these kinds of issues as they are presented. I might look at it this way: After all, not unlike sausages, the material of judicial opinions reflect the ingredients that go into them in the briefs and oral arguments.

So it is within the group, within the capability of the people in this room and people like us who either write about it or who win cases, to present relevant issues of what are competitive norms. That is the issue: What is the competitive norm for preparing and distributing fact works that are outside the scope of copyright protection?

I think I would start from a premise, to give my own bias, of defining piracy. That is, what the court in *Wainwright* called chiseling for profit, a doctrine, although you cannot now by copyright say we are protecting the sweat of the brow. Courts will remain reluctant to put into the marketplace a rule of law that contemplates Hobbes war of each against all. For one rival to take everything from a competitor and sell it is not socially desirable, yet competition is the preferred norm.

This opinion does say to us as legal advisors that competition has just gotten a bit of a boost from the Supreme Court. So watch your competitors, examine your product. Is your product as innovative as it could be? *Sony* and hundreds of cases say that the basic framework of copyright law is to provide an incentive to the creative person for the larger social benefit. Based on this opinion, legal advisors will ask their clients how good is your current product? What is on the periphery for development? Are you going to get into the marketplace with the most advanced product at the best price? That is also a way to protect your market share. That, I think, is appropriate. But it does deprive manag-

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ers of enterprise and their legal advisors of a quiet life. You cannot sit on the legal protection of your product. After all, the remedies under copyright law are awesome. You can bring somebody's enterprise to a screeching halt, as it is not too hard to get a temporary restraining order. As a result of this case, we will see a sharpening of competition, and that is one appropriate response. Managers of enterprise should say we are going to make a better product. That is one way to ensure that we are not going to be ripped off.

Then I think we will all begin to look more into the details of production of fact works. In other words, lawyers will begin to present the fundamental factual elements about whether a claim ends up to be unfair competition within fair use. So, in other words, now we will begin to turn to the cost accountants, and for every product, legal advisors will be saying to their manager clients: "Find out how much, make sure you know at all points how much everything costs, how much has been invested"—because the cases where piracy comes up are often the cases of high investment and low cost of copying. Copying floppy disks is an example; running the photocopier is another example.

In those circumstances if you present to a court material that may be outside of narrow protection because of *Feist* and related doctrines, but you say, look, we are not asking that there be protection of sweat of the brow, we are just asking that this material not be pirated—this competitor has taken this material that was developed at high cost. Copiers have no investment in it and have added nothing to society by appropriating it without improvement.

Well, if copyright does not protect you, society is still entitled to the worth of enterprise, to a return from enterprise, and a person who has just taken without improvement is not giving society any benefit. That is what section 902 in the Chip Act does. It says "original" in the Chip Act is defined as something that is not staple, known in the industry. To copy a chip is allowed so long as the resulting chip is an improved version of the copied chip.

So you could make a nice argument to a court or in a brief that says, look, here are the costs, that is what we are asking the court to do, to bar someone from taking the product and giving nothing to society. So I think courts will, in the end, respond to that argument.

So I think a great deal of detail about how products are developed, if they are innovative, what they have contributed, is going to become relevant, and I think courts will respond to that.

So, not to prolong this further and to make room for people who have a lot more to say and to open up the discussion, I will end on this optimistic note. We have in our power collectively, those of us that scribble for the law reviews and those of you who write briefs and make

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oral arguments, to focus on the technicalities of the enterprise, and that, I think, is the ultimate long run consequence of *Feist*. Thank you.

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