

COPYRIGHT—FACT COMPILATIONS—SWEAT OF THE BROW DOCTRINE IS INAPPLICABLE AND WHITE PAGES ARE NOT SUFFICIENTLY ORIGINAL TO WARRANT COPYRIGHT PROTECTION—*Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991).

The United States Constitution authorizes Congress to “secur(e) for limited Times to Authors . . . the exclusive Right to their respective Writings”¹ A century ago, the Supreme Court declared that a work must possess a degree of originality before constitutional copyright protection will attach.² Nevertheless, the originality requirement has engendered disparate results in judicial treatment of facts and factual compilations,³ due in part to differing interpretations of the 1976 revisions⁴ to the Copyright Act.⁵ Recently, the Supreme Court determined that the white pages listings, because they are merely a compilation of facts, cannot be copyrighted.⁶

In *Feist Publications v. Rural Telephone Service Co.*,⁷ the Court addressed whether copyright protection extended to the compilation of data for a telephone directory’s white pages.⁸ Rural Telephone Service Company (Rural) published a telephone directory which listed its customers in the white pages alphabetically according to name.⁹ The listings also contained the customers’ towns and telephone numbers.¹⁰ *Feist Publications*,

¹ U.S. CONST. art. I, § 8, cl. 8

² See *The Trade-Mark Cases*, 100 U.S. 82, 94-95 (1879). The *Trade-Mark Cases* Court broadly defined the word “writings” as the “fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like.” *Id.* at 94 (emphasis in original). In this regard, the Court determined that originality was required. *Id.* See also *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (the word “authors” limited copyright to “original intellectual conceptions of the author”).

³ See, e.g., *Jeweler’s Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 88 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922) (copyright not determined by the originality of materials nor dependant upon whether the matter in question was *publici juris*; rather, copyright is obtained by virtue of the labor an author expended in conducting research and obtaining facts). *But see Miller v. Universal City Studios*, 650 F.2d 1365, 1369 (1981) (copyright in a compilation rests upon originality in selection or arrangement of facts and not upon the “industriousness of the efforts to develop the information”).

⁴ See *infra* notes 104-132 and accompanying text.

⁵ 17 U.S.C. §§ 101-810 (1989) (originally enacted as the Copyright Act of 1790, Ch. 15, 1 Stat. 124 (1790)).

⁶ See *Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991).

⁷ 111 S. Ct. 1282 (1991).

⁸ *Id.* at 1287.

⁹ *Id.* at 1286.

¹⁰ Rural’s directory also contained yellow pages featuring Rural’s business subscribers and classified advertisements. *Id.*

Inc. (Feist) sought to include Rural's white pages listings in its own area-wide telephone directory.¹¹ After Rural refused to license such use,¹² Feist included listings identical to those found in Rural's directory in its own compilation.¹³ Subsequently, Rural brought a copyright infringement action¹⁴ in the United States District Court¹⁵ for the District of Kansas and was granted summary judgment.¹⁶

The United States Court of Appeals for the Tenth Circuit affirmed¹⁷ and the Supreme Court granted certiorari¹⁸ to determine whether the copyright in Rural's directory protected the white pages listings copied by Feist.¹⁹ Writing for the majority,²⁰

¹¹ *Id.* The Feist directory consisted of 46,878 white pages listings for fifteen counties. *Id.* By comparison, Rural's directory contained 7,700 white pages listings for the local area. *Id.* Feist used 4,935 of Rural's white pages listings in compiling its own directory. *Id.*

¹² *Id.* While Feist sought permission from ten local directories, Rural was the only company that refused to license its listings. *Id.* Rural's refusal created problems for Feist because it left a "gaping hole" in Feist's area-wide directory. *Id.* The district court concluded that Rural refused permission because it intended to unlawfully monopolize yellow pages advertising. *Rural Tel. Serv. Co. v. Feist Publications, Inc.*, 737 F. Supp. 610, 622 (D. Kan. 1990).

¹³ *Feist Publications*, 111 S. Ct. at 1286. Feist researched the accuracy of Rural's listings and thereby gained additional information such as each customer's street address. *Id.* Most of Rural's listings did not provide street addresses. *Id.*

¹⁴ See 17 U.S.C. § 501(a) (1989) (Copyright Act of 1976 [hereinafter 1976 Act]). Copyright infringement was defined in the 1976 Act as a violation of "any of the exclusive rights of the copyright owner as provided by sections 106 through 118." *Id.* Section 106 identifies "exclusive rights" as the right to reproduce the work, prepare derivative works, distribute copies of the work, publicly perform the work, and publicly display the work. 17 U.S.C. § 106 (1989). These exclusive rights were subject to various limitations, exceptions and exclusions. 17 U.S.C. §§ 107-118 (1989).

¹⁵ See 28 U.S.C. § 1338(a) (1989). The statute provided, in pertinent part: "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to . . . copyrights Such jurisdiction shall be exclusive of the courts of the states in . . . copyright cases." *Id.*

¹⁶ *Rural Tel. Serv. Co. v. Feist Publications*, 663 F. Supp. 214 (D. Kan. 1987). Rural argued that Feist was obliged to conduct its own research to obtain the same facts that Rural compiled. *Id.* at 216. Feist maintained that the copied facts were beyond the scope of copyright protection. *Id.* at 217. The district court granted summary judgment for Rural on the theory that telephone directories are copy-rightable. *Id.* at 214, 218.

¹⁷ See *Rural Tel. Serv. Co. v. Feist Publications*, 916 F.2d 718 (10th Cir. 1990). The appellate panel succinctly upheld the district court decision "for substantially the same reasons given by the district court." *Id.*

¹⁸ *Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 40 (1990).

¹⁹ *Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1287 (1991).

²⁰ *Id.* at 1286. Justice O'Connor delivered the opinion of the Court and was joined by Chief Justice Rehnquist, and Justices White, Marshall, Stevens, Scalia, Kennedy and Souter. *Id.* at 1285-86. Justice Blackmun concurred in the judgment. *Id.* at 1286, 1297 (Blackmun, J., concurring).

Justice O'Connor held that Feist's use of Rural's listings did not constitute copyright infringement because Rural's white pages were not sufficiently original to warrant copyright protection.²¹

Seventy years ago, however, no compilation of data was too commonplace for copyright protection.²² In *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*,²³ the Court formulated a doctrine known as "sweat of the brow" or, alternatively, "industrious collection," that was based upon the notion that copyright is a reward for the effort involved in compiling data.²⁴ In *Jeweler's Circular Publishing Co.*, both the plaintiff, Jeweler's Circular Publishing Company (Jeweler's), and the defendant, Keystone Publishing Company (Keystone), published directories of non-original illustrations for the jewelry industry.²⁵ Jeweler's brought a copyright action claiming that Keystone unfairly used the results of the labor that Jeweler's expended in the production of its compilation.²⁶ Rendering judgment for Jeweler's, the Court stated that it was illegal for one party to appropriate the results of another's labor to save time and expense in creating a work.²⁷ Noting that the 1909 Act expressly included directories as copyrightable works,²⁸ the Court determined that the reference resolved any ambiguities²⁹ regarding the copyrightability of

²¹ *Id.* at 1297.

²² *See supra* note 3 and *infra* note 35.

²³ 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922).

