University of Dayton Law Review

Volume 17
Number 2 *Copyright Symposium, Part I*

Article 5

1-1-1992

Open Discussion of Presentation by Professor Leo J. Raskind

University of Dayton

OPEN DISCUSSION

THE CHAIRMAN: Thank you, Leo [Raskind]. We now have time for lots of discussion. I would like to give everyone the opportunity to speak who wants to speak. I suppose we need a few rules to operate in a normal, civil, rational system.

To help in recording this program, it would help us if you would give your name and business or law school affiliation when you speak, and, second, it would help if only one person speaks at once.

So who would like to start off? Maybe I should ask, does anybody want to volunteer to disagree with Leo [Raskind]? It is always good to get contrary opinions on the floor.

PROFESSOR RASKIND: I guess I failed in the wake-up function.

PROFESSOR KARJALA: Dennis Karjala from Arizona State University College of Law. I have lots of questions. I found many interesting thoughts and insights in the presentation.

I just wonder, what are you doing about preemption? If we are going to start protecting all this stuff, how are we going do it?

PROFESSOR RASKIND: Gee, I thought you would never ask, because in my paper I have a draft statute.

PROFESSOR KARJALA: I did not see it. I did not get a copy of it.

PROFESSOR RASKIND: I guess I did not get it here timely. I think the state statute, obviously, is one of the things, and I should have mentioned it.

I think there will be two ventures. I think there will be some proposals for federal legislation either an extension of 1043A or to use of Commerce Clause to craft a federal statute expressly to protect databases. If not, then they will draft a statute, like the one I have scribbled out, which you will see in the paper, which says something like this: It shall be unlawful for any person subject to the jurisdiction of the state act to duplicate without permission for use or inclusion in any product distributed in the state by sale, rental, or otherwise, or to grant access by sale, rental, or otherwise to any part of the information contained in this directory, database, CD-ROM or whatever other form or so on and so on.

PROFESSOR KARJALA: Is that a state statute?

PROFESSOR RASKIND: That is a proposed, model state statute.

PROFESSOR KARJALA: That is not preempted?

PROFESSOR RASKIND: I am not so sure it is preempted. In other words, *Bonito Boats* has strong language that would lead you to that, but if you add to the line of Supreme Court cases of *Bonito Boats* the notions that came out of the Berne Convention Act, that we look to state law to craft up and put together moral rights, it is possible that a preemption issue from such a statute might be presented to the Supreme Court, and my conclusion under present doctrines would be that that statute would not survive.

PROFESSOR KARJALA: And would not survive section 301 either?

PROFESSOR RASKIND: It would not survive 301.

PROFESSOR KARJALA: Because facts are not copyright subject matter?

PROFESSOR RASKIND: Right.

PROFESSOR KARJALA: I question that.

PROFESSOR RASKIND: There is a penumbra of uncertainty there. That is my answer.

PROFESSOR REICHMAN: Jerry Reichman from Vanderbilt University. I liked Leo's [Professor Raskind's] talk because it has some subtle implications for the long term.

First of all, I am surprised at the surprise of the commentators and the bar about the stricter originality standard of *Feist*. I have been saying for years that *Batlin v. Synder* and its progeny introduced a quantitative standard of creativity for borderline subject matters from 1976 on. The empirical evidence is overwhelming. However, because Professor Nimmer did not like this line of cases, he ignored it at first and downplayed it later on, hence many observers were taken by surprise.

By 1990, the standard of originality in the Second Circuit as derived from *Batlin* ranged between *Eckes* and *F.I.I. v. Moody*, and the *Feist* decision leaves that doctrinal range exactly where it stood. Maybe one could argue that it is now *Eckes* plus or minus a tad, or *F.I.I. v. Moody* plus two tads, but nothing more than that. I just do not think there is much of a change there. I do wish the Supreme Court had not added constitutional underpinnings to this line of cases, but I do not think that will make any significant difference, either

In contrast, the most important aspect of *Feist* is its reference to "thin" copyright protection, this could have a major impact on the application of copyright law to borderline subject matters. Until *Feist*, we had only an underground decision beloved by many law professors, the *Kempner-Tragoe* case, which stated that "thin protection" of functional works was always an "open secret," and that *Baker v. Selden* supplied the policies and precedent that justified it. In the past, of

course, one could respond, "what does that *Kempner-Tragoe* judge up there in the Eastern District of Michigan know about it, when all these high-powered special interests are telling everybody a different and more protectionist story?"

