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Open Discussion of Presentation by Professor Jessica Litman

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OPEN DISCUSSION

THE CHAIRMAN: Another gauntlet thrown. Any responses?

MR. McDONALD: I understand the umbrage that Jessica [Litman] takes to method of access and method of pricing and that sort of thing. I deal with a group of folks who are creative and quite frankly if things changed, then, they would probably find a way of dealing with it. But as you have contemplated these various notions, let's say if the law you described was passed, they have still got the basics of economics, that they expend a certain amount of resources and they are going to find some other way of recouping those resources.

How do you envision that part of it would work? I mean they are going to come up with a new pricing and new distribution scheme to accommodate these changes. What do you think that pricing and distribution scheme would look like? I hate this answer in case it works out that way.

PROFESSOR LITMAN: Well, first of all, I am not, I suppose, supposing that Congress simply would pass a law saying we hereby preempt all state contract and trade secrecy law, but rather trying to put in place a federal statute that provides an alternative to recoup costs, but at the same time prohibits using this particular strategy for recouping costs. That is, I think that a world in which all those contracts are taken seriously is a good deal worse than the world we had before *Feist*.

In terms of, I mean I think under the Commerce Clause it is probably, but not without doubt, constitutional to pass an *INS*-type statute. And that that would—if what it is that database proprietors are concerned about is that their users may download the database and market a competing database, then if they have a right as against their competitors, a right to enjoin competitive use of data flowing from their database, then perhaps it doesn't cut into anybody's profits that they have to stop incidentally monitoring all of the rest of us, who aren't going to go into competition and would just as soon nobody keep very close records or charge us lots of money or tell us that we can't report to our next door neighbor what fact we learned on that database this morning.

PROFESSOR PATTERSON: One of the things that concerns me is what I call the Chicken Little syndrome on the part of the copyright entrepreneurs who come out with that the sky will fall unless you do not give us the protection we want and desire, and so the result is that copyright law is becoming a series of legal subsidies to guarantee profit for copyright entrepreneurs.

I think we need to step back and see what the market can do for these people. I am absolutely confident that the movie producers and Sony were absolutely convinced that their market for video cassettes was gone, and today where does the major income for movies come from? It comes from the sale and rental of video cassettes.

I think we—copyright entrepreneurs often suffer from, I suppose a bit of myopia induced by self-interest, and I think it is footnote 13 in *Sony* that is relevant whereby the comment was made in the monopoly of copyright and patents the tendency to extend everything to its ultimate limit and beyond is operating here.

I suppose one example is the matter of copying an article or a page in part consumes. I suppose one of my pet peeves here is the Copyright Clearance Center that says you have got to send me fifty cents every time you want to copy a page of a copyrighted compilation. Well, the factor that people are overlooking is that the ease of copying often results in what I call convenience copying that is going to have no economic impact on the copyrighted book at all. And what the copyright proprietors want is to be able to charge a fee to get additional income from the secondary market when, in fact, copyright I think is constitutionally limited to the primary market.

PROFESSOR RASKIND: I think there is some ambiguity in the discussion here and I would like to turn to Jessica [Litman] and ask her, did I correctly understand you to say if this statute were drafted to relate only and to control only the conduct between competitors; that is, it would not be actionable until the person who downloaded then made a commercial product and entered into competition.

So there are two subjects of this legislation, and I take it your principal concern was to the user who never had a record of—the two are getting merged in this discussion. I think we should unbundle that.

If I understand you, if it were addressed to competitors, you would not find it unpalatable to have such a statute.

PROFESSOR LITMAN: The difficulty is you don't know in advance who is going to turn into tomorrow's competitor. If you are using contractual restrictions in monitoring the use of the database, in order that you can enforce them against the person who tomorrow competes with you, you have got to look at all of us.

PROFESSOR RASKIND: I am willing to look but do you think that is a realistic prospect that Mr. Schatz is going to tell WESTLAW to sue me because I am becoming an active user all of a sudden and they know where I am and they have my number? So I think we should unbundle that.

PROFESSOR LITMAN: I think they are going to make a list of what you access, and I think at one point or another they are going to sell your name to someone who sells other kinds of products.

PROFESSOR PATTERSON: I am not so sure they would not sue him to make an example if that happens frequently.