²⁴ *Id.* at 88. Judge Rogers explained the sweat of the brow theory as follows:

The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires materials of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work.

Id. For a well-documented discussion of the doctrine's history in English law, *see id.* at 88-91.

²⁵ *Id.* at 84.

²⁶ *Id.* Keystone denied using any of Jeweler's original work in its own compilation. *Id.*

²⁷ *Id.* at 95.

²⁸ *See infra* note 96 for discussion of subject matter of copyright protection under the 1909 Act.

²⁹ *Jewelers Circular Publishing Co.*, 281 F. at 95. The Court may have been alluding to the first copyright statute which was enacted in 1790. *See* Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790)[hereinafter 1790 Act]. The Court recognized that the 1790 Act afforded copyright protection to the authors of maps, charts, and books.

directories.³⁰ Thus, the Court concluded that originality was not required to obtain copyright protection when an author labored to produce a work.³¹

Subsequent decisions embraced the reasoning of *Jeweler's Circular Publishing Co.*³² In *Leon v. Pacific Telephone & Telegraph Co.*,³³ the defendant, Pacific Telephone (Pacific), used information from a competitor's telephone directory and listed its customers according to their telephone exchanges.³⁴ The Court found that Pacific's use of names, addresses and telephone numbers from the competitor's directory constituted infringement.³⁵ Employing the sweat of the brow test, the Court maintained that the compilation of the plaintiff's directory invoked copyright protection that precluded Pacific from using any part of the directory, including the underlying facts.³⁶

The sweat of the brow test, unhampered by the enactment of a new copyright statute, remained intact for several decades.³⁷ Specifically, the 1976 Act expressly limited copyright protection of compilations to those elements that were original to the compilation author.³⁸ Nevertheless, courts relied upon the 1976 Act's inclusion of compilations as copyrightable materials³⁹ and

Id. The Court further asserted that because the 1790 Act specifically did not reference directories or similar compilations, it did not resolve clearly whether directories were copyrightable. *Id.*

³⁰ *Jeweler's Circular Publishing Co.*, 281 F. at 85.

³¹ *Id.* at 88.

³² See, e.g., *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937). The *Leon* court relied heavily on the explicit protection accorded directories in the 1909 Act and held that a telephone company's efforts in compiling its directory entitled it to copyright protection. *Id.*

³³ 91 F.2d 484 (9th Cir. 1937)

³⁴ *Id.* at 484-85. Pacific compiled directories entitled "Numerical Telephone Directory, San Francisco and other Cities and Towns, 1935-36" and "Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leonardo, 1935." *Id.* Pacific appropriated the information contained in these directories from Leon's alphabetical directories. *Id.*

³⁵ *Id.* at 485. At regular intervals, Leon distributed alphabetical directories to its subscribers, consisting of customers' names, addresses and telephone numbers. *Id.* Each directory was duly registered for copyright. *Id.*

³⁶ See *infra* notes 89-123 and accompanying text.

³⁷ The 1909 Act was repealed by the 1976 General Revision of Copyright Law.

³⁸ *Leon*, 91 F.2d at 485. The court recognized that the production of a telephone directory was a well-organized, complicated and expensive endeavor which required ingenuity, skill and original research. *Id.* at 485-86. Therefore, the court posited, "unless the product of such activity is by its very nature not subject to copyright, plaintiff's directories are certainly entitled to copyright protection." *Id.* at 486.

³⁹ The subject matter of copyright includes compilations. 17 U.S.C. § 103(a) (1976).

concluded that compilations were copyrightable per se.⁴⁰ For example, in *Hutchinson Telephone Co. v. Fronteer Directory Co.*,⁴¹ the United States Court of Appeals for the Eighth Circuit upheld a damage award to a telephone company for copyright infringement of its white pages, believing that the 1976 Act expressly made telephone directories copyrightable.⁴² While not openly espousing the sweat of the brow doctrine, the court held that the plaintiff's copyright was infringed because the defendant's directory was created from information generated by the plaintiff's efforts in compiling its own directory.⁴³

Notwithstanding the Eighth Circuit's reliance on the sweat of the brow doctrine,⁴⁴ other circuits disavowed the doctrine as a standard for copyright protection and concluded that the fruits of original research were not copyrightable.⁴⁵ In *Financial Information, Inc. v. Moody's Investor's Service*,⁴⁶ a case involving the use of index cards to present investment information to consumers,⁴⁷

⁴⁰ See, e.g., *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985)(telephone directories entitled to copyright protection under the 1976 Act); *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982); *Central Tel. Co. of Virginia v. Johnson Publishing Co.*, 526 F. Supp. 838 (D. Colo. 1981).

⁴¹ 770 F.2d 128 (8th Cir. 1985). Minnesota law required Hutchinson to publish a telephone directory. *Id.* at 129 (citing 5 MINN. R. § 7810.2900 (1983)). Hutchinson's directory contained white pages and yellow pages listings. *Id.* Fronteer published a similar directory for the commercial market. *Id.* at 130. Hutchinson alleged that Fronteer copied Hutchinson's white pages listings and incorporated the information into Fronteer's 1982 directory. *Id.*

⁴² *Id.* Several lower courts also adopted the sweat of the brow doctrine. See, e.g., *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir. 1922); *Rand McNally & Co. v. Fleet Management Systems, Inc.*, 600 F. Supp. 933 (N.D. Ill. 1984); *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982).

⁴³ *Id.* at 131-32. The court, nevertheless, utilized the sweat of the brow theory. *Id.* Fronteer asserted that Hutchinson accumulated the records to facilitate billing and that the publication required little or no effort. *Id.* at 131. The court, however, concluded that Fronteer's focus was too narrow. *Id.*

⁴⁴ *Id.* at 131-32. The court's determination nonetheless followed the sweat of the brow test set forth in *Jeweler's Circular Publishing Co.* See *supra* note 3.

⁴⁵ See *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573 (9th Cir. 1987) (research or labor taken in assembling encyclopedias is not a basis for copyright protection); *Miller v. Universal City Studios*, 650 F.2d 1365, 1369 (5th Cir. 1981) (authors of factual accounts cannot claim that their research is copyrightable); *Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) (previous author's theory of Hindenburg sabotage was not copyrightable and thus did not preclude subsequent author from using theory in literary work).

⁴⁶ 808 F.2d 204 (2d Cir. 1986).

⁴⁷ *Id.* at 205. The plaintiff, Financial Information, Inc., mailed each subscriber a "Financial Daily Card Service," consisting of index cards carrying information

the United States Court of Appeals for the Second Circuit concluded that research was not copyrightable by examining the definition of compilation in the 1976 Act.⁴⁸ The definition required that a project be an original work of authorship to warrant copyright protection.⁴⁹ The court posited that a grant of copyright protection based solely on the degree of the author's efforts, regardless of originality, risked restraining public access to factual research material.⁵⁰ Of course, the debate raged among scholars whether concern over public access was an adequate reason to repudiate the sweat of the brow doctrine.⁵¹ At least one court,

about municipal bonds. *Id.* The plaintiff's index cards contained information regarding the bonds' issuing authority, series, redemption date and redemption price. *Id.* Defendant Moody's Investors Service incorporated this information into its own bond reports, including false information planted by the plaintiff to detect copying. *Id.* at 206. The plaintiff brought an infringement action after determining that the defendant copied its data. *Id.* The court held that the plaintiff's index was not sufficiently original to merit copyright protection in the selection, coordination or arrangement of data. *Id.* at 208.