Meanwhile, factual works had consistently received thin protection from the Ninth Circuit, by which I mean protection against slavish imitation, but not against nonliteral takings of disparate elements. This form of protection amounts to a de facto kind of unfair competition law. And now the Supreme Court has come along and said: "Yes, that is all the protection that factual works are going to get." If so, then by implication, *Feist* raises serious questions about functional works, too, which have obtained only thin protection since *Continental Casualty* reinterpreted *Baker v. Selden.* As a result, I think we are going to see some narrowing of the scope of protection for computer programs, some narrowing of *Whelan,* for example, as Leo [Raskind] correctly points out.

I would like to point out that the Nordic countries quite some time ago adopted a neighboring rights solution for nonoriginal, noncopyrightable catalogues and directories, which is discussed in my paper. The Commission of the European Communities is proposing a modified versions of the Nordic "catalogue rule" to cover electronic data bases. I think we need to take a look at these approaches before embarking on a unilateral solution of our own, especially one that relies on full copyright protection.

MR. CUTLER: I am Norton Cutler with NCR Corporation. You implied, Professor Raskind, there was something socially good about bringing back sweat of the brow or investment group protection and I guess I would go over the facts and I do not understand why you feel that way.

PROFESSOR RASKIND: I am not sure what you are asking me. Suppose I asked you this question in response: Do you think there ought to be a rule in the marketplace that anybody could take anyone else's material and reproduce it in any circumstance?

MR. CUTLER: No copying.

PROFESSOR RASKIND: And so my thought is the courts are not going to countenance it. The courts are going to be faced with arguments from material otherwise outside the scope of *Feist* that there is unfairness, and try misappropriation or other kinds of arguments. My reaction to that is that rather than go awry, it gets you back to the *INS v. AP* case. In other words, the formula of that that you cannot reap where you have not sown is bound to be bandied about. And my thought in mentioning the costs items was to say these are the constituent elements of reaping where you have not sown, and it is better if

counsel brings to the court the details of what they think is reaping where you have not sown. Does that respond to your question?

MR. CUTLER: I guess as a litigator I would agree, but I wonder what is socially good about protecting facts just because people have spent a lot of time digging them up?

PROFESSOR RASKIND: You see, when you use the word facts, you and I may have a difference of opinion. I am not sure what a fact is. None of these words are self-defining. So in the census taker example in *Feist*, if the census taker were sent—assuming how the census is taken; that is, they get a book, they have some blank forms—the census taker goes to a jurisdiction populated by homeless people and that particular census taker decides he cannot count them, so they come up with what we would call an algorithm and they use a sophisticated statistical formula and they come up with a version, and that version is a number. Then that is not considered by the supervisor to be appropriate, so another census taker is sent out. Two different numbers appear. What is a fact in that circumstance?

In other words, is there a point in time when you cannot divorce the fact from the organizational compilational activity that produces that piece of information? So you and I may differ in that you may have an assumption that, well, I know a fact when I see one, and my argument is in this kind of protection of intellectual property is the underlying activity. That is what the word creativity meant in *Feist*, and that is what authorship means in 102. There is conduct and there is a product. Sometimes the two are easily distinguishable; sometimes they are not. Sometimes you can only tell about the product from looking through it at the conduct.

Are we speaking to each other?

MR. CUTLER: What I do not understand again, at least in trying to figure out what is socially good as opposed to what is a good argument in a lawsuit is the basic concept that the Constitution seems to be falling down on the side of disclosure as opposed to protection, and when you cannot separate the facts from the organizational skills, et cetera, then it ought to be disclosed and freely available.

PROFESSOR RASKIND: Who disclosed it in your hypothetical, the person who took it or the person who provided it in the first instance? You can say that they both disclosed it.

MR. CUTLER: If the fact is published, there are in your example a hundred people living in west Dayton, regardless of how they figured it out, anyone else ought to be able to talk about it.

