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Presentation by David O. Carson, Esq.

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MR. CARSON: I see we have dwindled down to the final few faithful. I guess that being the last person at the end of these two days, it is my job to reconcile all the viewpoints we have heard and to come up with the real answer to the problems that we have heard and have been discussing.

THE CHAIRMAN: My students want to know that.

MR. CARSON: Perhaps you could have one of them come up and speak because I do not have any answers. I probably have a few questions.

I think it has been very useful, helpful, and certainly stimulating to hear the various points of view that we have heard over the last two days. What I have to add, I suppose, is not necessarily a whole lot that is new. As I was sitting here this afternoon going over my notes and hearing other speakers speak, I kept checking off the points that I was going to make but heard being made for the second and third and fourth time by other people.

But I still thought I had a few things left to say until Kurt Steele got up—and then I crossed off the final three or four points on my checklist. So, I am not going to belabor too many points. I will probably keep my remarks relatively brief.

I think in a pre-*Feist*ian sense what I have to say may be original. I am not quite sure how creative it is. It certainly is not terribly novel after everything we have heard. My perspective is that of a practitioner and of a practitioner whose clients by and large tend to be interested in protecting intellectual property, because they are the creators of intellectual property.

Now, of course, copyrights and other rights are a two-edged sword. If you create intellectual property, you always run the risk that someone else is going to turn around and say "that was mine." It is not really a closed-minded point of view—I hope—that I come with, not one that single-mindedly looks to full protection, but one that realizes that, as I think many people here have acknowledged, one of the purposes of our copyright and other intellectual property laws is, in fact, the dissemination of information and to assist others in learning and further promoting the progress of science, and useful arts. That is what it is all about.

I think all of us who have spoken here probably have either a proprietary or philosophical point of view which tends to slant our take on some of these issues. I think those of us from academia perhaps may not necessarily have a proprietary point of view, but look upon a case

such as *Feist* as an opportunity, perhaps a welcome opportunity, to start thinking about the underpinnings of our intellectual property system and asking whether it really is the best of all possible systems. I think that is what we ask of our legal scholars. That is what we ask of any scholars.

For me, I suppose, my task is a little more modest. I am not here really to devise the ideal system of intellectual property protection, the system that ideally balances the rights of proprietors and creators against the rights of those who utilize the information. My real task as a practitioner, who has to deal with this stuff on a day-to-day basis, taking clients' problems as they are presented to me, is to ask what is wrong with the system we have now. What do we need to do, if anything, to repair the system that we have now? And what it boils down to from my point of view is if it ain't broke, don't fix it, and if it is broke, you fix what is broken, but you do not necessarily start from scratch.

Feist may or may not require us to do some fixing. It may indeed require us in many ways to start from scratch. If it does, I have not seen that yet. And the cases we have seen since *Feist* are further evidence that at the very least we should wait and see before we start prescribing new solutions. We can always prescribe them. There is nothing wrong with that. It is a very salutary effort I think to proscribe new solutions, but certainly before we start implementing them, let's wait and see.

And I think perhaps the key question that we should ask ourselves is: is the system working now? Has it been working? If it has been working, then it is not clear to me at all that we need a whole lot of change. If it has been working but *Feist* has changed it so much that it will not work anymore, then perhaps we need change. But as I see *Feist*, *Feist* has not necessarily changed the terrain so much; perhaps it has, perhaps it has not.

There are certainly inklings of change in there if you take every single word of Justice O'Connor's opinion seriously. Professor Karjala would prefer not to take all of it seriously, I think I would too. I stand with him there.

I would like to think that we do not really have a new constitutional requirement of creativity, or if we do, it is not a particularly stringent one. I suspect that we do have that requirement, but I also suspect that it is so unstringent that it may not really be a problem for us. What is creativity, after all? A modicum of creativity does not sound like very much to me.

If you look at the facts of *Feist*, I for one am not terribly bothered that the white pages telephone directories can be copied by someone

who wants to produce another white pages directory. Perhaps the only people who are bothered by that are the people who produce white pages and the people who produce other types of directories who fear that they may be next, but I do not think *Feist* necessarily means that you may be next.

Consider the *Bellsouth* case (assuming it was correctly decided and certainly there are many people who think it was not). The court purported to be applying *Feist*. There was a yellow pages directory which does not have a whole lot more selection, coordination, and arrangement than a white pages has, and one court of appeals managed to find there was protection, and not only protection but infringement.