⁴⁸ *Id.* at 207. Section 101 of the 1976 Act provides in pertinent part: "A compilation is a work formed by the collection and assembling of preexisting materials or of data that are *selected, coordinated or arranged* in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (1989) (emphasis added).

⁴⁹ *Financial Information, Inc.*, 808 F.2d at 207.

⁵⁰ *Id.*

⁵¹ See Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 541 (1981). Denicola addressed the concerns of various commentators regarding the infringement of free speech through copyright encompassing fact-based collections. *Id.* at 540. In response, Denicola posited that data-based collections did not impinge First Amendment rights because copyright law protected factual expression, not the facts themselves. *Id.* Denicola further maintained that the availability of copyright only to the expression of ideas safeguarded any First Amendment interest in free dissemination of ideas. *Id.* at 540-41. Denicola argued that copyright did not provide a monopoly over facts; instead, he stated that the lack of copyright protection over facts simply required subsequent authors to revisit the public domain of those factual sources rather than copy those facts from earlier works. *Id.* at 541. Denicola concluded, therefore, that affording copyright protection to fact collections posed no greater threat to free speech than the protection of pure compilations. *Id.*

But see Tanya Wells, Comment, *Copyright Protection for Compilations of Fact: A Doctrine in Search of Conceptual Underpinnings*, 21 ARIZ. ST. L.J. 1117, 1130-31 (1990). Wells asserted that inconsistent application of the idea/expression dichotomy presented a First Amendment conflict. *Id.* Wells proffered that an author's style of expression in a factual work is often minimal, thereby defeating the idea/expression dichotomy. *Id.* at 1131. The author further noted that the First Amendment issue was compounded by the sweat of the brow theory which created copyright in factual works based solely on the author's efforts. *Id.* at 1130. Wells suggested that the sweat of the brow doctrine impinged upon free speech by threatening authors with copyright infringement if they use facts or ideas protected by another's efforts. *Id.* at 1130-31.

See also Sarah Lum, Note, *Copyright Protection for Factual Compilations—Reviving the*

however, concluded that the sweat of the brow theory was an improper basis for copyright protection of compilations.⁵² In *Eckes v. Card Prices Update*,⁵³ a case involving the copyrightability of a baseball card pricing guide,⁵⁴ the United States Court of Appeals for the Second Circuit considered whether a listing of baseball card values could be originally selected, coordinated or arranged in a way that merited copyright protection.⁵⁵ Rejecting the sweat of the brow theory,⁵⁶ the court examined whether the plaintiffs' subjective judgment and selectivity of premium baseball cards merited copyright protection of the pricing guide.⁵⁷ Asserting that the originality of the plaintiffs' presentation was protected expression, the court posited that the card guide was copyrightable.⁵⁸ Thus, the Second Circuit concluded that the defendant's use of the same presentation resulted in a copyright infringement.⁵⁹

One year later, the United States Court of Appeals for the Seventh Circuit reaffirmed that the copyrightability of compila-

Misappropriation Doctrine, 56 *FORDHAM L. REV.* 933 (1988) (maintaining that copyright law may not provide adequate protection for compilations); Elizabeth M. Saunders, Note, *Copyright Protection for Compilations of Fact: Does the Originality Standard Allow Protection on the Basis of Industrious Collection?*, 62 *NOTRE DAME L. REV.* 763 (1987) (advocating lower threshold of originality for fact-based works).

⁵² See, e.g., *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2d Cir. 1984) (baseball card pricing guide was not entitled to copyright protection under the sweat of the brow theory).

⁵³ 736 F.2d 859 (2d Cir. 1984).

⁵⁴ *Id.* at 860. The plaintiffs, Dennis Eckes and James Beckett, published a pricing guide for all baseball cards manufactured between 1909 and 1979. *Id.* Defendant, Card Prices Update, compiled a similar publication, using many of the same cards used by the plaintiffs. *Id.* at 860-61. On the basis of this similarity, the plaintiffs brought an infringement action. *Id.* at 861.

⁵⁵ *Id.* at 862. The court's consideration of originality comported with the requirements of originality set forth in section 101 of the 1976 Act. *Id.* at 862-63.

⁵⁶ *Id.* The court indicated that a prior author cannot force a subsequent author to engage in independent research by invoking the sweat of the brow doctrine as a basis for copyright protection of the preexisting work. *Id.*

⁵⁷ *Id.* at 863. The court noted that although some baseball cards should clearly be classified as "premium" on any dealer's list, the plaintiffs exercised "selection, creativity and judgment in choosing among the 18,000 or so different baseball cards to determine which were the 5,000 premium cards." *Id.*

⁵⁸ *Id.* at 864. The panel relied on numerous courts and commentators. See, e.g., *Roy Export Co. v. Columbia Broadcasting Systems, Inc.*, 672 F.2d 1095, 1103 (2d Cir.), *cert denied*, 459 U.S. 826 (1982) (selection of non-copyrighted Charlie Chaplin films clips considered copyrightable); *Dow Jones & Co. v. Bd. of Trade*, 546 F. Supp. 113 (S.D.N.Y. 1982) ("subjective judgment and selectivity" in stock listings were copyrightable); 1 N. NIMMER, *NIMMER ON COPYRIGHT* § 2.04[B], at 2-41-2 (fact-based literary works protected if originally selected or arranged); Denicola, *supra* note 51, at 530 (originality based on choice or selection of data).

⁵⁹ *Id.*

tions rested in the presentation of the facts, not the facts themselves.⁶⁰ In *Rockford Map Publishers v. Directory Service Co. of Colorado*,⁶¹ the court held that a map publisher's arrangement of factual data in a plat was copyrightable.⁶² The court distinguished between copyright for contributions to a work and copyright for the effort expended in compiling the underlying information.⁶³ The court emphasized that copyright laws protected incremental contributions in producing a new work and not the effort expended in making these contributions.⁶⁴ Accordingly, the court concluded that the effort expended in producing a work was not dispositive of whether that work deserved copyright protection.⁶⁵

⁶⁰ See *Rockford Map Publishers v. Directory Serv. Co. of Colorado*, 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 475 U.S. 1061 (1986).

⁶¹ 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 475 U.S. 1061 (1986).

⁶² *Id.* at 148. The plaintiff, Rockford Map Publishers, produced plat maps of rural counties. *Id.* at 147. The maps indicated the size, location and ownership of each parcel. *Id.* The defendant, Directory Service Co., also produced plat maps. *Id.* In so doing, Directory Service Co. used maps of other mapmakers as a "base" from which to develop its own maps. *Id.* Rockford placed bogus names in its maps to detect copying. *Id.* As a result of this practice, Rockford discovered that Directory Service Co. had used Rockford's map as a template and sued for copyright infringement. *Id.* at 147-48.

⁶³ *Id.* at 148. Judge Easterbrook posited that copyright law protected the expression itself, not the effort expended in its creation. *Id.* The judge explained:

A person who produces a short new work or makes a small improvement in a few hours gets a copyright for that contribution fully as effective as that on a novel written as a life's work. Perhaps the smaller the effort the smaller the contribution; if so, the copyright simply bestows fewer rights. Others can expend the same effort to the same end. Copyright covers, after all, only the incremental contribution and not the underlying information.

