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After Feist

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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.

AFTER *FEIST*

*Jessica Litman**

On March 27, 1991, the United States Supreme Court handed down its opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.*,[1] upsetting a settled, if uneasy, understanding of the scope of copyright protection for databases and other compilations of fact. The Register of Copyright's remark that "the Supreme Court dropped a bomb"[2] when it issued the *Feist* opinion soon became the *bon mot* quoted by everyone to describe the occasion.[3] By grounding its opinion in the Copyright Clause of the Constitution,[4] rather than in the copyright statute,[5] the Court appeared to foreclose the possibility that Congress could repair damage done in *Feist* by amending the copyright law. Few observers, however, seem content to leave the perceived damage unrepaired. Instead, they are calling for a statutory fix based on some other congressional power, most probably the Commerce Clause.[6]

That such sui generis legislation will soon be proposed seems unquestionable. Because a great deal of money is invested in databases and other compilations of facts, there is sure to be great enthusiasm for enacting some sort of copyright-like, intellectual property protection of fact compilations. Because the database and factual compilation industries have structured themselves around the belief, well-supported by extant case law,[7] that their works enjoyed copyright protection already, the request for sui generis protection will be viewed as merely restoring what *Feist* took away. When such a proposal is characterized as a res-

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* Professor of Law, Wayne State University. 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 accomondating my erratic schedule. I would also like to thank Jonathan Weinberg, whose demanding editorial advice and substantive suggestions greatly improved this paper.

1. 111 S. Ct. 1282 (interim ed. 1991).

2. *Copyright Office And Copyright Royalty Tribunal Report Status To House Panel*, 41 Pat. Trademark & Copyright J. (BNA) No. 524, (April 18, 1991).

3. *E.g.*, Paul Goldstein, *Copyright: The Donald C. Brace Memorial Lecture*, 38 J. COPY. SOC'Y 109, 118 (1991) (quoting Ralph Oman, Register of Copyrights).

4. The Commerce Clause states that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ." U.S. CONST. art. I, § 8, cl. 3.

5. 17 U.S.C. §§ 101-810 (1977 & Supp. 1991).

6. *E.g.*, Goldstein, *supra* note 3, at 119; Michael Klipper & Meredith Senter, Jr., *Thick Book, but Thin Protection*, LEGAL TIMES, April 22, 1991, at 28.

7. *See, e.g.*, National Commission on New Technological Uses of Copyrighted Works, Final Report 42 (1978) [hereinafter CONTU Report]; 1 PAUL GOLDSTEIN, COPYRIGHT § 2.14.2, at 180-86 (1989).

toration of well-deserved and essential protection, it is tempting not to look at such legislation as a bargain between its beneficiaries and the members of the public. It is tempting not to ask what benefits the public will receive in return for the bargain; it is tempting not to question whether the public might require some insurance that the bargain will not prove too costly. Such questions may prove to be unpopular ones. This paper seeks to raise some of those unpopular questions, and to offer some unpopular answers in response.

I. *Feist's* IMPLICATIONS FOR DATABASES

Feist Publications v. Rural Telephone Service Co.[8] involved a fact pattern typical of telephone book infringement cases. The plaintiff phone company published a white pages directory; defendant publisher published a competing white pages directory. When plaintiff refused to license its listings to defendant, defendant used plaintiff's telephone book to extract the listings that fell within the geographic area of its directory. Defendant hired verifiers to dial the numbers thus acquired and ask the persons who answered the phone to confirm their names, telephone numbers, and street addresses.[9] It then published a telephone directory containing the verified listings. The plaintiff sued for copyright infringement, and the district court, following an unbroken line of telephone directory cases, held that defendant had infringed plaintiff's copyright by relying on the plaintiff's directory as a source for its listings without first obtaining those listings independently.[10] In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed.[11]

The Supreme Court reversed in a sweeping opinion that denounced a century of directory copyright infringement cases as based on a misunderstanding.[12] Surprisingly to many observers,[13] the Court did not hold that it was not copyright infringement to use a copyrighted phone book as a reference source for people's telephone numbers in order to call them up and verify the information. Indeed, the Court did not even reach the scope of copyright protection, or the nature of copyright infringement, for copyrightable compilations of fact. Instead, the

8. 111 S. Ct. 1282 (interim ed. 1991).