So for those of us who, when *Feist* first came down, were very concerned that this was really and truly going to revolutionize the field, and in particular was going to deprive publishers and authors of compilations that are primarily factual in nature of any protection—looking back six months later we looking back are asking ourselves: has it really changed that much? And I do not think we know the answer.

I think perhaps in the long run it will not have changed, but I have not seen the evidence. I have not seen a single one of the courts of appeals cases since *Feist* that have given me, as someone who generally tends to represent people who are trying to protect their copyrights, great concern. I think perhaps in some cases, I might have come out a little differently, or at least arrived at the results a little differently, but the results that I have seen are not worrisome from the point of view of someone who is hoping to protect intellectual property rights.

Given that, we should ask ourselves do we really need to resort to any change now? We have heard some of the practical problems with trying to resort to legislative change. It does not happen that quickly, it may not well happen unless you can get a consensus, the practical difficulties are tremendous.

I would not even endorse trying to do that unless I thought that there was a true desperate need to do that. And I do not see the need yet. A year from now when we have had more cases come down and perhaps we have seen a shift in emphasis in some of the courts, perhaps we will see that need, but not yet.

Again I commend those who have prescribed new ways of looking at the problem, new ways of seeking the proper balance between the rights of the creator and the rights of the user. But at this point I do not think it is necessary to try to implement them. It is good to think about them. It is helpful to think about them. I know I have come away from this meeting aware of many more possibilities for solutions—if we need solutions—than I had been thinking of when I came

in, but I still stay where I was when I came in: I am not sure we need change.

One reason I am not sure we need change, as I mentioned, is that the system has worked. We are living in an age that, at least if you believe the news magazines, is an age of the information explosion. If anything, we are suffering from an excess of information. We are not living in an age when people are deprived of access to facts. I for one would be more than happy to have fewer facts flung at me every day.

The fact of the matter is that I do not see a need and I have not heard anyone thus far in the two days here demonstrate a need for further access, further ability to use the products of those who come up with factual compilations, databases and so on. The system thus far has worked, and if I am right about that, that tells us a couple of things.

First of all, it tells us that perhaps sweat of the brow was not so terrible because in a few parts of the country sweat of the brow prevailed and yet it did not prevent the rise of the information society that we have now. It did not prevent the explosion of information that we have now.

Looking at it from the other side, it tells us that perhaps *Feist* is not really a threat to the progress of our information society because, probably in more places than not, we did not have sweat of the brow before *Feist*, and, in fact, if you look at the case law prevailing in circuits such as the Second and the Ninth, I am not convinced that *Feist* changed the law at all.

If you look at cases in the Second Circuit, like the *Eckes* case or the *Financial Information, Inc. v. Moody* case, they were saying exactly the kinds of things that *Feist* is saying now. And if you look at the case law, for example, in the Second Circuit since *Feist*, the court there certainly has professed to say *Feist* has not changed anything—we were doing this already. If you look at what the court has been doing, in fact, it has been doing what it was doing before *Feist*.

So what that tells us is *Feist* has not necessarily shifted the balance. The new rules under *Feist*, whatever they may be, such as the rules of focus on selection, coordination, and arrangement, are not new rules, at least not everywhere. They are rules we have been playing with for quite some time and I have not seen publishers or database proprietors suffering under those rules.

I think the point was made very eloquently that copyright is not the only solution and perhaps is not the most important solution. It has not been. In the past we have always relied on copyright knowing it was there, but, in fact, as we have already heard, there is not a database publisher I am aware of who relied on copyright primarily; if anything, it was always there as a back-up.

Contract is and has been, I think, the primary means of protecting one's database and I think that will continue to be the case. Some people in this room have expressed a fear about that. But the fact of the matter is it is going to continue that way, and I do not see legislation as another means to do it. I have doubts that the legislature would care to or would be able to do it in most cases, and I think that, at least with respect to online databases, contract probably will continue to be increasingly important.

Another theme, that I elaborated on in my paper and I am not going to elaborate on too much today, is that perhaps sweat of the brow was not so bad from a doctrinal point of view.

Earlier in this meeting we had the benefit of hearing a very interesting and intriguing historical and constitutional analysis of the history and purpose of copyright. As someone whose first love has always been history, I enjoyed reading it immensely. I learned a lot, because I have not had the ability up until now to really spend a whole lot of time with the history of copyright. I have had to deal too much with the day-to-day problems a practitioner has. I am not sure I necessarily agree with all the conclusions that I saw in that analysis, but at least it provoked me to start thinking: what is copyright all about, what was copyright all about when it first started—at least in this country?

