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## Reach Out and Touch Someone: Reflections on the 25th Anniversary of Feist Publications, Inc. v. Rural Telephone Service Co.

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# HISTORICAL ESSAY

## REACH OUT AND TOUCH SOMEONE: REFLECTIONS ON THE 25TH ANNIVERSARY OF *FEIST PUBLICATIONS, INC. V. RURAL TELEPHONE SERVICE CO.*\*

*Craig Joyce*\*\* & *Tyler T. Ochoa*\*\*\*

### ABSTRACT

2016 marks the 25th anniversary of the Supreme Court's opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.*, one of the Court's landmark opinions in copyright law, and one that continues to define the standard of originality for copyrighted works in general and compilations of data in particular. The *Feist* case, however, was an unlikely candidate for landmark status. Only a handful of court opinions and academic authors had expressed dissatisfaction with the existing state of the law concerning originality and data compilations.

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Further, the Tenth Circuit’s opinion in *Feist* was a two-page, unpublished decision that could not be cited as precedent. The Supreme Court nonetheless granted certiorari and resolved a circuit split by rejecting decisively the “sweat of the brow” doctrine. In doing so, and in unexpectedly grounding its opinion in the Constitution’s Copyright Clause, the Court firmly reinvigorated a standard for originality that has proven durable, flexible, and occasionally controversial in meeting the challenges of copyright law in the 21st century.

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## I. INTRODUCTION

2016 marks the 25th anniversary of the Supreme Court's opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>1</sup> one of the Court's landmark opinions in copyright law—and one that continues to define the standard of originality for copyrighted works in general and compilations of data in particular. The *Feist* case, however, was an unlikely candidate for landmark status. Only a handful of court opinions and academic authors had expressed dissatisfaction with the existing state of the law concerning originality and data compilations.<sup>2</sup> Further, the Tenth Circuit's opinion in *Feist* was a two-page, unpublished decision that could not be cited as precedent.<sup>3</sup> The Supreme Court nonetheless decided to “reach out and touch someone”<sup>4</sup> by granting certiorari,<sup>5</sup> and it resolved a circuit split by rejecting decisively the “sweat of the brow” doctrine.<sup>6</sup> In doing so, and in unexpectedly grounding its opinion in the

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1. 499 U.S. 340 (1991) (argued Jan. 9, 1991; decided Mar. 27, 1991). Hereinafter, any mention to *Feist*, without more, refers to this Supreme Court opinion.

2. See *infra* Part II.D.

3. *Rural Tel. Serv. Co. v. Feist Publ'ns, Inc.*, 916 F.2d 718 (10th Cir. 1990) (opinion reproduced in full as Appendix 3), *rev'd*, 499 U.S. 340 (1991). Indeed, in a September 11, 1990 letter to his fellow Justices, John Paul Stevens recommended that the Court grant certiorari in another telephone directory case, *Illinois Bell Telephone Co. v. Haines & Co.*, 905 F.2d 1081 (7th Cir. 1990), and not in *Feist*: “CA7's opinion . . . is published, unlike CA10's opinion in *Feist Publications*. Moreover, CA10's opinion does not explicitly resolve this issue [i.e., the degree of copyright protection properly afforded under 17 U.S.C. § 103(b) to telephone directories and other compilations of facts] but affirms the district court's resolution.” Letter from Justice John Paul Stevens to Justice Harry A. Blackmun (Sept. 11, 1990) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 573, Folder 89-1909) (visited Oct. 29, 2015) [hereinafter Blackmun Papers]. Ultimately, Justice O'Connor and the Court took a quite different tack toward the issues presented in *Illinois Bell* and *Feist*—and utilized the latter as their vehicle for decision. Memorandum to the Conference from Justice O'Connor (Mar. 25, 1991) in Blackmun Papers.