9. Rural Tel. Serv. Co., Inc. v. Feist Publications, Inc., 663 F. Supp. 214, 217 (D. Kan. 1987), *aff'd*, 916 F.2d 718 (10th Cir. 1990), *rev'd*, 111 S. Ct. 1282, 1286 (interim ed. 1991).

10. *Feist*, 663 F. Supp. at 219. This, of course, was functionally indistinguishable from conferring copyright protection on the factual contents of the plaintiff's directory.

11. *See* Rural Tel. Serv. Co. v. Feist Publications, Inc., 916 F.2d 718 (10th Cir. 1990).

12. Feist Publications, Inc., v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1291 (interim ed. 1991).

13. *See, e.g.*, Alfred C. Yen, *The Legacy of Feist: The Consequences of a Weak Connection Between Copyright and the Economics of Public Goods*, 52 OHIO ST. L.J. (forthcoming 1992).

Court held that white pages telephone directories were not copyrightable at all.[14]

The implications of *Feist*'s holding for copyright in computer databases are indirect. The Court held the plaintiff's phonebook uncopyrightable in *Feist* because it failed to display the minimal creativity that the Constitution requires.[15] Unlike white pages directories, computer databases are surely sufficiently original to merit copyright protection. For proprietors of databases that are compilations of factual material, however, the copyrights their databases are assuredly entitled to may offer only illusory protection. "Notwithstanding a valid copyright," the Court noted, "a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement."[16] Although the structure of a computer database's storage and retrieval mechanisms is highly creative and represents a large measure of the database's commercial value, the aggregation of individual data is in fact its most salable aspect. Under the Supreme Court's analysis, a competitor would be infringing no copyright if it simply stole the data and left the base.[17]

If facts themselves are, as a matter of constitutional law, unprotectable under the Copyright Clause of the Constitution, moreover, Congress cannot provide meaningful protection to the data in factual databases by amending the copyright statute.[18] There is no apparent constitutional impediment, however, to according essentially equivalent protection to data under the Commerce Clause.[19]

II. PROTECTING FACTS

The scholarly literature on copyright protection of collections of facts is copious,[20] and has been largely unanimous. Commentators

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14. *Feist*, 111 S. Ct. at 1297.

15. *Id.* at 1296-97.

16. *Id.* at 1289.

17. The analysis is the same for databases like WESTLAW and LEXIS, which compile works of the federal government and other uncopyrightable components. Of course, a huge proportion of online services offer compilations of otherwise copyrightable material. Such services should weather the change in the law announced by *Feist* unscathed.

18. *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT § 2.2.1, at 10-11 (Supp. 1991).

19. *See, e.g., id.* at 11; Goldstein, *supra* note 3, at 119. The Commerce Clause states that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ." U.S. CONST. art. I, § 8, cl. 3.

20. *See, e.g.*, Robert C. Denicola, *Copyright in Collections of Facts: A Theory for Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 91 COLUM. L. REV. 1865 (1990); Robert A. Gorman, *Fact or Fancy: The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y 560 (1982); Barry R. Jones, *Copyright: Commentary — Factual Compilations and the*

agree that copyright protection for factual compilations strains copyright theory intolerably.[21] As a normative matter, however, many scholars concluded, before *Feist*, that factual compilations deserve copyright protection, and that, at least in some cases, such protection should extend to the facts themselves.[22] They therefore offered a variety of suggestions for rationalizing such protection within copyright's framework, through reconceptualization of the authorship involved in compiling facts,[23] reinterpretation of statutory language,[24] or statutory amendment.[25]

The arguments in support of protecting the facts in factual compilations have no less force today, after *Feist*, than they did before the decision. Such arguments typically focus on the need to provide incentives sufficient to inspire the creation of valuable compilations of facts.[26] If second-comers can help themselves to arduously collected data with impunity, nobody will invest the money and labor required to collect the data in the first place.[27] And electronic databases and other factual compilations have tremendous value.[28] The extraordinary growth of the online database industry over the past decade demonstrates that our society has an insatiable hunger for information, especially when it can be made available in easily accessible form. Thus, an argument in support of intellectual property protection for facts, after *Feist*, would invoke the specter of the current wealth of electronically

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Second Circuit, 52 BROOK. L. REV. 679 (1986); Ira Lurvey, *"Verifying" From Prior Directories — "Fair Use" or Theft?*, 13 BULL. COPY. SOC'Y 271 (1967); William F. Patry, *Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable)*, 12 COMM. & THE LAW 37 (1990); David A. Shipley & Jeffery S. Hay, *Protecting Research: Copyright, Common Law Alternatives, and Federal Preemption*, 63 N.C. L. REV. 125 (1984); William L. Anderson, Comment, *Copyright Protection for Citations to a Law Reporter: West Publishing Co. v. Mead Data Central, Inc.*, 71 MINN. L. REV. 991 (1987); Jack B. Hicks, Note, *Copyright and Computer Databases: Is Traditional Compilation Law Adequate?*, 65 TEX. L. REV. 993 (1987).