Id. (citing *Mazer v. Stein*, 347 U.S. 201 (1954)).

⁶⁴ *Id.* The court indicated that copyright gives people incentive to create new works. *Id.* Thus, the court stated that the reward to be collected for the contribution to a work is equal to the amount of the contribution. *Id.* According to the court, the subjective assessment of the effort involved in compiling the work does not determine copyright. *Id.*

⁶⁵ *Id.* Accordingly, the court rejected Directory Service Co.'s argument that Rockford's lack of industriousness precluded them from asserting copyright in their plat maps. *Id.* As Judge Easterbrook explicated, time input was irrelevant. *Id.* The judge articulated:

A photograph may be copyrighted, although it is the work of an instant and its significance may be accidental. In 14 hours, Mozart could write a piano concerto, J.S. Bach a cantata, or Dickens a week's installment of *Bleak House*. All of these are copyrightable. Dickens did not need to complete *Bleak House* before receiving a copyright; every chapter — indeed every sentence — could be protected standing alone. Rockford Map updates and republishes maps on more than 140 counties every year. If it put out one large book with every map, even Directory Service would concede that the book was based on a

While lower courts continued to reject the sweat of the brow theory, the United States Supreme Court remained silent as evidenced in *Harper & Row, Publishers v. Nation Enterprises*.⁶⁶ In *Harper & Row*, the Supreme Court declined to resolve the sweat of the brow controversy and decided the case on other grounds.⁶⁷ Nonetheless, various circuit courts either repudiated the doctrine⁶⁸ or suggested that its application be limited to directory cases.⁶⁹

The time was finally ripe for the Supreme Court to address the sweat of the brow theory in *Feist Publications v. Rural Telephone*

great deal of 'industry'. Rockford Map, like Dickens, loses none of its rights by publishing copyrightable matter in smaller units.

Id. at 148-49 (footnote and citations omitted).

⁶⁶ 471 U.S. 539 (1985).

⁶⁷ *Id.* at 548. The Supreme Court did not explore the interaction of sweat of the brow theory and the idea/expression dichotomy because a valid copyright existed in the plaintiff's work as a whole. *Id.* In *Harper & Row, The Nation* magazine obtained a stolen manuscript of former President Gerald Ford's autobiography. *Id.* at 539. Although the manuscript consisted of pure fact compilations, the work was original enough as a whole to merit copyright protection. *Id.* at 548. *The Nation's* appropriation of 300 to 400 verbatim quotes from the author's manuscript was held to be a copyright infringement. *Id.* *The Nation* could not invoke the fair use doctrine because of its unreasonable use of the manuscript's language. *Id.*

The fair use doctrine was defined as "privilege in other than owner of copyright to use copyright material in reasonable manner without consent, notwithstanding monopoly granted to the owner." *Merepol v. Nizer*, 361 F. Supp. 1063, 1067 (S.D.N.Y. 1973). The fair use doctrine was a judicially created, equitable defense to copyright infringement that was eventually codified at 17 U.S.C. section 107 (1989). See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 294 (1989). Fair use becomes relevant only after the plaintiff has established a prima facie case for copyright infringement by showing substantial similarity between the plaintiff's and the defendant's work. *Id.* Then, the defendant must prove that his use of the plaintiff's material was privileged as a fair use. *Id.*

The preamble to section 107 of the 1976 Act enumerated various activities that did not constitute infringement. Such activities included, but were not limited to, criticism, comment, news reporting, teaching, scholarship or research. 17 U.S.C. § 107 (1989).

Under section 107, four factors were dispositive of the fair use defense. *Id.* Section 107 states:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for the value of the copyrighted work.

Id.

⁶⁸ See *supra* note 57.

⁶⁹ See *supra* note 45.

Service Co. ⁷⁰ Justice O'Connor began the Court's analysis with an overview of copyright limitations.⁷¹ Historically, the Court noted, facts were not subject to copyright protection because they did not represent an original work of authorship.⁷² The majority conceded that this proposition was problematic as to factual compilations because many such volumes consisted of nothing but raw data,⁷³ unaccompanied by any original expression.⁷⁴ Therefore, the Court asserted that a copyright could not automatically attach in compiled facts when such protection would not be accorded the compilation's constituent parts.⁷⁵ To clarify copyright protection for exclusively fact-based works,⁷⁶ however, the Court reviewed the creative aspect of the originality requirement for copyright eligibility.⁷⁷

Justice O'Connor indicated that judicial interpretation⁷⁸ of the Constitution's grant of copyright set forth that a work must

⁷⁰ 111 S. Ct. 1282 (1991).

⁷¹ *Id.* at 1287.

⁷² *Id.* The constitutional definition of *author* is "he to whom anything owes its origin." *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 58 (1884). *See also supra* note 2. Justice O'Connor concluded that an "undeniable tension" existed between the two propositions because many compilations exist solely of raw data. *Id.* The Justice concluded pure facts did not "magically change their status when gathered together in one place." *Id.*

⁷³ *See Miller v. Universal City Studios*, 650 F.2d 1365, 1369 (5th Cir. 1981). Raw data include scientific, historical, biographical and news data which are "part of the public domain and available to every person." *Id.*

⁷⁴ *Feist Publications* 111 S. Ct. at 1287. The Justice noted that copyright law utilized the term "original" to mean that the "work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." *Id.* (citations omitted). The Justice agreed, however, that the threshold level of creativity was "extremely low." *Id.* Justice O'Connor explained:

Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.

Id. at 1287-88 (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936)).

⁷⁵ *Id.*

⁷⁶ *Id.* Compilations were expressly included in both the 1909 Act and the 1976 Act. *See supra* notes 40-48 and *infra* note 110.

⁷⁷ *Feist Publications*, 111 S. Ct. at 1287.

⁷⁸ *See U.S. CONST.* art. I, § 8, cl. 8; *Sony Corp. of America v. Universal Studios*, 464 U.S. 417, 429 (1984) (copyright was "intended to motivate the creative activity of authors and inventors, the provision of a special reward, and to allow the public access to the product of their genius after the limited period of exclusive control has expired"). *See also supra* note 2 and accompanying text.

be independently created by its author to be original.⁷⁹ Moreover, the Court maintained that this view remained a bedrock principle of copyright law.⁸⁰ Thus, the Court articulated the axiom that facts could not be copyrightable because they were discovered, not created.⁸¹ Applying this maxim to factual compilations, the Court posited that the requisite originality may be present if the author exhibited creativity in the selection or arrangement of the data.⁸² The majority opined that, although the selection or arrangement may be protected, the underlying facts were not copyrightable.⁸³

Also, the majority addressed an important limitation to the copyrightability of factual compilations.⁸⁴ The Court stressed that protection extended only to those components of a compilation that were original to the author.⁸⁵ Justice O'Connor explained that the effect of copyright was to protect an author's right to original expression while allowing others to use the underlying facts or ideas.⁸⁶ According to the Court, this principle, known as the idea/expression dichotomy,⁸⁷ limited the

⁷⁹ *Feist Publications*, 111 S. Ct. at 1288.

