

Functional Compilations

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Abstract

At some level, every human-made creation is a compilation. Yet, most do not qualify for copyright protection on account of the functionality that typically affects the selection and arrangement of their component parts. The Supreme Court's decision in *Feist v. Rural Telephone Service* established that works of authorship must be "original" to qualify for copyright protection and that originality requires a modicum of creativity. However, the Court did not say what kind of creativity would satisfy this standard. In the years since *Feist*, courts have sometimes rejected compilation copyright claims because the compilation was too functional to be protectable. Courts have sometimes relied upon copyright's exclusions of methods and systems to say that a systematic or methodical selection and/or arrangement of information is uncopyrightable. Other times, they have invoked the merger doctrine, as when the selection and arrangement was dictated by functionality. Still other decisions have ruled that functional selections or arrangements lack originality.

Functionality as a general basis for disqualifying some compilations from copyrights has not been widely recognized in the case law and law review literature. Some judges and commentators have denied that functionality is ever a limit on copyright (except maybe as to pictorial, graphic, and sculptural works that lack physical or conceptual separability). This article demonstrates that functionality does and should limit the protectability of compilations. Copyright aims to protect not originality per se, but expressive originality. Some compilations satisfy the expressive originality standard, but others do not. Since *Feist* forbids granting copyright protection based on sweat-of-the-brow rationale, functional compilations would seem to lie largely outside the bounds of copyright protection and even if protectable, the scope of that protection is thin, requiring proof of exact or near-exact copying.

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