PROFESSOR RASKIND: I see different versions to what you just said. If you say there are a hundred people in west Dayton, the person who went and counted them certainly could talk about it. But

could the person who wants to use that number say: "I am not going down to west Dayton, that is a pain in the neck and it costs money, here is so and so's piece of paper that has it and I am just going to copy that, reproduce it, and replicate it for sale."

In some circumstances I am suggesting that could pose a problem and a court may say, no, you cannot take the fact. The fact that it is a fact, that it is a piece of information that is known and derived from somebody's intellectual activity does not, without looking into the context of the circumstances, tell you who appropriately should be able to disclose it. You can have the last word.

MR. CUTLER: No.

PROFESSOR RASKIND: Have I run you over with words? I did not intend to do that.

THE CHAIRMAN: I think we have some other people who want to jump in.

MR. STEELE: Kurt Steele, Rand McNally. I believe one of the problems with the *Feist* case is that, for better or for worse the Court decided to take a case to resolve the conflict among the circuits that on the surface had some very simple "facts," telephone listings. If the court had instead waited for a more opportune case and dealt with "facts" that had more expression clothing, maybe the rather simplistic, almost black and white statements in their opinion would not have been quite so strident. There would have been more sensitivity that not all facts are the same as you are suggesting.

My question is how much of what we are talking about now is a problem of deciding to what degree certain "facts" are clothed sufficiently to be protectible so adequate protection for many different types of works could still be found post-*Feist* if the courts work hard enough to do that, or are the courts more likely to very stringently apply *Feist*?

PROFESSOR RASKIND: You have asked me a lot of things. I think to start with the last, I would say that that's what I meant when I said we as group have the capability of filling that hole by what we do.

Let's try to get as concrete as possible because you and I have been talking on the abstract level. How about a map of south Florida in which the map maker effectively described the rate of economic development, the rate of condominiums, trying to get a lot of factual information in here. It gets coalesced in the map, and in the two dimensional it is multi-colored and they use a whole variety of special symbols that reflects underlying information about the rate of change, how many new strip shopping centers there are, how many condominiums there are, and so on and so on. So, we have something concrete to talk about.

Now, at some point along comes one of your competitors and they photocopy it or they reduce it and they sell it. And at some point I think I would say to you the person who does that ought, under some legal doctrine, not to be able to do that. Am I responding to what your concern is?

MR. STEELE: I do not think there is any question about that under the current law.

PROFESSOR RASKIND: So we change that. And the second person, they may still photocopy it but then they add some material to it. In a different shade, they may show the gross income of all the acquiring, how many shopping centers have been acquired, the shopping centers on the first map that have been acquired, some financial data by color and an attached legend of who bought them. Now what about that one?

MR. STEELE: We are moving a little off.

PROFESSOR RASKIND: I thought that is where you and I were. Put me back on the track.

MR. STEELE: How would you respond to that? Is your second example arguably protectible post-*Feist*?

PROFESSOR RASKIND: That is the beginning of where protection could begin. I cannot tell you whether it would be adding this piece of information or that piece of information, but the person—that I think is the ultimate object.

If you took the maps out of the picture and you have two essays that described all the events that happened, most of us would say there is narrow protection for facts and protection for copyright, and that information, you and I would agree, ought to be disclosed in a sense.

And so at some point, I think the court would draw a line and that is how they would go. They would say you have this second person who has now contributed something material to this information and maybe some of the information is widely available. It may be that in defense the second person might point out that the map that had, you say it is a Rand McNally map, but the U.S. Statistical Abstract had some of that same information, and there is a doctoral piece somewhere that has some of that information. And what you have is information that you acquired at some cost and expense, but it is alternatively available from other sources, and so on. So I think originality in the *Feist* sense really does mean some kind of comparison to the patent concept of novelty. I think courts have upheld it. Have I responded to what you asked?

MR. STEELE: This will be an interesting two days.

PROFESSOR RASKIND: Are we both going to survive?

THE CHAIRMAN: With good grace and good humor.