⁸⁰ *Id.* The Court indicated that leading scholars agreed on this point. *Id.* (citing L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. REV. 719, 763, n.155 (1989)).

⁸¹ *Feist Publications*, 111 S. Ct. at 1288. The Court stated that originality was determined by distinguishing between creation and discovery. *Id.* The Court explained that a fact did not owe its existence to its reporter; thus, facts were merely discovered and, therefore, unoriginal. *Id.* at 1288-89.

⁸² *Id.* The Court recognized, however, that factual compilations potentially possess the required originality. *Id.* at 1289. Justice O'Connor noted that compilers of facts necessarily must choose the inclusion and placement of the data and, if these decisions entail a minimum degree of creativity, they may be copyrightable. *Id.* (citation omitted). Thus, the Justice concluded: "even a directory that contains absolutely no protectable written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement." *Id.* (citation omitted).

⁸³ *Id.* The Justice posited that the facts did not owe their existence to the author's efforts. *Id.* at 1288. The majority distinguished discovery from creation and noted that the first person to record a fact did not create the happenstance. *Id.* Justice O'Connor analogized census takers—who do not create population figures but derive the numbers from the "world around them"—with recorders of historical, scientific or biographical facts. *Id.* (citation omitted). The Justice proclaimed that copyright did not attach in any of these situations because the data was not constitutionally original. *Id.* (citation omitted).

⁸⁴ *Id.*

⁸⁵ *Id.* This limitation comports with § 103(b) of the Copyright Act of 1976. *Id.*

⁸⁶ *Feist Publications*, 111 S. Ct. at 1289.

⁸⁷ *Id.* at 1290. The Court stated that the idea/expression dichotomy was advanced more than a century ago in *Baker v. Selden*, 101 U.S. 99 (1880). In *Baker*, *Selden* sought copyright protection for a book that explained a certain method of

copyrightability of factual compilations.⁸⁸

After determining that the idea/expression dichotomy limited the copyrightability of compilations, the Court examined the underpinnings of the 1909 Act and its potential as a breeding ground for sweat of the brow adherents.⁸⁹ The majority asserted that Congress intended the 1909 Act to embody the originality requirement for copyright established in prior Court decisions.⁹⁰ The Court remarked, however, that sections 3⁹¹ and 4⁹² of the

bookkeeping. *Id.* at 99-100. The book included certain forms to be used in the accounting system discussed in the book. *Id.* at 100. Defendant Baker prepared a work that explained the same accounting method as Selden and used similar forms. *Id.* The Court found that the knowledge conveyed in a work can be used by a subsequent author as long as the method of expressing this knowledge is not copied. *Id.* at 103. Thus, the Court held that Selden could not assert copyright in the underlying idea of the accounting system nor preclude Baker from using that idea in his own work. *Id.* at 107. The *Feist Publications* Court construed *Baker* to hold that copyright rewards originality rather than the effort expended in collecting data. *Feist Publications*, 111 S. Ct. at 1290.

Later courts memorialized the subtle reference to the idea/expression dichotomy set forth in *Baker*. See *Mazer v. Stein*, 347 U.S. 201, 217 (1954) ("a copyright gives . . . protection . . . only to the expression of the idea—not the idea itself"). See also Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 559 (1990) (arguing that courts should consider this idea/expression dichotomy to be the central axiom of copyright law to use when determining what is protected in infringement cases).

⁸⁸ *Feist Publications*, 111 S. Ct. at 1290.

⁸⁹ *Id.*

⁹⁰ *Id.* See also *supra* note 2. The Justice recognized that Congress used the words "writings" and "authors." *Id.* Because these words were utilized both by the framers in Article I, section 8, and by the Court in subsequent decisions, Justice O'Connor concluded that Congress "necessarily incorporated the originality requirement." *Id.* The majority readily conceded, however, that the reference was merely implicit and therefore troublesome. *Id.*

⁹¹ See Copyright Act of 1909, ch. 391, § 3, 35 Stat. 1075, 1076 (1909). Section 3 of the 1909 Act provides in pertinent part: "The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright." *Id.* (emphasis added).

The Court believed that section 3 of the 1909 Act was poorly drafted because it failed to mention that originality determined which component parts of a work were copyrightable. *Feist Publications*, 111 S. Ct. at 1290-91.

⁹² See Copyright Act of 1909, ch. 320, § 4, 35 Stat. 1075, 1076 (1909). Section 4 of the 1909 Act provides in full: "The works for which copyright may be secured under this title shall include all the writings of an author." *Id.*

The terms *writings* and *author*, however, were previously defined by the Court as establishing the prerequisite of originality. See *The Trademark Cases*, 100 U.S. 82, 94-95 (1879) (construing the Constitution's use of the word "writings" very broadly as "fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like"). The *Feist Publications* Court indicated that the statute necessarily, albeit implicitly, incorporated these judicial definitions in § 4 of the 1909 Act. 111 S. Ct. at 1290.

1909 Act failed to expressly identify the originality requirement as the determinative factor in copyright protection.⁹³ The majority blamed the statute's ambiguous language for the disparate treatment given facts and factual compilations by lower courts.⁹⁴

According to the majority, lower courts ignored the ambiguities of sections 3 and 4 of the 1909 Act, preferring instead to focus upon section 5.⁹⁵ Although section 5 specified directories as works entitled to copyright,⁹⁶ the majority opined that section 5 was not intended to render all directories copyrightable.⁹⁷ The Court posited that this section was predominately an administrative provision indicating the types of categories under which an author could register a copyright.⁹⁸ The majority asserted that lower courts erroneously understood section 5 to provide for automatic copyright protection of compilations irrespective of originality,⁹⁹ thus creating the sweat of the brow approach to copyright protection.¹⁰⁰

The majority criticized this approach, stating that the sweat of the brow doctrine rendered facts copyrightable and precluded current authors from relying on facts contained in works by earlier authors.¹⁰¹ The majority submitted that the 1976 revisions to the copyright statute¹⁰² specifically included the originality re-

⁹³ *Feist Publications*, 111 S. Ct. at 1290-91.

⁹⁴ *Id.* at 1290-91. The Court found section 3 ambiguous because it stated that "the copyrightable component parts of the work" were the only aspects protected but failed to "identify the specific characteristic—originality—that determined which component parts of a work were copyrightable and which were not." *Id.*

⁹⁵ *Id.* For an interesting discussion on this concept, see *Patterson & Joyce*, *supra* note 80 at 760-61.

⁹⁶ See Copyright Act of 1909, ch. 391, § 5, 35 Stat. 1075, 1076 (1909) (emphasis added). Section 5 of the 1909 Act provides, in pertinent part: "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: (a) Books, including composite and cyclopedic works, *directories*, gazetteers, and other compilations."

⁹⁷ *Feist Publications*, 111 S. Ct. at 1291.

⁹⁸ *Id.* The Justice reasoned that this inclusion led some lower courts to incorrectly infer that all items listed in section 5(a) were per se copyrightable without regard for "any further or precise showing of original—personal—authorship." *Id.* at 1290 (citation omitted).

⁹⁹ *Id.* (citing *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir. 1922) *cert. denied*, 259 U.S. 581 (1922)).

