

## Recent Case Law & Statute Information from the Web

### A Compilation Work

#### **Software Cases.**

- [\*Bateman v. Mnemonics\*](#) - Eleventh Circuit Court of Appeals decision dated March 22, 1996 providing an detailed analysis of software copyright infringement. The case discusses: (1) the FEIST two pronged test for copyright infringement; (2) jury instructions; (3) the "successive filtration" test for copyright infringement; (4) compatibility requirements negating a finding of infringement; (5) interface specifications copyright; and, (6) trade secret misappropriation where JNOV is entered on appeal, reversing the judgment for plaintiff, and ordering a new trial on the copyright infringement counts due to jury instruction errors.
- [\*ProCD, Inc. v. Zeidenberg\*](#), 86 F.3D 1447 (7th Cir., June 20, 1996). This phone directory data case is important because it validates the legality of "shrink wrap" software licenses for the first time. This case suggests that similar "on screen acceptance" licenses, now commonly used on the Internet, may also be upheld as legal someday. The phone directory database at issue in this case was not protected by copyright, but was protected by contract. So the person who published ProCD's phone directories on the Internet was found to have breached the shrink wrap license agreement that came with the software.

#### **The Notorious Internet Worm Case.**

- [\*United States v. Robert Morris\*](#), 928 F.2d 504 (2nd Cir. 1991). This is the famous criminal case about the "Worm that ate the Internet," the college kids' computer virus experiment that went bad and inadvertently shut down most of the Internet on November 2, 1988. He was held criminally liable under the [Computer Fraud Act](#) for unauthorized access of other computers even though he had no intent to do any damage.

#### **Internet Information Liability Cases.**

- [\*Cubby, Inc. v. CompuServe, Inc.\*](#), 776 F.Supp.135 (S.D. N.Y. 1991) Landmark cyber-law case shielding CompuServe from liability for libelous statements posted on one its forums. The court held that CompuServe was a distributor, not a publisher, since it did not attempt to exercise editorial control over the contents of the information flowing through its network.
- [\*Playboy Enterprises, Inc. v. George Frena\*](#), 839 F.Supp. 1552 (M.D. FL. 1993) Another landmark computer-law case imposing liability on a BBS operator for files that his users had posted on his board of scanned copies they had made from Playboy magazine. Copyright infringement for illegal distribution was found even if sysop did not know the files were on his board, but as you can see from the decision, the sysop in fact did know, and even put ads for his board on many of the gifs.

#### **Facts Cannot Be Copyrighted Cases.**

- [\*Feist Publications, Inc. v. Rural Telephone Service Company, Inc.\*](#), 916 F.2d 718 (CA 10 1990), reversed. Full Text of this landmark U.S. Supreme Court decision on Information Law. It stands for the proposition that "**facts cannot be copyrighted.**" Still, the original selection and arrangement of facts **can** be copyrighted. Here an unanimous Supreme Court held that the alphabetical listing of names in the white pages of the phone book was not subject to copyright