Well, I take a broader view, I suppose, about what the purposes of copyright are. Yes, the constitutional purpose is to promote the progress of science and useful arts. I do not think that means, however, that every single case where one is asserting one's copyright must be put under the microscope and analyzed with a view to asking yourself: does this particular situation promote learning, promote dissemination, promote access above all other values?

I think there is a subsidiary value, which has been recognized in the case law throughout and by most of the commentators, that in order to promote the progress of science and useful arts, you have to give an incentive to people to create. There is nothing astounding about that, there is nothing wrong about that. It is a pretty clear underpinning of the Copyright Clause.

The fact of the matter is that we value sweat works. We get a lot of use out of sweat works, and I for one would not have been upset if *Feist* had, in fact, upheld sweat of the brow. I would not have had problems with it from a constitutional point of view, I would not have had problems with it from a policy point of view. But nor do I weep for the demise of sweat of the brow.

I think that what we are left with most likely still gives sufficient protection. We will have to wait and see. If, in fact, we find that emphasis on selection, coordination, and arrangement is not sufficient, that

it does not provide sufficient incentive for one to come up with that compilation which really is more or less universal, which tries to gather all the facts relating to a particular subject—because that, after all, is a very, very useful type of compilation for all sorts of reasons—then, perhaps, we need to resort to Professor Karjala's solution, which is to come up with some form of a misappropriation theory which says: all right, fine, you do not really show any creativity in what you have done, not in the sense that Justice O'Connor thought, however slight that creativity needs to be, but we recognize that you have put a great investment of time and money and effort into compiling this product. It is a product we value, and, therefore, we are going to give you protection to some degree against appropriation.

I do not know how anyone can disagree with that because I suspect if, in fact, we did not have that kind of protection, we would find far fewer works of that nature being created. I do not think anyone really wants to see that happen. It does take a great deal of time and expense to produce many databases, and if you can get by the contractual and other defenses that the database proprietors have established and that usually work, it is all too simple to recreate them at very little cost. That is not something that we should place any value on.

But one thing I do wonder about is whether we really do need a two-tiered system of copyright protection—whether those works that some would call works with low authorship or low value or a second class copyright should be segregated off into a separate system and I, for one, would resist that.

I think all of us can agree that there are certain types of works that perhaps in the hierarchy of things we consider more creative—more worthy of protection in many ways. I think most of us might disagree when asked to come up with our checklist of which works belong in which category. And if you really think about it, if you looked at any of those categories, all of us would agree that not everything in each of those categories is necessarily worthy of such great protection.

We talk about protecting Verdi's grandchildren. Well, I for one appreciate Verdi. I am not quite sure, as someone else said, that I care a whole lot whether his grandchildren live off the fruits of his labors. I think they can find jobs themselves and take care of themselves. But I am concerned that Verdi in his lifetime should not be deprived of the fruits of his labors.

I am not so sure that I necessarily have the same feeling with respect to a lot of the so-called composers whose music we hear on the airwaves today. I am not sure that all such music has a greater value to society than a mundane prosaic database that simply collects all the

facts in a given area so that those people who need to know those facts and utilize those facts have easy access to them.

I think I know what my choice is in terms of which creates more value to us. So I am a little concerned about categorizing types of works and saying those works are deserving of lesser protection. The fact of the matter is that we do that, but we do not do it in such an ironclad way.

I do not think anyone would question the fact that in analysis of copyright infringement, the courts evaluate different types of works in different ways anyway. It has long been the case that if you have infringement of a factual work, the copy is going to have to be much closer than if you have infringement of, say, a traditional fiction or literary work. The scope of permitted use is greater, particularly with the fair use doctrine.

In fact, one of the advantages of our current system and one of the inherent characteristics of the copyright law as it has developed in this country is that it is flexible, that in any given case the courts have the tools available to them to evaluate the situation, to evaluate in a sense the inherent value of the work that is alleged to be infringed, the inherent value of what has been taken from it, and the inherent value of what the defendant is doing. And whether you find that analysis on the surface of what the court is doing or whether it is just there under the surface, I think it is going on.