¹⁰⁰ *Id.* The Court noted that the sweat of the brow doctrine eschewed the principle that facts or ideas are not entitled to copyright. *Id.* See *supra* note 87 and accompanying text (doctrine directly opposes the idea/expression dichotomy).

¹⁰¹ *Feist Publications*, 111 S. Ct. at 1292. The Court indicated that such a preclusive effect distorts the axiom that facts were not copyrightable. *Id.*

¹⁰² See *supra* note 14. The Justice noted that Congress purposefully dropped the "all writing of an author" language and replaced it with "original works of author-

quirement to ensure that the sweat of the brow justification for copyright protection would not be repeated.¹⁰³ The Court emphasized that the 1976 Act made the originality requirement explicit by including all original works of authorship¹⁰⁴ within the subject matter of copyright.¹⁰⁵ Furthermore, Justice O'Connor stated that section 102(b) of the 1976 Act¹⁰⁶ was universally understood to prohibit the copyright of facts because the section provided that copyright protection did not extend to ideas embodied in a work.¹⁰⁷ The Court considered section 102(b) to be a clarification of the ambiguities in sections 3 and 4 of the 1909 Act.¹⁰⁸

Also, the majority discussed two new provisions of the Copyright Act of 1976 that were designed to minimize the confusion generated by section 5 of the 1909 Act.¹⁰⁹ First, the Court explained that Congress designed the definition of "compilation"

ship." *Id.* (citing 17 U.S.C. § 102(A)). The statute's legislative history supported this conclusion, Justice O'Connor posited, because Congress expressly intended "to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute." *Feist*, 111 S. Ct. at 1293 (emphasis in original)(citation omitted). The Justice further asserted that the Copyright Office echoed this intention: "[o]ur intention here is to maintain the established standards of originality." *Id.* (emphasis added)(quoting SUPP. REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW, 89th Cong., 1st Sess., Part 6, at 3 (1965)).

¹⁰³ *Feist Publications*, 111 S. Ct. at 1292-93.

¹⁰⁴ See 17 U.S.C. § 102(a) (1989). The 1976 Act provided: "[c]opyright protection subsists. . . in original works of authorship fixed in any tangible medium of expression. . . ." *Id.*

The 1976 Act does not include a definition of "original works of authorship." See *id.* at § 101. In this regard, Congress stated that it intended to "incorporate without change the standard of originality established by the courts. . . ." H.R. REP. No. 1476, 94th Cong., 2d Sess. 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664.

¹⁰⁵ *Feist Publications*, 111 S. Ct. at 1292.

¹⁰⁶ See 17 U.S.C. § 102(b) (1989). Section 102(b) of the 1976 Act provides in relevant part: "In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id.*

The legislative history of this provision indicates that § 102(b) was designed to reinforce the idea/expression dichotomy that evolved through the judicial system: "Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate . . . that the basic dichotomy between expression and idea remains unchanged." H.R. REP. No. 1476, 94th Cong., 2d Sess. 51, 57 (1976), reprinted in 1976 U.S.C.C.A.N. at 5659, 5670.

¹⁰⁷ *Feist Publications*, 111 S. Ct. at 1293. See also NIMMER, *supra* note 58 at § 2.03[E](declaring that facts are the equivalent of discoveries); *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 556 (1985)("[n]o author may copyright ideas or the facts he narrates").

¹⁰⁸ *Id.* See *supra* notes 106-07 and accompanying text.

¹⁰⁹ *Feist Publications*, 111 S. Ct. at 1293.

provided in section 101 of the 1976 Act¹¹⁰ to emphasize that collections of facts are not copyrightable *per se*.¹¹¹ The Court remarked that the statutory definition provides that compilations will be copyrightable only if their facts are selected or arranged in an original manner.¹¹² Thus, the Court concluded that originality in the selection, coordination or arrangement was the primary basis for determining the copyrightability of fact-based works.¹¹³

Having determined that originality in selection or arrangement was dispositive, the Court next examined whether any degree of selection or arrangement of data would meet the statutory requirements for copyright.¹¹⁴ The majority suggested that some means of selecting or arranging data would not be sufficiently original to warrant protection, especially if those means were trivial.¹¹⁵ The Court noted, however, that even a valid copyright did not extend protection to facts.¹¹⁶

Reviewing section 103(b) of the 1976 Act,¹¹⁷ Justice

¹¹⁰ See *supra* note 61. The 1976 Act defined compilation as "a work formed by the collection and assembly of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (1976).

¹¹¹ *Feist Publications*, 111 S. Ct. at 1293. See *supra* note 61 (§ 101 has no counterpart in the 1909 Act).

¹¹² *Feist Publications*, 111 S. Ct. at 1294. The Court stressed that originality was also required by virtue of section 102 of the 1976 Act to eliminate the notion that fact-based works were copyrightable regardless of their originality. *Id.* The Court noted that statutory ambiguities in the 1909 Act caused some lower courts to lose sight of the originality requirement embodied in the Act. *Id.* at 1290.

The majority described the tripartite structure of section 101 of the 1976 Act as the embodiment of the originality requirement for copyright. *Id.* at 1293. Specifically, the Court identified three distinct elements of section 101 that must be met before copyright could be obtained in a compilation: (1) collection and assembly of pre-existing data; (2) selection, coordination or arrangement of data; and (3) creation of an original work of authorship. *Id.* The Court emphasized that the mere collection of data did not satisfy the requirement for copyright absent some minimal amount of creativity in selection or arrangement. *Id.* at 1294.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* In reaching this conclusion, the Court noted that section 101 of the 1976 Act required that the underlying facts in a compilation be arranged "in such a way" that the work as a whole was original. *Id.* See 17 U.S.C. § 101 (1989). See also *supra* note 48 (statutory language).

Following the principle that every word of a statute be given effect, the Court concluded that the statute envisions that some compilations may lack originality. *Feist Publications*, 111 S. Ct. at 1294 (citing *Moskal v. United States*, 111 S. Ct. 461, 466 (1990)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1294-95. The legislative history of section 103(b) stated its purpose as follows:

O'Connor found that the statute protected those elements created by the author but did not protect pre-existing material.¹¹⁸ With respect to fact-based works, the Court interpreted the section to extend only to a creation that was selected, coordinated or arranged in an original manner.¹¹⁹

Summarizing the 1976 Act, the majority concluded that originality, not sweat of the brow, was the basis for copyright protection.¹²⁰ The majority commented that several lower courts, most notably the Second Circuit,¹²¹ repudiated the sweat of the brow theory.¹²² Acknowledging this trend, the Court returned to the facts at issue to decide whether Feist copied anything that was original to Rural.¹²³

The Court determined that, because the directory possessed some original text, the raw data in Rural's white pages was not copyrightable.¹²⁴ The Court explained that information concerning names, towns, and telephone numbers did not exist simply because someone compiled it into a listing.¹²⁵ Characterizing this data as preexisting material, the Court deemed it un-

Section 103(b) is . . . intended to define . . . the important interrelationship and correlation between protection of preexisting and of "new" material in a particular work. The most important point here is one that is commonly misunderstood today: copyright in a "new version" covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51, 57 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5659, 5670.