21. *See, e.g.*, 1 GOLDSTEIN, *supra* note 7, § 2.14.2, at 180; Denicola, *supra* note 20, at 527-30, 535-36; Anderson, *supra* note 20, at 1003-07.

22. *See, e.g.*, Denicola, *supra* note 20, at 530; Ginsburg, *supra* note 20, at 1908-16; Jones, *supra* note 19; Anderson, *supra* note 20, at 1019-24, Hicks, *supra* note 20; *see also* 1 GOLDSTEIN, *supra* note 7, § 2.14.2.2 at 183-86 (discussing different courts' views pertaining to the proper scope of protectible subject matter). *But see* Patry, *supra* note 20; Shipley & Hay, *supra* note 20.

23. *See, e.g.*, Denicola, *supra* note 20, at 530-31, 538.

24. See, e.g., Sarah Lum, Note, *Copyright Protection for Factual Compilations — Reviving the Misappropriation Doctrine*, 56 FORDHAM L. REVIEW 933, 950-52 (1988).

25. *See* Ginsburg, *supra* note 20, at 1927-34.

26. *See, e.g., id.* at 1907-15; Jones, *supra* note 20, at 712.

27. *See, e.g.*, GOLDSTEIN, *supra* note 18, § 2.14.2, at 30-31.

28. *See, e.g.*, U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information 73-77, 158-69 (1986); Rochelle Cooper Dreyfuss, *Information Products: A Challenge to Intellectual Property Theory*, 20 INT'L L. & POL. 897 (1988); Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Trend?*, 38 CATH. U. L. REV. 365, 367 (1989).

accessible information sources dwindling as database creation ceases to be profitable.

I have never been an aficionado of incentive arguments in favor of broadened copyright protection.[29] They seem to me to prove too much.[30] In the context of a burgeoning, dynamic, and immensely profitable database industry, I have little fear that *Feist* will result in the industry's withering away.[31] Intellectual property protection is, after all, only one route to securing return on investment. Other, equally effective mechanisms beckon, and the industry, aided by the clever lawyers we all are, will surely adjust to the post-*Feist* world.[32] We have the technology to enable information providers to achieve all the protection copyright might have supplied, and more, simply by placing conditions on access and monitoring customer usage. Indeed, a large number of on-line databases availed themselves of those strategies well before the *Feist* decision.[33]

It is the very practicality of alternative sorts of protection that disturbs me when I imagine the world of information products after *Feist*. Most of the alternative means of protecting one's investment in collections of data require tight control over access and dissemination.[34] Policing control over access and dissemination, in turn, requires significant monitoring of who is using the database and what data she is retrieving. All of these measures cost money, and that cost is folded into the price for database access, along with some extra amount to compensate the owner for inevitable leakage of the system.[35] Thus, a world of commercial databases with no meaningful intellectual prop-

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29. Jessica Litman, *Essay: Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991).

30. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 997-98, (1990).

31. It is worth recalling that the law before *Feist* was hardly monolithic. A number of courts of appeals, most notably the Second and Ninth Circuits, had interpreted the copyright statute to offer very little protection to factual compilations. *See, e.g.*, Worth v. Selchow & Richter, Co., 827 F.2d 569 (9th Cir. 1987); Financial Info., Inc. v. Moody's Investors Serv., 808 F.2d 204 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1986); Baila H. Celedonia, *"Feist v. Rural Telephone:" Is the Sky Falling for Directory Publishers?*, N.Y.L.J., April 12, 1991, at 1. Notwithstanding that fact, an abundance of online database service was made available to customers in the states of New York and California.

32. *See, e.g.*, Celedonia, *supra* note 31; Klipper & Senter, *supra* note 6, at 28.