PROFESSOR RASKIND: What would their damages be?

PROFESSOR PATTERSON: They would not want damages, but an injunction, a rule of law.

PROFESSOR RASKIND: That would keep me from being a subscriber? But, maybe. But it seems to me that is what is at issue here. So, there is the societal interest in the individual. That is what I am wanting to unbundle and to access to knowledge for scholars and learning and building and so on. But there is also the societal interest in having some order in the marketplace and not letting people come against each other, and those two societal interests should be addressed separately.

MR. STEELE: I think one thing we clearly agree on is that contracts are increasingly becoming much more important. I also think you were right that the publishing and information industry would not be content to discard its contractual apparatus in return for some sort of new statutory scheme.

I believe you and I are looking at a world through two different looking glasses, and I guess I trust the marketplace a little bit more than you do. Capitalism, somebody said, is a very messy form of economy; however, compared to what we have seen happen to other types of economic organizations, capitalism looks like an attractive and fruitful way of organizing how we engage in economic transactions.

To start with, there are many incentives to create information. You have many people searching to find market niches where information is needed. You have many publishers working hard to drive costs down so that selling prices can be lowered. I think the end result is that an enormous amount of information is available.

I realize, of course, that none of this works perfectly and there will be disconnects. There will be researchers, for example, who walk in the library and find out that what they used to get for free ten years ago now costs $1.00. But somebody has to pay the cost of creating and distributing information, maybe individual researchers should not have to pay for a particular licensed use, but maybe their universities should.

Fundamentally, I find revolutionary any discussion of a statutorily mandated dismantling of our right to contract. This discussion clearly reflects that we all view information as very important. If you had made the same proposal about how to buy cars, clothes or food, however, most of us would probably say we do not agree with that.

PROFESSOR GORDON: Part of your response seems to be that you are not sure if this system works or not. I can understand what you are saying. So this is offered by way of friendly amendment [to Professor Litman].

You are worried about two things. One is the abstract value of the First Amendment and the other is invasion of privacy of the kind explored in Orwells' *1984*. Let us put the First Amendment aside for a moment.

Looking at the *1984* concerns, you are really not worried about Mead Data figuring out ahead of time what we are doing, rather, we are worried about Mead Data selling information about us to other persons who might be misusing it. So one way to deal with this without dismantling anything might be a narrowing of the privacy statute saying things like online computer companies can keep records of what their customers do for no longer than thirty days after the bill is paid. That might look more revolutionary as a statute since it is inhibiting certain kinds of self help, but it speaks directly to the problem. It might appeal more honestly to the privacy issue at stake and therefore get more popular support; in any event some sort of direct ruling coming from Congress like that might conceivably work.

PROFESSOR LITMAN: Then the question is, and I think online database proprietors could ask legitimately: "Look, we have got to be able to keep track of and monitor stuff for more than thirty days because for some of us, the danger that someone will on the thirty-first day be able to make use of data downloaded from us in a product that competes with us is very real." Not everything sort of passes out of utility in the month, and so if there is any kind of exception to allow legitimate enforcement of contractual restrictions, it is going to swallow up whole.

PROFESSOR GORDON: I have a question.

PROFESSOR RASKIND: Can I interrupt and pose one back to you [Professor Gordon]. Isn't the problem wider? All of us belong to professional associations. You may belong, I do, to the American Economics Association. They sell their lists of—Hertz paid them I forget how much for the list of all their members so they could send a card to every member that said we will give you a discount if you show this when you go to rent a car at the airport. So the moral of computers has invaded our rights and gave economic value to our names and addresses in all varieties of ways, and if you draft a privacy statute, you will have to address that as well as all these database folks.

PROFESSOR GORDON: A privacy statute that discouraged the sale of mailing lists? I think it would be wonderful if I got less junk mail. But there are further First Amendment questions, though. For

example, it may make a big difference to someone who is fighting for unregulated birth control advice to know who is a member of NOW [National Organization for Women], and NOW members may want such advocates to be able to find that out. So I am not sure exactly how I come down on that, but I do think a privacy statute might be a better way. That was just offered by way of friendly amendment hereby rejected.

