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Presentation by James E. Schatz, Esq.

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MR. SCHATZ: As my role, and I think the role of other people who are going to be commenting on the main presentations, was described to me, it was to raise some questions that would lead to discussion. And so while I submitted a paper that discussed many of the things that Professor Patterson, and a few of the things that Professor Raskind, have talked about, I am going to limit myself to things that I think would be useful for discussion.

For instance, I discussed, at least on a couple of pages, Professor Patterson's view on the Statute of Anne and the Copyright Clause, which I disagree with. I think everybody can read that. But I think it is not that interesting what happened in the 1700's, quite frankly, and it's not very relevant to today with computers, TVs, and CD-ROMS, and who knows what other developments in the future.

Let me start off with one of the things that Professor Raskind said and, I think, Professor Karjala talked about also, and that is that the discussion of "facts" in *Feist* was not very helpful. I couldn't agree more. I think that what is going to happen is that, based on *Feist*, courts are going to be very likely to try to find out what "facts" means, and they are going to be trying to separate facts from expression and from selection, coordination, and arrangement, and I don't think they are going to do a very good job.

Professor Raskind indicated several examples where information really is not "facts" and borders more on expression, and so, I think you are going to have a lot of misleading discussion. If courts believe that alleged facts should be protected from a particular taking, they are going to stretch to find that those facts are either expression or are really selected, coordinated, or arranged in a certain way that allows protection from the taking in question. I think you are going to have a lot of strained interpretations and I am not sure that that is going to be particularly helpful in pushing the law forward.

I do believe that courts will find protection. And some laws, like Professor Raskind's example of misappropriation, are going to rise to protect against what courts consider to be unfair takings. One of the things I cover in my paper, which I would like to cover here because I would like to see what other people's comments are on it, is that, in fact, state laws in this area are not preempted. Let me discuss that for a minute.

We are now faced with a situation after *Feist* where the labor and expense necessary to create a factual compilation is not protected in and of itself by copyright. Protection is not needed for literary expres-

sion as that is already protected by copyright, but rather what we are talking about is protection for the huge investments in time and effort it takes to develop factual compilations.

Feist makes it clear that Congress has no power under the Constitution to extend copyright protection for the collection and assemblage of facts however great the investment of time and effort by the compiler. This follows from the Court's conclusion that originality is a constitutional requirement for the extension of copyright protection and the Court's characterization of facts as bits of information that "do not owe their origin to an act of authorship."

If Congress has not been delegated the power to protect the collection and assemblage of factual material under the Copyright and Patent Clause, then under the Tenth Amendment that power may be reserved to the states. Certainly, if Congress lacks the constitutional power to protect the collection and assemblage of factual material, as the Court implicitly held in *Feist*, then it can't act to preempt state attempts to protect such effort from unauthorized appropriation. In other words, if Congress can't act in that area, then it cannot act in the other way.

In fact, Congress itself has acknowledged that in certain circumstances the states may provide protection for the presentation of facts, apart from their selection, coordination, and arrangement. In passing the 1976 Copyright Act, Congress said, in the legislative history, that misappropriation is not necessarily synonymous with copyright infringement:

> For example, state law should have the flexibility to afford a remedy against a consistent pattern of unauthorized appropriation by a competitor of the facts, i.e., not the literary expression, constituting hot news whether in the traditional mode of the *International News Service* case or in the newer form of data updates from scientific, business, and financial databases.

The states, therefore, can act to protect a compiler's investment of time and labor in collecting and assembling the data contained in factual compilations.

In his paper, and I believe he spoke about this briefly, Professor Raskind postulated that, under *Bonito Boats*, a state statute protecting the collection and assemblage of information contained in a directory, database, index or other form of assembled information would likely be preempted by section 301 of the Copyright Act. The opinion in *Bonito Boats*, however, implies that Congress has the power to protect the unpatented boat hulls at issue in that case, but had elected not to provide patent protection. As was stated there by the Supreme Court, taken together, the novelty and non-obviousness requirements express a con-

gressional determination that the purposes behind the Patent Clause are best served by free competition and exploitation of what is already available to the public or that which may be readily discerned from publicly available materials. Thus, since Congress chose not to provide patent protection in such cases where it could have, this was an area that Congress felt was best left unregulated and this congressional decision was accorded the same preemptive force as a decision to regulate.

Based on *Feist*, however, it is clear that Congress does not have the power to grant copyright protection to the collection and assemblage of facts in a factual compilation. As a result, *Bonito Boats* does not appear to mandate preemption of a state law protecting such effort.

One last point. Professor Patterson spoke a lot about the complaints about what has happened to copyright law in that it has supposedly allowed people to monopolize and censor, and that the copyright law has been turned on its head. But what he did not say, and what I think is the most important response, is that copyright is not much of a right. He made it sound like it is a great monopoly and provides a great censorship tool, but it really does not provide much of a tool because all it prohibits is copying. You can create the same thing, as indicated in many copyright treatises, as long as you do it independently. So, if you want to create a collection of public domain material, even if there is an absolute prohibition on copying any other compilation of it anywhere, you still have a right to go to the public domain source and collect the same data in exactly the same format as long you are not copying it.

You can exercise independent creation, or you can look at what is available and say that sounds like a great idea and go copy the information from the same place. There may be a problem with copying the selection and arrangement, but the point is that the copyright, that provides this monopoly or censorship right, is not much of a right. It does not really protect much. It is not like a patent that absolutely prohibits people from doing whatever it is that's patented. Copyright only prohibits copying, or, as I think people in the industry would say, piracy or rip-offs. Thank you.