¹¹⁸ *Feist Publications*, 111 S. Ct. at 1295.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* Seventy years ago, the Second Circuit formulated the sweat of the brow doctrine. See *Jeweler's Circular Publishing Co.*, 281 F. 83 (2d Cir. 1922). See also *supra* note 3. Later, the same court repudiated the theory. See *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966) ("We. . . cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior material"), *cert. denied*, 385 U.S. 1009 (1967).

¹²² See *supra* notes 52-64 and accompanying text. See also *Miller v. Universal City Studios*, 650 F.2d 1365 (5th Cir. 1981). In *Miller*, the plaintiff prepared a book involving a Georgia kidnapping with the assistance of the victim. *Miller*, 650 F.2d at 1367. Defendant Universal City Studios made a movie based entirely on the book but failed to secure movie rights. *Id.* Rejecting the sweat of the brow theory, the court held that facts discovered as a result of research were not entitled to copyright protection absent some originality in their selection, coordination or arrangement. *Id.* at 1369-70.

¹²³ *Feist Publications*, 111 S. Ct. at 1295.

¹²⁴ *Id.* See *supra* notes 8-13 and accompanying text for discussion of the facts.

¹²⁵ *Feist Publications*, 111 S. Ct. at 1296.

copyrightable under section 103(b) of the 1976 Act.¹²⁶

The majority next decided whether these uncopyrightable facts were selected, coordinated, or arranged in an original way to warrant protection of the work as a whole.¹²⁷ The Court noted that Rural's listings were typical because they provided the most basic information about each subscriber.¹²⁸ Therefore, the Court concluded that Rural's listings lacked the modicum of creativity¹²⁹ necessary for copyright protection.¹³⁰

Finally, the Court announced that Rural's coordination or arrangement of facts was not sufficiently creative to warrant copyright protection.¹³¹ The majority stated that an alphabetical arrangement of facts was too commonplace to be original.¹³² Hence, the majority held that Rural's alphabetical arrangement of basic subscriber information did not meet the constitutional or statutory requirements for copyright protection.¹³³

In *Feist Publications*, the Court dismantled the sweat of the brow doctrine and revitalized the idea/expression dichotomy.¹³⁴ In so doing, the majority credited the 1976 Act with curing ambiguities in the 1909 Act that allowed the sweat of the brow doctrine to take root.¹³⁵ Despite the Court's reliance on the 1976 Act, the question remains whether the idea/expression dichotomy, which was formulated nearly a century ago in *Baker v. Selden*,¹³⁶ should preserve the rights of compilation authors in the aftermath of the 1976 Act.

¹²⁶ *Id.* See also *supra* note 104.

¹²⁷ *Feist Publications*, 111 S. Ct. at 1296.

¹²⁸ *Id.*

¹²⁹ *Id.* The Court noted that the standard of originality, while law, required something more than just a routine selection of data. *Id.* The Court's reasoning intimated that a selection of white pages listings was never copyrightable if it followed the basic "formula" of names, towns and telephone numbers. See *id.*

¹³⁰ *Id.* The Court also stated that Rural's selection of listings failed the originality requirement because its selection was governed by state law as part of its monopoly franchise. *Id.* at 1296-97.

¹³¹ *Id.* at 1297.

¹³² *Id.*

¹³³ *Id.* In so holding, the Court emphasized that a contrary result would erroneously award Rural a copyright based on effort rather than originality. *Id.* This decision implicitly rejected application of the sweat of the brow doctrine. See *id.*

¹³⁴ The Court indicated that its decision was not intended to demean Feist's compilation effort. *Id.* at 1297. Rather, the Court posited that copyright rewards originality, not effort. *Id.* The majority sought to uphold the right of authors to build upon the ideas or information contained in earlier works. See *id.* This right is the essence of the idea/expression dichotomy. See *supra* notes 100-03 and accompanying text.

¹³⁵ See *supra* notes 117-127 and accompanying text.

¹³⁶ 101 U.S. 99 (1880). See also *supra* note 87 (discussion of facts in *Baker*).

For example, the 1976 Act attempted to codify the idea/expression dichotomy by clarifying what constituted originality.¹³⁷ The Act explicitly awarded copyright only to those components of a work that owed their expression to the author. The 1976 Act, however, failed to specify the quantum of originality required for copyright protection,¹³⁸ leaving room for dispute among authorities¹³⁹ regarding when creativity becomes protected expression. Absent stronger guidelines,¹⁴⁰ the originality requirement is left dangerously vulnerable to the subjective impressions of the trier of fact.¹⁴¹

Moreover, it is impossible to discern the difference between an unprotected idea and an original, protected expression.¹⁴² Some decisions after *Baker v. Selden*¹⁴³ have held that ideas and expressions merge in situations that present limited modes of expression for a single idea.¹⁴⁴ As a result, these expressions can-

¹³⁷ See *supra* notes 51, 61, 119, 121 (text and comments on Sections 101-103 of the 1976 Act).

¹³⁸ The Court emphasized that the originality requirement is not especially stringent. *Feist Publications*, 111 S. Ct. at 1294. Rather, the Court observed that a work need only display some minimum level of creativity to pass the originality test. *Id.* Thus, the Court presumed that the vast majority of compilations would pass this test. *Id.* Accord M. LEAFFER, *supra* note 81, at 36 (standard of originality is a *de minimis* one; "almost any distinguishable variation of a prior work will constitute a sufficient quantity of originality").

¹³⁹ Compare MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, 3-12 (1988) (necessary quantum of originality is that which is more than trivial) with *Gracen v. Bradford Exchange*, 698 F.2d 300, 305 (7th Cir. 1983) (work is original if substantially different from another work).

¹⁴⁰ The determination of originality in literary or artistic endeavors is susceptible to a subjective assessment of the scrutinized work's aesthetic qualities. See Note, *supra* note 51, at 946. The concept of originality with which the courts must deal—the legal concept—requires an objective view of the creativity of the work. *Id.* Although factual compilations do not necessarily lend themselves to aesthetics, courts must vigilantly refuse to succumb to subjective reasoning in assessing originality. See *id.*

¹⁴¹ The potential result of such subjectivity is inconsistent application of the originality standard in an area of law already rife with ambiguities. See, e.g., *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972) (words and short phrases considered unoriginal by the Copyright Office although other authorities argued short phrases were capable of originality); *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776, 781-82 (S.D.N.Y. 1968) (plastic flowers deemed original creations although artificial corsages denied copyright for lack of originality); *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544-45 (2d Cir. 1959) (commercial box labels denied copyright on originality grounds).

¹⁴² See LEAFFER, *supra* note 67, at 50 ("The idea-expression distinction is left undefined in the Copyright Act The idea-expression dichotomy is easy to state but becomes more difficult and elusive to apply in practice"). *Id.*

¹⁴³ 101 U.S. 99 (1880). See also *supra* note 87 (discussion of *Baker*).

¹⁴⁴ See, e.g., *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967). In *Morrissey*, the plaintiff owned the copyright in a set of contest rules. *Id.* at

not be protected.¹⁴⁵

In *Feist Publications*, Rural's directory was capable of expression in a finite number of forms, consisting of names, addresses and telephone exchanges in limited combinations.¹⁴⁶ Because such arrangements typically lack the modicum of creativity¹⁴⁷ required by the 1976 Act,¹⁴⁸ idea and expression will likely merge into unprotected expression.¹⁴⁹ Consequently, without a clear delineation between idea and expression, the dichotomy becomes a tenuous foundation upon which to repudiate the sweat of the brow theory.