- because it was an unoriginal selection and arrangement of mere facts, the names, addresses and phone number or everyone in a certain geographical location.
- [\*BellSouth Advertising & Publishing Corporation v. Donnelley Information Publishing, Inc.\*](#), 999 F.2d 1436 (11th Cir. 1993). Important Information and Computer Law case which extends and enlarges upon Feist to include the Yellow Pages of the phone book as unprotected "fact." The computer copying and republication of yellow pages was found to be legal. The sharply divided appellate court in an en banc rehearing reversed an earlier decision, provoking a bitter dissent from Circuit Judge Hatchett. This case significantly broadens the Feist decisions' "factual exception" to copyright.
  - [\*CCC Information Services, Inc. v. MacLean Hunter Market Reports, Inc.\*](#), 44 F.3d 61 (2nd Cir. 1994). This is a significant Information and Computer law case which starts to put the brakes on Feist. The computer copying of Red Book car prices was found to be a copyright violation, not a lawful copying of "mere facts." The car price data compilation was held to be an "original work of authorship." The "Idea Merger," and "Public Domain" defenses were also considered and rejected.
  - [\*Arica v. Palmer\*](#) 970 F.2d 106 (2nd Cir.). Another interesting case applying Feist to deny copyright to a system of psychological insights called by the courts, in semi "tongue in cheek" fashion, to be mere facts not subject to copyright.
  - [\*Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc.\*](#) 936 F.2d 671 (2nd Cir. 1991). Follows Feist and holds that charts of horse racing statistics (facts), arranged by functional grids, with no possibility of variation, lacked sufficient originality to be copyrightable.
  - [\*Lipton v. The Nature Company\*](#) 71 F.3d 464 (2nd Cir. 1995). Follows Feist and holds that the selection and arrangement of a compilation of animal terms ("terms of vengery") was sufficiently original to warrant copyright protection of the compilation. But the opinion also held that an injunction entered against the infringer prohibiting any use of the copyrighted terms was overbroad, that the injunction should be limited to the compilation itself, not the individual terms.
  - [\*The National Basketball Association v. Motorola, Inc.\*](#), 65 USLW 2506, 41 USPQ2d 1585 (2nd Cir. (N.Y.), Jan. 30, 1997) Here the 2nd Circuit applies Feist to deny a claim for theft of basketball scores because the events of the NBA games were facts unprotected by copyright. However, this opinion suggests that an exception to Feist should exist for "fresh facts" under an old common law doctrine of misappropriation of "hot news". In my opinion this is an attempt to resurrect the "sweat of the brow" doctrine rejected by the Supreme Court in Feist, to provide protection to facts where the facts are new, and their free taking (called "free riding" by the court) would destroy the economic incentive to gather the facts in the first place. The 2nd Circuit has added "time and tragedy" as elements to avoid copyright pre-emption of state law misappropriation claims, and thus to circumvent Feist. We'll see if any of the other Circuits decide to follow this idea, or if the Supreme Court will ultimately be persuaded to allow this exception to Feist. I doubt it.
  - [\*Publications International v. Meredith Corporation\*](#), 88 F.3d 473 (7th Cir. 1996). Applies Feist to cookbooks and holds that in this case the food recipes were unprotected facts and procedures. The case involved a compilation of Dannon Yogurt recipes. The decision is very well written, and has a refreshingly light touch in the description of the facts of the case. Also note the interesting procedural twists in this case involving the issuance of a preliminary injunction, reversed on appeal, where defense counsel for some unexplained reason failed to show up at the injunction hearing, and the trial Judge granted the injunction in reliance on an affidavit he had stricken from the record. The decision suggests the one and only way that recipes are likely to be granted copyright protection by the courts.

### ***Information as Property Cases.***

- [\*Carpenter v. United States\*](#), 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). Landmark U. S. Supreme Court decision affirming that information is property. The criminal conviction of the Wall Street Journal reporter who wrote the "Heard on the Street" article was affirmed. The reporter had leaked information to investor friends as to what his article would say about the value of certain stocks. He was convicted of obtaining "property" from the Wall Street Journal by a fraudulent scheme. He defended on the basis that his advance knowledge of the contents of his articles was not "property," it was an "intangible right" not subject to the mail fraud law. The

Supreme Court rejected this argument because the newspaper considered all information in its articles to be confidential prior to publication, and "its intangible nature does not make it any less "property" protected by the mail and wire fraud statutes."