MR. McDONALD: Jack McDonald, Dun & Bradstreet. In the comments that we were just given it was suggested that what appears to be a fact may not be a fact. And it was so implied that if you hold something out as a fact and you publish that there are a hundred people in south Dayton, assuming there is a south Dayton, that by holding that out somebody could pick it up and use it.

Is the problem then one of putting a disclaimer in front saying that all data elements contained herein are the result of algorithms that contain my selection, judgment, and other criteria that I have authored. I mean, do you add something to your copyright notice saying that these are all approximations? Does that get you off the hook?

PROFESSOR RASKIND: Well, my reaction to that would be now you switched from copyright law to contract law and you are moving in the direction of shrink-wrap license and that is an alternative means of protection. That is a perfectly viable lawyer's response to the avoid the *Feist* decision. If you ask me should you do that, sure.

Look at the first screen that Mr. Schatz has authored in WESTLAW. It tells you the things you can do and things you cannot do, and it sounds like he has some of the things in there that you were saying.

Mr. Schatz, do you agree with that?

MR. SCHATZ: We cannot agree with just everything.

PROFESSOR RASKIND: The legend that appears on WESTLAW with respect to limitations, I assume you were responsible for these.

MR. SCHATZ: I do not know. You will have to give me a basic draft of the legends on these.

PROFESSOR RASKIND: And I take it, I interpreted your question to mean such a legend you would put on your own.

MR. McDONALD: I have never looked at his legend. I probably ought to. I do not see how I am engaging in shrink-wrap. I am characterizing or providing information to disclosure as to the nature of the material I am providing.

PROFESSOR RASKIND: But the legal consequences of that would be you are inviting somebody by using that product to accept that whole thing. I am saying it could be a contractual method of protection.

THE CHAIRMAN: Jack [McDonald], are you also trying to suggest that such a legend would undercut an assertion that these things really are facts, and by implication, therefore, they are expressive statements, that there are a hundred people in Dayton, but you are saying that is an expressive statement as opposed to a factual one and there-

fore you cannot copy it as a fact, and if you take that information, you are taking my expression; is that what you are trying to say?

MR. McDONALD: Exactly.

THE CHAIRMAN: I think, that statement stays inside the copyright law.

PROFESSOR RASKIND: Then you are laying a premise for a court then to say, ah, those materials are not what we would call unprotected facts in this case.

There are two legal consequences to what you assert. One, it could raise a contract right, and the other, it could be a predicate for a finding by a federal judge as a matter of law that this material is not fact. Does that respond?

MR. McDONALD: Certainly down the road. I mean if somebody were to copy my estimate that there are a hundred people in south Dayton and I were to sue them for copyright infringements, down the road, they would certainly have the opportunity to say I did not have any authorship in developing that number, that I had used perfectly mundane and routine, I guess garden variety might be a popular version these days, methods of deriving that number of one hundred. That certainly is something that would be contested, but it is an off the bat sort of thing.

In terms of giving notice of what you consider to be a fact, something that you consider to be factual and something that you consider to be ultimately protectible within a compilation, do you have to—the answer you gave to the other gentleman—give the reader or the user some sort of notice?

PROFESSOR RASKIND: I do not think scienter is an element of this, but how you characterize the material might be probative and evidentiary of what kind of material it is. That is one evidentiary element to which a court could look.

THE CHAIRMAN: Notice we have identified two separate problems already. One is trying to figure out what things are factual. The broader category is what things are in the public domain, whether it is a federal court opinion published by Mead Data Central or West, for example, or a fact, whatever that might be. But what things are in the public domain and therefore freely takeable in those elements in which they are public domain.

The second issue is when you assemble the whole bunch of these public domain materials, factual materials, whatever they might be, to what extent is the assemblage protectible as an assemblage in some sense. I think we have two different questions on the table already.

PROFESSOR KARJALA: This question of protecting factual information is something I want to elaborate on in my talk tomorrow, but

since it has come up in this context, I would like to makes a brief introductory comment.

What I think the problem is with an approach like *Feist* is that you say facts are not copyrightable—period. You remove all ability from the courts to balance. Yet, intellectual property law in general, and copyright law in particular, is, in fact, a balance of a variety of social policies and intentions.