Another theme we have seen in the course of our history of copyright law in this country is a theme which at least some commentators here have lamented, but one which I would endorse: that as the means of expression and the media of expression have expanded over time, copyright has proven to be sufficiently flexible to deal with all those media. Copyright was created in response to technological change. We have copyright because we have the printing press. That's what led to copyright—new technology.

For a long time that was the only means of publication, of mass dissemination of information, but in this day and age the printing press is taking on an increasingly diminished role, an important role to be sure, but not nearly the role that it had two hundred years ago or twenty years ago.

The fact that in many cases we now do not technically publish certain works but rather we display them, we broadcast them, we make them accessible to the user in some other fashion should change the protection that we give them. For many people the television of today serves exactly the function the newspaper of yesterday served, and I, for one, am not convinced that we need some creature other than copyright to deal with these new media. Again, copyright law is flexible

enough. Certainly we have heard about the vague standards of copyright law. That is something that I suppose we all find perplexing from time to time. But it is also, I think, one of the strengths of copyright that it is so flexible. It is able to deal with a given situation and, hopefully, usually come up with the right solution.

For example, anyone who looks at the tools we have in our tool kit as copyright practitioners has to realize that we do not have many rules that offer any precision at all. What is the patterns of abstraction test? It is not a test at all. It is a concept; it is a way of looking at things. But does it really tell you how to judge whether something is infringed? It gives you a framework. That is all it gives.

So the flexibility of copyright is one of its strengths. It means we do not need to devise new means of protection for the new media of copyright expression. Therefore, I for one do not think that we necessarily need to jump headlong into a revision of our copyright law or into a side-stepping of our copyright law to find some other system to protect new types of works or old types of works.

And, again, if you look at the history of copyright in this country, what was protected under the first copyright statute? Maps, charts, and books. And I would suggest to you that the types of books that the first Congress was thinking of probably were not, for the most part, works of fiction or compilations of poetry; they were probably largely fact works. That's what the founding fathers were thinking about.

So for those people who tell us today that copyright is not the appropriate means for protecting fact works, if that is true, then copyright today must not be the copyright that those people who put the Copyright Clause in the constitution were thinking about, and if that is the case, then those who tell us that protecting fact works is not consistent with the purposes of the Copyright Clause have a little bit of explaining to do.

So, what do we need to do to protect fact works, the works that are endangered after *Feist*? Well, I think we have to wait and see. I suppose that is not a very satisfying prescription. It is always more satisfying to have a call for action, a plan with a goal in sight so you can know where you are going, and you will know with a certainty (since you are the one that came up with the plan) that it is going to give you (so you think) the kind of protection that you think reflects the proper balance.

But living in the world of day-to-day practice as I do, dealing with the situations as they come case-by-case, I am willing to sit and wait and let *Feist* percolate a little bit in the lower courts. If we reconvene a year from now we will undoubtedly have a greater history to look at in terms of case law.

We may well find that *Feist* was not the revolution that we thought it was, or we may well find that the courts finally woke up and realized that *Feist* has to be taken seriously and that, therefore, the types of works that most of us in this room would agree do deserve some degree of protection are being deprived of that protection. Maybe that is what we will find out in the next few months or next few years.

But I do not think any of us knows today just what the status is. And that's very frustrating for all of us. It certainly is frustrating for me when a client comes in and asks me how do I protect my compilation—it is nice to have the certainty of an answer. We do not have the answer. Some of us have the answer—so we think. But even the answers that some of us have come up with are only answers in theory. They are answers that if implemented may or may not, in fact, work.

I am concerned with telling my clients today what they can do to protect themselves. I do not have many answers today. But I think the best I can say is that you will have to try the tools you have already, and we will just have to wait and see. Given a little more time, I think we will know whether we are really in trouble, whether we really need change or whether we do not.

In conclusion, I am pleased to have heard the many and varied prescriptions we have had, some of which I think I would agree with, many of which I think I would not. But my final word would be, yes, let's continue to think about them, let's continue to discuss them, it is important to do that.

But I am not sure that we need to act hastily. Change would be premature, and if we all agree to convene a year from now, perhaps we can reexamine some of the proposals we have heard today. Perhaps some of them will make more sense and some of them will make less sense, and perhaps we will all agree that *Feist* was just a tempest in a teapot. That is what I would like to think. I may well be wrong. But until we are persuaded that there really and truly is a crisis, I do not think we need to try to put out a fire that may not exist. Thank you.