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## Foreword

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## Foreword

### Erratum

Due to an editorial error, "Foreword" was misspelled as "Forward" in the printed issue.

# FORWARD

## SYMPOSIUM: THE CONSTITUTIONALITY OF PROTECTING FACTUAL COMPILATIONS

*Jeffrey H. Matsuura\**

The Program in Law and Technology at the University of Dayton School of Law hosted a Scholarly Symposium on “The Constitutionality of Protecting Factual Compilations” on October 4-5, 2002, in Dayton, Ohio. Sponsored by Lexis-Nexis, Reed-Elsevier, Thomson-West, the Software & Information Industry Associations, and eBay, the Symposium provided a forum in which law professors, practicing attorneys, and law students could interact with business and technology professionals. These diverse parties engaged in spirited and insightful analysis and discussion of constitutional law issues associated with application of federal and state law to protect ownership of databases and other forms of factual compilations.

Mr. Michael Jacobs, Vice President and General Counsel of Lexis-Nexis and Adjunct Professor at the University of Dayton School of Law, provided an introduction to establish a context for the presentations that would follow. Professor Robert Gorman, of the University of Pennsylvania and Of Counsel to the law firm, Meyer and Klipper, followed with a comprehensive and clear overview of the historical perspective of the development of United States copyright law from the first Copyright Act, through the “sweat-of-the-brow” doctrine, to the U.S. Supreme Court decision in *Feist Publications v. Rural Telephone Service*.

With the historical stage set by Professor Gorman, Mr. Corey Roush, of the law firm Hogan & Hartson, described the various legal theories applied by owners of factual compilations to protect their compilations. Unable to rely on copyright law principles in the post-*Feist* era, Mr. Roush discussed how owners of factual compilations turned to other federal and state law claims to manage their compilations. Mr. Roush’s paper is included in this Symposium issue.

Discussion at the Symposium also addressed the subject of the role of the public domain in the management of access to factual compilations. Professor Tyler Ochoa, of Whittier Law School, discussed the historical origins of the concept of the public domain. Professor Ochoa spoke on the public ownership aspect of the public domain and on the issue of the

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irrevocable nature of the public domain. His paper is included in this Symposium issue.

Two speakers focused on the scope of federal and state power to protect ownership of factual compilations. Professor Paul Bender, of the Arizona State University College of Law and Of Counsel to Meyer and Klipper, and Professor Justin Hughes, of Cardozo Law School, examined the role of the Commerce Clause in legal protection for factual compilations. Professors Bender and Hughes also addressed the subject of federal pre-emption of statutory efforts to protect compilations. They also examined limits imposed by the Copyright Act and by *Feist*, to the protection of factual compilations. Papers by Professor Bender and Professor Hughes are part of this Symposium issue.

First Amendment implications of database protection were also addressed at the Symposium. Professor James Weinstein, of the Arizona State University College of Law, and Professor Eric Goldman of Marquette University Law School examined whether the First Amendment limits the ability of Congress or the states to protect factual compilations. Professors Weinstein and Goldman also discussed the level of First Amendment scrutiny database legislation would face. Professor Weinstein's paper is included in this collection.

A discussion of the *Eldred v. Ashcroft* case was also part of the Symposium. Professor Paul Heald, of the University of Georgia School of Law, provided an overview of the case. Professor Heald also led a lively discussion in which the Symposium participants considered the relevance of the *Eldred* case to the database protection debate. Subsequent to the Symposium, the U.S. Supreme Court upheld the constitutionality of the extended copyright term in *Eldred*. The issues raised by the Symposium participants with regard to potential lessons for the database debate that may be provided by *Eldred* continue to be significant today.

The Symposium also benefited greatly from presentations made by Mr. Allan McLaughlin, Senior Vice President and Chief Technology Officer for Lexis-Nexis, and by Mr. Harry Silver, Senior Director of Lexis Product Management. Mr. McLaughlin and Mr. Silver provided an overview of the technological complexity and the economic value of major commercial databases. In their presentations, Mr. McLaughlin and Mr. Silver helped Symposium participants to develop a more accurate sense of the significant resources applied to the development and maintenance of commercial databases and of the substantial economic value created by those databases.

Participants at the Symposium actively explored diverse aspects of the constitutional law implications of legal protection, at federal and state levels, for databases. By the end of the Symposium, participants had a clearer understanding of the scope of the constitutional issues and of the means available to resolve those issues. Participants also developed a greater appreciation for the richness of current database offerings, the substantial economic resources associated with creation and maintenance of

those offerings, and the commercial value of those offerings. We believe that the papers included in this issue will give the reader an accurate sense of the scope and content of the discussion that took place at the Symposium.