And there are different kinds of facts. I think the question, "Is this or is this not a fact?" is ultimately fruitless. The real question is, what kinds of facts or factual information call for some protection; what kinds of information really ought to be left for free and open debate? And I think the examples of *Wainwright*, on the one hand, and this census data, on the other, are good because both works take effort to produce.

Let's say, you get the economic predictions of some particular company's fortunes in *Wainwright*; you get, let's say, a very difficult population to estimate in census data. Factual data or census data, whether it is taken by the government or private people, may well be matters of considerably more public interest than the sort of data in *Wainwright*, which is certainly of interest to investors, but it is not the kind of data that has to be immediately subject to free and open debate.

The problem is that we need to draw a balance. We want to give an incentive for people to go out and dig up these facts. I agree with Leo [Raskind] completely about that, and I think the courts are going to be very sensitive to that. They have in the past, and I see no reason to think they are going to change. But that is only one factor.

We have another factor which is the free dissemination of information. However, I do not think we really want to say absolutely that we do not have any protection for any factual information. There is a balance. It is very sensitive; the protection should be very limited, but we should not ignore the production incentive completely.

The same thing goes for functionality—we must balance. We want limited protection for functionality under copyright law because copyright goes on for too long and the remedies are too heavy-handed. We want to be very careful about protecting functional works with copyright and we want to be very careful about overprotecting facts; there is no question about that. But these interests must be balanced against production incentives with respect to the kind of factual information that we are talking about.

PROFESSOR REICHMAN: I think I agree with you completely. You put your finger on something very important. We are just really

becoming familiar with what I call mature copyright paradigm of the Berne Convention because we have nothing like it.

We had what Barbara Rieger called a very primitive law and what some authors have said, including myself, after the 1909 Act was little more than what other countries would consider an industrial design law. In effect eighty-five percent of all works only got twenty-eight years of protection. Empirically, you had a very short term of protection in which it did not matter very much how subtle you became in drawing the line between skilled efforts and creative, literary and artistic works because you did not have the true authors' right of law.

Then this country set about preparing for what would be our role in the 1990s, and that is, bringing our law into line with the international copyright paradigm. Now, under the international copyright paradigm, you do not have low originality standards even though the myth is that you do. On the contrary, you have quite a surprisingly high standard in which most of the domestic foreign laws actually use the term novel. They do not mean novel in the effective sense, they do not mean objective novel. They mean something called subjective novel.

But the standard, for example, in the Federal Republic of Germany is a personal, intellectual creation. That can be a fairly stiff standard. What is happening is that their surprisingly stiff standards are coming down and as the only other country that has had as low a standard as the United Kingdom, ours are moving up towards the Berne paradigm.

So the problem is that we are talking about a law that gives seventy-five to one hundred years of protection, not because it is there to protect technology and not because it is there to stimulate investment in computerized databases, but because the sons and daughters and grandchildren of Verdi should not have to go hungry or because the author Stuns Lonnigan should not have to go around with a begging bone in his hand in his own lifetime while the publishers are making money off his books, which is exactly what happened with the 1909 Act.

And, therefore you are entirely right, the question is misphrased if we are saying we are going to use this big powerful, terribly powerful, paradigm to protect stuff that needs to have a much more delicate balance between investment and users and competition, and at the same time incentive. So we are using a cannon where a pistol would do. And I think if we get that message from the Supreme Court's case, we can move on to developing some very interesting and important protective tools for the twenty-first century that would give a much lower, much more interesting form of protection for a whole lot of things that I call

legal hybrids that do not fall or fit very well between either the patent or the copyright paradigm.

MR. CLARK: Rob Clark with NCR Corporation. One of the burning issues we have in our business is the extent to which copyright law might be used in order to prevent computers and other machines from using a common language so they would be unable to talk with one another or work together and be compatible with other products in the marketplace.

By way of hypothetical, if someone were to expend a lot of time, money, and a great deal of creativity in conceiving a new language and then commence to write a book, either written in such a language or describing such a language. I guess, I am wondering about the extent to which the copyright law should affect people's ability to write other books either using the same language or other books written differently to describe that.

