



Intellectual Property Protection of Fact-based Works

Copyright and Its Alternatives

Edited by
Robert F. Brauneis

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Robert F. Brauneis

The George Washington University Law School, USA

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Preface

The chapters in this book are based on papers presented at a symposium entitled ‘Feist, Facts, and Functions: IP Protection for Works Beyond Entertainment’, which was held in Washington, DC on 28 September 2007. The symposium was co-sponsored by The George Washington University Law School and the Software and Information Industry Association. For their support of the project, I would like to thank Frederick M. Lawrence, the Dean of the Law School; Michael Ryan, Director of the Law School’s Creative and Innovative Economy Center; Ken Wasch, President of the Software and Information Industry Association; and Keith Kupferschmid, Senior Vice President of the Association. For their aid in organizing and staffing the event, I would like to thank Sarah Huisentrut Orye, Shauna Eisenberg, and Thomas Lee of the Creative and Innovative Economy Center. For his superlative assistance in compiling the indices, I would like to thank David Yung Ho Kim, whose work was generously supported by the Cardozo Law School during my visit there in the Spring of 2009; for his timely support in finalizing the indices, I would like to thank Thomas Mittenzwei. Finally, and most importantly, I would like to thank the participants in the Symposium for their presentations and for their subsequent contributions to this volume, from which I have learned a great deal.

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PART I

Copyright and facts: historical and comparative perspectives

1. *Feist*, facts and functions: historical perspective

Miriam Bitton¹

INTRODUCTION

The 1990s brought significant developments in the field of information technology. These in turn stimulated the creation of a new global market for electronic information services and products, a market that is occupied substantially by electronic databases. The emergence of these new technological developments challenged many branches of the law, including intellectual property law. A particularly prominent part of this debate is how the law should address the protection of electronic databases.

The debate over database protection in the United States can be traced back to the Supreme Court's seminal decision in *Feist Publications, Inc. v Rural Telephone Service Co.*² In *Feist*, the Court found white pages telephone directories to be non-copyrightable. The Court held that the touchstone for copyright protection is creative originality, and that this requirement is constitutionally mandated. The Court's decision also clarified that its holding 'inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, 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.'³ *Feist* thus ended the tradition in some courts of providing copyright protection based on the labor invested in creating the work and declared the death of the 'sweat of the brow' and 'industrious collection' doctrines.

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² 499 U.S. 340 (1991).

³ *Id.* at 349.