One last question. Remember when I asked David Carson about what his First Amendment position was and the gentleman up there [Mr. Sheils] and they both gave us the protectionism argument about why the First Amendment really was not violated?

Your [Professor Litman's] answer in response to them is partially to draw a vivid *1984* picture, which is not directly implicated by the copyright sort of concerns, and second to talk about the symbolic value of the First Amendment. What I would like to ask you to do is draw some more vivid pictures or doctrinal arguments about why the First Amendment is indeed implicated when you have a federal or state regime that allows anti-copying rights to be granted to individual proprietors of facts.

PROFESSOR LITMAN: In five minutes or less. We have had—I mean I think my view is pretty idiosyncratic. One of the things in this case that I was disappointed in, in Justice O'Connor's analysis, is that the reason we do not protect facts is that they are not original, which has led to a discussion all through here about: "Well, what about these original things? They must not be facts." Because I think most facts are original, most facts are absolutely the product of a great deal of brain power. And I think we don't protect them for a completely different reason, the same reason we don't protect ideas, which is that while they may well be original, they are too important. We need them to talk about.

We need to be able to talk about facts and, therefore, we do not protect them under the copyright statute. The fact that the copyright statute does not protect facts and ideas is why everybody says we do not have to worry about a First Amendment problem in a statute that authorizes the enjoining and shredding of protected expression because copyright does not give you any protection in facts and ideas.

I think whenever you give property protection to facts and ideas, then you do not have that particular out to say there is no First Amendment problem, and you do not have the other kinds of outs that we have been talking about, I mean. So I think it poses a fairly significant, both symbolic and probably practical, First Amendment problem. That series of First Amendment problems is going to depend again on what kind of data it is we are talking about not letting you use, since

we are more comfortable with certain kinds of proprietary data than we are with others.

PROFESSOR KARJALA: Looking at this question of why the market does not work from the other end, at least for part of these things, I wonder if it makes any difference in your analysis whether the facts that you are worried about protecting are independently discoverable or not. Because, fundamentally, once an idea is published, it is hard to prove independent creation in a copyright situation. Once you have had access to it, it is kind of hard to show you could have done it independently. And some facts—what was going on in President Ford's mind, for example—are not independently discoverable. Protection for the acquisition of those facts is essentially protection of the facts themselves and that is troublesome.

But I wonder, isn't less troublesome if you have got a collection of relatively mundane facts? It is still a lot of work to collect them and put them in a database, but isn't the problem a little bit different? If the original collector put too many restrictions on your use of the collection, what is to stop somebody else from going out and collecting the same facts and competing? What is to stop the market from working with respect to databases that contain only generally available facts, so that all we are talking about is the effort involved. Then, isn't protection less troublesome, not for the facts themselves, but the collection effort?

PROFESSOR LANGE: Put it another way. Don't you just have to say "Coase" and stop; isn't that really what you are arguing? In other words, aren't we generally better off in a setting like this to allow ourselves to negotiate our way around these problems with all the flexibility that accompanies that kind of freedom to negotiate, if indeed we really take his [Mr. Sheils'] place, seriously, to be fair, and know meanwhile that we have got some really heavy duty mechanisms for allowing us to do so if he forgets, than it is to adopt an ever more refined system of regulations that oblige us to?

PROFESSOR KARJALA: You would not have to rely on them to be fair if the market is working. If the consumers do not like it, won't somebody else come along and not be so heavy handed about it? I just wonder why we do not rely on the market in that context?

MR. McDONALD: If I could, we are assuming that the information market, that information is just of one grade. And the folks that are in the business have sort of recognized that there are certain types of information that are actually just commodities. It does not matter who you purchase them from and they are readily available. And the basic thing you can charge for is the cost of the gathering. So it is a minimum cost in the marketplace that has driven those sorts of things

down. A pretty good example is mailing lists, a good name, address, and telephone number; they are not hard to come up with, and basically what you are paying for is the cost of gathering. That is just a combined level of information.

As you move up the scale and there is increased input into it, the incentives to take and produce that and the need to recover the costs of doing that take on sort of different parameters. There is a quality aspect that comes in where somebody else's products might be much better than mine. And there I think the talk about information just as one unit, I think you have to refine your thinking a little bit. I think the market works in both instances, but I think it works quite differently in each.