PROFESSOR RASKIND: That is not an easy question and it would get you back to the old game, thinking about the code book cases which I am sure you have consulted. When you get the language you are dealing with the kind of information that is so central to the transmission of intellectual activity, that it is sort of like typefaces, then I think you have a different set of issues to balance. So I think a language is a very difficult thing for which to claim copyright protection although there is some old authority to suggest that. Is that a responsive answer to your question?

MR. CLARK: I think to the extent that our company embraced open systems strategies, we are of the opinion that the law should not protect such language.

PROFESSOR RASKIND: I think the law we are dealing with at the moment really would not protect it. Have you seen Richard Stern's piece on that?

MR. CLARK: No, I have not.

PROFESSOR RASKIND: He has given a lot of thought to it. It is a nice piece. He concludes the same. It is like typeface. Language is central to the transmission of electronic activity; it would not be a good, socially desirable thing to allow somebody to use that, especially if that is an efficient means of making those machines.

MR. ODOZYNSKI: John Odozynski. I just want to ask Professor Raskind a follow-up to that. I think everyone could agree a common language would be an important media for artificial transmission of intellectual property. But why, by virtue of the straightforward application of either copyright or patent law, would it not be protectible because I can see it would clearly be under either copyright or patent law, a novel, innovative, creative, original. The common language

would be easily protectible in any number of ways on any number of levels.

PROFESSOR RASKIND: I do not agree with you about the last part. I think with the patent part you would have trouble because these languages all have a commonality to them, with substantial variations, and I think the doctrine of equivalence would make any claim—I mean, you could try to write the claim that this language is different, but. So reasonable people could differ about that. That would be one reaction.

And the other reaction is with typefaces. Look at the problems that there have been with typefaces, and typefaces are a constituent element of just what you seek to protect. So in those circumstances there is an activity that results in a physical product, which would be on the side of *Feist*. You could use *Feist*'s analysis to say it is outside the scope.

MR. ODOZYNSKI: Well, it seems to me it depends upon what he was talking about, whether he was talking about a common language in the abstract. It seems to me there could be aspects of a common software language that clearly would have commonality to things that occurred before, a prior art, but that, as a development of that language, there would be an invention made or a number of inventions made that might very well be patentable, that might very well be the aspect of a common language that would render it most desirable. And similarly if the writing and reducing of the ideas that represent that common language, in reducing that to code, I wonder why there would not be reflected some creativity that would render that code copyrightable.

PROFESSOR RASKIND: You just said that. Of course, you could say that of it, but in the end if that were—in what context would you want to protect it. In other words, let's look it that way.

MR. ODOZYNSKI: I would want to protect it every context I could.

PROFESSOR RASKIND: But there is what is called fair use, isn't there? So then someone could come along and say I used your language because this particular device that I have to meter some medical instrument will use the computer to do that, and it is an improvement. In some circumstances the court might find that you are not using that in medical field and this is an adaptation of your language and 107 would say that. So I think if you're looking for a blanket statement about language because there is cost and effort into it, I do not think you could make that claim.

MR. ROMANOW: Joe Romanow from GTE. Getting back to *Feist*, Professor Raskind, you suggested that *Feist* might well be lim-

ited to the very special facts of the case. On the other hand, you also suggested a statute outside of copyright law that would protect databases. I do not want to draw the wrong inference.

There seems to me there is a lot of room for negotiation still in protecting databases that might have a modicum of creativity in them. Are you suggesting that computer databases will come under the sweep of the *Feist* case?

PROFESSOR RASKIND: If you mean come under the sweep, do I think there will be a case where someone has downloaded. Let's be as specific as possible. Yes, I think there will be case where someone will download from electronic database, make a few changes, as I said with regard to the map of south Florida, and market another product, and then the issue will be joined. So, yes, I think there is likely to come up such an instance.

Do I think—who will win in those circumstances? As I said to Dennis [Karjala], there certainly will be, and it is a rational response by lawyers who represent industry who have databases to try state law, to try the state statute, a process where state statutes will be enacted. Then the issue of preemptions, about which Dennis [Karjala] and I may or may not agree, will then arise, and so reach over in the next dozen years. Am I responding to you?

MR. ROMANOW: I guess the major thrust of my question is, is there still room for a good deal of originality even in factual databases notwithstanding the *Feist* case?