33. *See* Hearty & Polansky, *ACS Chemical Journals Online: Is it Being Downloaded And Do We Care?*, *in* Library Of Congress Network Development and MARC Standards Office, Network Planning Paper Number 16: Intellectual Property Rights in an Electronic Age (Proceedings of the Library of Congress Network Advisory Committee Meeting, April 22-24, 1987) at 45, 47-49 (1987); *The Supreme Court Eliminates Copyright Protection for White Pages and Maybe More*, 7 DATABASE SEARCHER, May, 1991, at 7.

34. The use of trade secrecy as a means of protection, for example, requires a meaningful degree of actual secrecy. Rebecca S. Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 YALE L.J. 177, 190-95 (1987).

35. *See* Ginsburg, *supra* note 20, at 1918-22.

erty protection is a world in which access to facts is expensive and tightly controlled. It is also a world in which records are kept of the facts that one seeks, and questions are asked about the uses to which those facts are put.

Giving meaningful statutory protection to the individual data in collections of data seems a reasonable price for forestalling such a world, if it would do so. If offering proprietors a statutory incentive to collect and disseminate data would entice them from relying on alternatives that limit public access to their works and threaten the privacy of people who use them, it might be a sensible bargain for the public to strike. Indeed, that argument is one of the traditional utilitarian justifications for copyright and patent legislation.[36]

There is no reason to expect, however, that such a bribe would prove effective. Such evidence as history offers indicates that the proprietors of compilations of data would, if offered meaningful federal protection, accept it gratefully but without abandoning alternative forms of protection that are available. While Congress was considering whether to extend copyright protection to computer software, proponents of copyright protection argued that, without the security of copyright, authors of computer programs would conceal technical information rather than disclose it to the public.[37] If proprietors of computer programs continued to rely on trade secrecy and contract law to protect their valuable software, it was argued, the net result would be diminished access to computer programs, wasteful duplication of research and development, and unnecessarily expensive products.[38] Ultimately, of course, Congress expressly recognized that computer programs should receive copyright protection.[39] Software manufacturers have aggressively exploited the protection that the copyright statute confers on their works.[40] They have simultaneously refined and pressed their claims to protection under the rubric of trade secrecy.[41] Indeed, by

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36. *See, e.g.*, CONTU Report, *supra* note 7, at 17-18; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989); Eisenberg, *supra* note 35, at 206.

37. *See, e.g.*, Greg J. Nelson, *The Copyrightability of Computer Programs*, 7 ARIZ. L. REV. 204, 218 (1966); Note, *Copyright Protection for Computer Programs*, 64 COLUM. L. REV. 1274, 1297-1300 (1964).

38. *See, e.g.*, CONTU Report, *supra* note 7, at 125 (summarizing contractor report); Note, *supra* note 36, at 1298-99.

39. Pub. L. No. 96-517, 94 Stat. 3028 (1980) (codified at 17 U.S.C. §§ 101, 117 (1977 & Supp. 1991)). *See generally* CONTU Report, *supra* note 7.

40. *See generally Computers and Intellectual Property: Hearings Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., 1st & 2d Sess. (1991).

41. *See, e.g., Fair Use Of Unpublished Works: Hearing on Title I of H.R. 2372 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the*

combining copyright doctrine and trade secret doctrine, software proprietors have devised a synergistic form of protection that is more than the sum of its parts. Copyright leaves ideas, methods, and processes unprotected.[42] Trade secrecy protects ideas and processes from disclosure but permits their discovery through reverse engineering.[43] Some software proprietors argue, however, that the combination of copyright and trade secrecy makes reverse engineering of software to analyze its underlying ideas, methods, and processes illegal.[44]

It is, of course, human nature to avail oneself of any strategic advantage and attorney nature to devise clever combinations of available strategies to achieve a competitive edge. What lawyers for software companies have dreamed up on their clients' behalf is precisely what clients pay attorneys for. But the example should make us less than sanguine about the prospects of using some form of quasi-copyright protection for facts to seduce database proprietors from relying on other forms of protection.