#### **Articles:**

- The [Legal and Practical Protection of Computer Databases](#). Full Hyper-Text of Ralph Losey's article, written for the general reader and lawyers alike. A must read for anyone interested in the law governing information.
- "[Patently Absurd](#)" by [Simson L. Garfinkel](#) - article from **WIRED Magazine** about the current state of patents in the area of computers.
- [Regulation and the National Information Infrastructure](#). This article is by Henry H. Perritt, Jr., Professor of Law, Villanova University School of Law.
- An in-depth discussion of intellectual property law as it affects multimedia developers: "[An Intellectual Property Law Primer for Multimedia Developers](#)" by lawyers J. Dianne Brinson and Mark F. Radcliffe, authors of the *Multimedia Law Handbook* from Ladera Press.
- A detailed and information-rich "White Paper" from Index Stock Photography, Inc. titled "[Licensing Still Images](#)" deals in a practical fashion with important copyright and intellectual property issues facing multimedia developers.

#### **Statutes:**

*The Communications Decency Act was declared unconstitutional by the United States Supreme Court and its enforcement enjoined in [ACLU v Reno](#). First a three judge federal court in Philadelphia declared the law VOID as a violation of the controlling law of the land - the Constitution. In so doing they saved the Internet and our rights to free communications from the excesses of Congress in an election year, 1994. I have selected some of the [best quotes from the lengthy trial court decision](#). Next, the Supreme Court of the United States continued its 200 year tradition of upholding the Constitution, in spite of all of the political heat from Congress and the President, and affirmed the trial court's decision. The [entire text of the Supreme Court decision](#) is well worth reading. It is the first decision of the Supreme Court on the Internet and will effect your rights on the Internet for decades to come.*

- Congress passed the "[Communications Decency](#)" amendment to the Telecom Bill. It impacted everyone on the Internet and was a blatant violation of the Free Speech rights of the First Amendment of the U.S. Constitution. Among other things it purportedly outlawed "...the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person." What is "indecent information?" Why try and change the Internet into the childrens room in the library? There are better solutions to protect our children and the sensitive. The Congress made a colossal mistake. Fortunately, the Supreme Court once again showed itself to be the backbone of American culture and rose above the political pressures on the day. The United States Supreme Court courageously declared the Communications Decency Act unconstitutional. [ACLU v Reno](#). The judicial system and the Constitution have once again preserved the right to free speech in the United States. The checks and balances of our legal system continue to work after over 200 years! The Supreme Court saved the Internet community from the excesses of Congress in an election year that was attempting to gather votes by pandering to the internet-porno fears of the public at the expense of our constitutional rights. See the [Electronic Frontier Foundation's analysis of this act](#). Or [press here](#) to read it for yourself.

- [Constitution of the United States of America](#) (for your convenience, this is a full text version). This is the law behind all of the other laws in the U.S. For a hypertext version of the U.S. Constitution, click [here](#).
- U.S. Copyright Statutes. Full Text of Title 17 of the Federal Code pertaining to copyright law ([Chapters 1-7](#) (nota bene: 216k file), and [Chapters 8-10](#)) (nota bene: 82k file). We have provided these statutes in full text format for your convenience.
- [The Computer Fraud and Abuse Act](#), [The Electronic Communications Privacy Act](#), [The Stored Wire and Electronic Communications and Transactional Records Act](#). These acts are contained in Title 18 of The United States Code, and govern your cyberspace rights and responsibilities.
- [Lanham Act - Trademark Act of 1946](#)

#### ***Misc. Resources***

- [Cyberspace Law Review Bibliography](#), by Eric Schlachter, Esq. This in-depth bibliography brings together numerous articles that relate to Cyberspace Law. Readers may also wish to read [Electronic Net works and Computer Bulletin Boards](#), also by Mr. Schlachter.
- The [full text](#) of a speech given in 1993 by Vice-President Gore on the Information Infrastructure.
- The Electronic Frontier Foundation's [Electronic Civil Liberties Library](#) of internet related documents.
- [Journal of Online Law](#)

#### ***International Resources***

- [National and International Copyright Liability for Electronic System Operators](#), by Charles J. Meyer. From the Indiana Journal of Global Legal Studies.
- [Global Information Policymaking and Domestic Law](#), by Fred H. Cate. From the Indiana Journal of Global Legal Studies.