PROFESSOR RASKIND: I think I would say yes, and I think it comes out like this because the word "original" both in the opinion and in the statute focuses on the product and when you say authorship that focuses on the company. So let's be as specific as possible.

Suppose I went to a software manufacturer at NCR who came out with a fancy software package and would make it available, even with regard to the *Feist* case. If I could keyboard it in, I could get the previous records; I would get the geographic data of all the counties in Kansas that were involved, and I might get the names of all the people; in other words, aggregate a whole bunch of information in various bits and pieces. Now for some reason I do not have the opinion, so I go out and gather that material and I buy the software package. But then I go to LEXIS and WESTLAW, and I just download the cases. So I take all of their case law material, but I have surrounded it with a bunch of different material.

I think that that is the kind of hypothetical. Did that respond to what you have in mind? How should that come out, I think that is the question. At what point should the court say, okay, you have done enough, and/or should they say wait a minute that is just plain stealing

and you have not done anything. All that stuff is available. I think those are the issues and how they get framed. Does that respond to your question?

MR. ROMANOW: Yes.

PROFESSOR KARJALA: Just a small point on the LEXIS question. Downloading the LEXIS database has always been a favorite example of mine, even long before *Feist*. I do not think we are talking about facts. What we have in the LEXIS database are literary works that happen to be in the public domain for various policy reasons. But we are not downloading facts. So I do not think there is any question in this case that a state misappropriation protection of this activity has to be preempted.

So now you really are stuck, and I think *Feist* is pretty clear that this kind of a database is not protected. There is no selection in what is in the database because every single case is there. There is no arrangement, essentially by definition, in a database, or if there is any arrangement, you are not taking it because you are simply taking the case one by one. If *Feist* is correct, that is the end of legal protection for those kinds of works. I think that is wrong, but I think that is the result. That's pretty clear.

PROFESSOR REICHMAN: I think the thrust of the question was that it may not be so clear and if Leo [Raskind] would agree that it is not so clear you can copyright such matter, I would agree with him. I think *Eckes* is the key: no one should underestimate the importance of the Second Circuit's *Eckes* decision. "Selection and arrangement" is not a very exacting standard as our courts have interpreted it, because the usual test is to ask if there was any room for choice. How was there in *Eckes*? Plaintiffs could show they had left out a whole bunch of cards that were possible to include, and they took a whole bunch of other baseball cards for certain reasons, and that was it. Indeed, I think we have another baseball-related decision after *Eckes*, in which the court applied the *Eckes* rationale to pitching forms, again in the Second Circuit.

PROFESSOR RASKIND: The Chinese telephone directory.

PROFESSOR REICHMAN: Maybe, but there is still another case. In any event, that is what I meant by *Eckes* plus or minus a "tad." It may even be a little less than *Eckes* and a little bit more than *F.I.I. v. Moody*, I would suspect.

PROFESSOR KARJALA: What about LEXIS? What about that?

PROFESSOR REICHMAN: I agree with you. I do not think that is all important because, with LEXIS, you are dealing with literary works, but I think there is going to be—

PROFESSOR KARJALA: But there is no selection or arrangement; that is the point.

PROFESSOR REICHMAN: I think it will often be possible to manufacture claims of selection and arrangement. I think Leo [Raskind] is right. I think before he surrenders to misappropriation law, I think he should consider that, to the extent the appropriation is slavish, the courts are going to lean over backwards to find a modicum of arrangement and selection, anyway. They are going to grab onto that language in *Feist* and say, we know the threshold is very low, even if it has to be drawn somewhere, and that is not a very exacting standard for selection and arrangement.

One thing *Feist* will eliminate is the tendency of prior courts to say that a defendant's slavish imitation could retroactively make plaintiff's contribution more "original." This was always result-oriented bunkum, and Professors Patterson and Joyce poke fun at it in their wonderful article. So, after *Feist*, if a plaintiff really cannot show any basis of selection and arrangement, then he is in trouble where he might not have been before, even in the presence of slavish imitation. Apart from this, however, I would wait a while before I gave up on the games of selection and arrangement that we are going to play.