III. THE COSTS OF THE BRIBE

If the promise of bribing the proprietors of factual databases to provide unrestricted access to their products in return for statutory protection is dubious, the cost of removing facts from the public domain is significant. Our society has long viewed facts as basic building blocks: building blocks of expression;[45] of self-government;[46] and of knowledge itself.[47] Depriving the public at large of the unfettered use of those building blocks could frustrate the growth of learning, impede the mar-

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Judiciary, 102d Cong., 1st Sess. (May 30, 1991) [hereinafter *Hearings on H.R. 2372*] (statement of William Neukom, Microsoft Corp., on behalf of the Software Publishers Ass'n); Pamela Samuelson, *Reverse-Engineering Someone Else's Software: Is it Legal?*, IEEE SOFTWARE, Jan. 1990, at 90; Cary H. Sherman, *Shrink-Wrap Licensing of Computer Programs, in* PRACTICING LAWYER INSTITUTE, COMPUTER L. INST. 1985, at 541 (1985).

42. 17 U.S.C. § 102(b) (1977 & Supp. 1991).

43. *See, e.g.*, THOMAS G. FIELD, AVOIDING PATENT, TRADEMARK & COPYRIGHT PROBLEMS 10 (1991); Eisenberg, *supra* note 34, at 193-94.

44. *See, e.g., Hearings on H.R. 2372, supra* note 41 (statement of William Neukom, Microsoft Corp., on behalf of Software Publishers Ass'n); *Fair Use and Unpublished Works: Joint Hearing on S.2370 and H.R. 4263 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice*, 101st Cong., 2d Sess. 349-53 (1991) (statement of James M. Burger, Apple Computer, on behalf of the Computer and Business Equipment Manufacturers Ass'n); Samuelson, *supra* note 41, at 91- 93. *See generally* Jessica Litman, *Copyright and Information Policy*, 55 L. & CONTEMP. PROBS. (forthcoming 1992).

45. *See, e.g.*, Litman, *supra* note 30, at 1014-17.

46. *See, e.g.*, Samuelson, *supra* note 28, at 371-72.

47. *See, e.g.*, Gary L. Francione, *Facing the Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519, 552 (1986); Samuelson, *supra* note 28, at 369-67.

ketplace of ideas, and impoverish public discourse.[48] Under our current view of things, one who encounters a fact can use that fact in any way she chooses. She may learn the fact and absorb it into her world view, convey the fact to others, incorporate the fact into a book, an argument, a database, or a political campaign without anyone's permission.[49] When we recognize property rights in facts, we endorse the idea that facts may be privately owned and that the owner of a fact is entitled to put restrictions on the uses to which that fact may be put. That is itself a revolutionary notion; it transforms some of the fundamental premises that underlie the way we conceive of our society.[50]

Nor is it sufficient answer that computerized databases and other factual compilations are just one species of a plethora of information sources available to the public, which might seek its data from other spheres. Databases are increasing their share of the information market with remarkable speed. The prospect that online databases will be the research tool of choice in all industrialized societies by the end of this decade is no longer the stuff of science fiction. Thus, the availability of alternate sources may be a short-lived consolation.[51] More importantly, the principle that information cannot be owned is fundamental to our First Amendment jurisprudence and forms the foundation of our intellectual property regimes.[52] That principle facilitates access to and dissemination of information; it also has important symbolic significance. Thus, the price of bribing the proprietors of factual compilations with the pledge of statutory protection for the data they disseminate may be exorbitant. The bribe seems tolerable only if the recourse to self-help that is already feasible seems likely to confine public access to information at least as acutely as any statutory scheme.

IV. THE TERMS OF THE BRIBE

Whether the public will be well- or ill-served by a statutory bargain with the proprietors of factual compilations depends, of course, on the terms of the bargain. A statutory repair of the damage *Feist* is perceived to have caused could take a variety of different forms. At the protectionist end of the spectrum, such a statute could purport to restore the law that was applied before *Feist* in the most expansive judi-

48. *See, e.g.*, Litman, *supra* note 30, at 1012-23; Litman, *supra* note 44.

49. *But see* Carpenter v. United States, 484 U.S. 19 (1987) (conspiracy in disclosing confidential business information of the Wall Street Journal).

50. *See, e.g.*, International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (stating that "[t]he general rule of law is, that the noblest of human productions — knowledge, truths, ascertained, conceptions, and ideas — become, after voluntary communication to others, free as the air to common use.")

51. *See* Litman, *supra* note 44.