Industrious collection is an equitable remedy against the possible merger of idea and expression, considering the widespread potential for unjust enrichment.¹⁵⁰ Indeed, a consideration of the equities reinforces the natural right of authorship by defending the notion of a natural right to the fruits of one's labor. This right is deemed by some to be just as much a part of copyright law as the balancing of economic incentives to produce creative works with the right to disseminate them.¹⁵¹

Considering the apparent injustice of applying the idea/ex-

676. Morrissey contended that the defendant used one of his rules in its own promotional contest. *Id.* The court allowed the defendant to copy the plaintiff's contest instructions because contest rules can only be expressed in a limited number of ways. *Id.* at 678-79.

¹⁴⁵ Nevertheless, the question remains whether the idea itself can be so fully developed as to deserve copyright protection. Accordingly, Shakespearean characters, Einstein's *Doctrine of Relativity*, and Darwin's *Origin of the Species*, to name but a few possibilities, present an unusual twist to the idea/expression dichotomy. See LEAFER, *supra* note 81, at 53 (positing that the line must be drawn between mere ideas that sketch the general nature of the project and a fully-developed characterization of an event).

¹⁴⁶ See *Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991).

¹⁴⁷ See Denicola, *supra* note 51, at 527 (asserting that alphabetical or numerical arrangements are not the "sorts of works associated with artistic inspiration").

¹⁴⁸ See *supra* text accompanying notes 132-34.

¹⁴⁹ In *Feist Publications*, the Court suggested that the prerequisite of originality is not met by a routine selection or arrangement of data. *Feist Publications*, 111 S. Ct. at 1296.

¹⁵⁰ The *Feist Publications* decision apparently countenances substantial reproduction of commonplace "standard" compilations. *Feist Publications*, 111 S. Ct. at 1296-97. The Court implied that any directory organized alphabetically or numerically meets this description. *Id.* Indeed, the Court stated that if Rural's white pages listings were a likely candidate for copyright, then no collection of facts could fail. *Id.* at 1297.

Nonetheless, emphasizing arrangement over effort ignores the problem of unjust enrichment. See, e.g., Denicola, *supra* note 51, at 528 ("It is the effort of collecting that must be rewarded in order to . . . safeguard the author's investment of time and money, not the act of placing Abbot before Baker").

¹⁵¹ See Denicola, *supra* note 51, at 519-520.

pression dichotomy to factual compilations,¹⁵² the most disquieting aspect of the *Feist Publications* decision is the Court's failure to suggest a more unified approach to infringement actions involving fact-based works.¹⁵³ Of the approaches adopted to handle factual compilations,¹⁵⁴ the most reasonable attempts to balance the economic incentive to create with an author's property interest in the work created. This balancing approach asks whether a subsequent compilation author used an earlier author's work for a legitimate purpose that was not commercially damaging to the earlier author. This standard shifts the focus of infringement away from the ambiguous nature of the originality requirement and its idea/expression counterpart. Such a focus enhances public policy goals that seek to promote general dissemination of knowledge by ensuring that subsequent compilers will have free access to prior works for legitimate ends.¹⁵⁵ Interestingly, this balancing approach also forms the underlying rationale of the fair use doctrine.¹⁵⁶

Had the Court used a balancing approach as the basis for its

¹⁵² Current copyright law, codifying the idea/expression dichotomy, does not always promote creativity and free flow of information by protecting expressions rather than ideas because the line dividing the two is often elusive. See *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 582-83 (1985) (Brennan, J., dissenting).

¹⁵³ Infringement analysis requires the ability to distinguish between protectable and nonprotectable elements. See *Lum*, *supra* note 51, at 953. Because this distinction is often problematic in cases involving compilations, it is difficult to apply traditional analysis to these works. *Id.*

¹⁵⁴ The most notable approach to problems of copyright in factual compilations has been the use of state misappropriation law. *Id.* The common law tort of misappropriation has been employed to prohibit the appropriation of facts. *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918). The *International News Serv.* Court formulated a standard which called for the protection of one's property right in a creation that arises from extensive labor or expense. *Id.* at 239-40. The Court asserted that unauthorized use of another's creation, resulting in commercial damage to the creator, constitutes misappropriation. *Id.* at 240. This remedy, however, relies on state law, inviting potential for inconsistent application and federal preemption. See *Lum*, *supra* note 51, at 949-50. The validity of the misappropriation doctrine has also been questioned by the Supreme Court on grounds that state law prohibitions against copying interfere with the constitutional policy of free access to information. See *Denicola*, *supra* note 51, at 517-18 n.7.

¹⁵⁵ The interest in dissemination of information is especially compelling in situations wherein the copyright owner has little to lose by allowing access to a copyrighted work. See LEAFFER, *supra* note 67, at 318-19.

¹⁵⁶ See *Denicola*, *supra* note 51, at 524 n.44. Not surprisingly, *Feist* did not invoke the defense of fair use. Indeed, confusion arguably exists whether factual compilations can survive application of the idea/expression dichotomy and thus attain copyright. Without a valid copyright in the preexisting factual work, the subsequent compilation author need not invoke the fair use defense as a basis for using parts of the earlier work. The potential difficulty with finding copyright in factual

reasoning in *Feist Publications*, the Court probably would have reached the same decision in favor of Feist. For example, one of the simplest cases to justify on balancing grounds is one wherein the defendant made a productive, non-commercial use of the plaintiff's work.¹⁵⁷ Feist used customer information from Rural's copyrighted directory in preparation of Feist's multi-area directory.¹⁵⁸ Feist's productive, non-commercial¹⁵⁹ use of Rural's directory is justifiable on balancing grounds because it is consistent with the public interest goal of production and dissemination of creative works. This public interest goal is most evident in situations such as that presented in *Feist Publications* wherein access to one creative work enables another author to build on it and produce a new work of authorship.

Application of this balancing principle comports with the general philosophy of copyright at common law. The common law view of copyright separated the author from the work of authorship, emphasizing the economic value of production and dissemination of information.¹⁶⁰ Thus, the public welfare goal of copyright at common law was consistent with the public interest goals supported by application of the balancing approach. Perhaps the Court will find an opportunity to examine this approach in a subsequent case and provide lower courts with a solid framework for the resolution of copyright disputes involving fact-based works.

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complications, therefore, may render the fair use doctrine obsolete as an approach to infringement actions involving fact-based works.

¹⁵⁷ See LEAFFER, *supra* note 67, at 319. Productive, non-commercial uses of a copyrighted work benefit the public because the market for the work is unharmed, and incentives to produce works of authorship are not suppressed. *Id.*

¹⁵⁸ *Feist Publications*, 111 S. Ct. at 1286-87.

¹⁵⁹ Arguably, Feist's directory is for non-commercial use because it is distributed free of charge to Feist's customers. *See id.* at 1286.

¹⁶⁰ By contrast, the civil law views the author's work as an extension of the author's personality. See LEAFFER, *supra* note 67, at 2. As a result, the author is deemed to possess a moral entitlement to control the product of intellectual labor. *See id.*