52. *See, e.g.*, Samuelson, *supra* note 28, at 371-75.

cial decisions[53] and remove data compiled into factual compilations from the public domain entirely. Such a statute would presumably incorporate a privilege modeled on copyright's fair use privilege[54] which would prove to be as unavailable to any competitive compiler as fair use turned out to be in copyright cases.[55] At the other end of the spectrum, a statute could authorize a narrow misappropriation cause of action,[56] limited to competitive dissemination of compiled data, and subject, perhaps, to a compulsory license for derivative uses.[57] Noncompetitive use of facts by compilation purchasers and database subscribers would remain outside of the scope of the statutory remedy.[58] At its most bounded, such a solution could provide for only a short period of exclusivity — measured perhaps in weeks — before the compiled data would be subject to competitive reproduction and dissemination by others.[59]

Even this most constrained of solutions, however, would diminish the public domain by according proprietary rights in facts that had hitherto been part of the commons.[60] Thus, for the public to gain from its bargain, it should receive something in return beyond the augmentation of profit incentives to compile and disseminate data. If the public benefit of such a statute is its supposed enhancement of public access to, and use of, a diversity of factual compilations, the public is entitled to demand some assurance that its access and use would in fact be enhanced.

Most crucially, I would argue, the public should demand that in return for federal statutory protection of compiled data, the web of state law doctrine that may permit legal enforcement of restrictions on use of data be unequivocally preempted. There are, of course, compila-

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53. *See, e.g.*, United Tel. Co. of Mo. v. Johnson Publishing Co., Inc., 855 F.2d 604 (8th Cir. 1988); West Publishing Co. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987); National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982).

54. *See* 17 U.S.C. § 107 (1977 & Supp. 1991).

55. *See, e.g.*, West Publishing Co. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 749 U.S. 1070 (1987); Rural Tel. Serv. Co. v. Feist Publications, Inc., 663 F. Supp. 214 (D. Kan. 1987), *aff'd*, 916 F.2d 718 (10th Cir. 1990), *rev'd*, 111 S. Ct. 1282 (interim ed. 1991).

56. *See* International News Serv. v. Associated Press, 248 U.S. 215 (1918).

57. *See* Ginsburg, *supra* note 20, at 1924-36.

58. The terms competitive and noncompetitive uses are used, rather than commercial and noncommercial uses, because a nonprofit database service operating in competition with a commercial one causes no less damage simply because it need not earn a profit. Similarly, a commercial subscriber making noncompetitive use of facts gleaned from a commercial database is behaving no less legitimately than a noncommercial subscriber engaged in the same activity. Classic misappropriation doctrine focuses on behavior between competitors.

59. *See International News*, 248 U.S. 215.

60. *See* Litman, *supra* note 30; *see also* Litman, *supra* note 44.

tions of fact that are used strictly internally. Compilations of facts for solely internal consumption are used in-house rather than sold; their owners charge no access or subscription fees.[61] Proprietors of such compilations have a legitimate claim to the protection of trade secrecy, contract and breach of confidence doctrines. Except for compilations whose use is truly so limited, however, recourse to trade secrecy and restrictive user contracts should be flatly prohibited.

If the federal statutory protection that Congress enacted were as capacious as copyright at its most expansive, state law doctrines providing some extra measure of protection would probably be largely superfluous. Preemption of alternative remedies would, at worst, be a harmless precaution against the clever legal arguments of tomorrow. If, however, the federal statute were to purport to strike a balance between the claims of database proprietors and the subscribers who use them, state law alternatives might provide expedients for recalibrating that balance at the public's expense.

V. CONCLUSION

For me, the most crucial cost of according quasi-copyright protection to facts is the loss of the symbolic force of the axiom that facts cannot be owned. As I weigh the advantages and disadvantages of extending statutory protection to data, I find that that price is one that I would be unwilling to pay. I am acutely conscious, however, that my assessment may be a minority view. And I see the practical disadvantages of such a purist's approach: retaining the symbolic advantages of the axiom, after *Feist*, may well encourage tight restriction of public access to information, and close monitoring of the uses to which that information is put. I would argue, however, that the only legitimate justification for conferring statutory protection on facts is ensuring that public access to factual compilations is enhanced. Any such statute, therefore, should not only be crafted to provide narrow remedies for competitive injury, but should also preclude its beneficiaries from relying on more restrictive strategies for protecting their data.

61. This distinction would separate, for example, a hospital's computerized patient records from a subscription database of medical research, or the customer mailing list that is kept confidential from the customer mailing list that is rented to other concerns.