4. In 1979, American Telephone and Telegraph Company (AT&T) urged people across the country to—metaphorically—“Reach Out and Touch Someone” through AT&T's telephone service. See *Bell System “Reach Out and Touch Someone” Commercial* (Apr. 2, 1979), <https://www.youtube.com/watch?v=HO17B-ACRn0> [<https://perma.cc/XYE7-RHTE>]. The slogan and ad campaign proved to be highly popular, even spawning a 2001 episode of the television courtroom comedy series *Ally McBeal*. *Ally McBeal: Reach Out and Touch* (20th Century Fox television broadcast Feb. 12, 2001), <http://www.imdb.com/title/tt0510336/> [<https://perma.cc/X6RC-P4P5>]. In 1984, reduced in scope after fighting federal antitrust litigation and now only formerly known as “Ma Bell,” AT&T faced a new competitive marketplace accompanied by new advertising imperatives. A sharper-edged campaign, “The Right Choice,” rolled out at the end of 1985. See *The Right Choice*, AT&T TECH CHANNEL (July 25, 2012), <http://techchannel.att.com/play-video.cfm/2012/7/25/at&t-archives-the-right-choice> [<https://perma.cc/JB2V-5VQ6>].

5. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 498 U.S. 808 (1990).

6. *Feist*, 499 U.S. at 352–54. See *infra* Part III.B.

Constitution's Copyright Clause, the Court firmly reinvigorated a standard for originality that has proven durable, flexible, and occasionally controversial in meeting the challenges of copyright law in the 21st century; and it also provided meaningful, if incomplete, guidance as to what aspects of compilation works are copyrightable under current U.S. law.

Part II of this essay surveys the law of originality before *Feist*, from the 19th-century cases on which *Feist* primarily relied, to the early 20th-century cases setting forth the doctrine then known as "industrious collection," to the late 20th-century cases that began to question the doctrine. Part III tells the story of the *Feist* case itself and analyzes the opinion. Part IV looks at the aftermath of the case and briefly discusses its influence on U.S. copyright law. Part V concludes.

## II. BEFORE *FEIST*

### A. *Originality in the 19th Century*

Article I, Section 8, Clause 8 of the U.S. Constitution provides:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.<sup>7</sup>

The grammatical structure of the Clause suggests that copyrights are granted to authors for their writings, to promote the progress of "science" (meaning "knowledge" generally, in 18th-century parlance),<sup>8</sup> while patents are granted to inventors for their discoveries, to promote the progress of the "useful Arts"<sup>9</sup>

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7. U.S. CONST. art. I, § 8, cl. 8. For historical background concerning this clause, see generally Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC'Y U.S.A. 675 (2002).

8. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (defining "science" as "knowledge" or "any art of species of knowledge"); NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (defining "science" as, "[i]n a general sense, knowledge, or certain knowledge").

9. EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 11–12, 115–33 (2002); Sean O'Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733, 809–26 (2015); see also *Golan v. Holder*, 132 S. Ct. 873, 884 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 192–93 (2003); *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966). *But see* Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. REV. 421, 463–69 (2009) (contending that the phrase "Science and useful Arts" should *not* be read disjunctively).

(meaning “technology,” as distinguished from the liberal arts).<sup>10</sup> “Progress” had two meanings in the 18th century: it meant both an improvement in quality, as it does today, and also “dissemination” or “spread.”<sup>11</sup> Thus, patents are granted to promote the creation and dissemination of technology, in the form of new inventions, while copyrights are granted to promote the creation and dissemination of knowledge, in the form of new works of authorship.

The Copyright Act of 1790 potentially granted copyright protection, subject to conditions, to “any map, chart, book or books.”<sup>12</sup> An 1802 amendment added any “print or prints” made by engraving or etching,<sup>13</sup> while the Copyright Act of 1831 added any “musical composition” to the list.<sup>14</sup> These acts did not expressly set forth any minimum standard which a work had to meet in order to qualify for copyright protection; however, all of them used the word “author” in identifying the person entitled to copyright protection. The word “author” implies some degree of originality, because “the writer cannot have been the author of what he has borrowed from another.”<sup>15</sup> Hence, the question became what degree of “authorship” was necessary to qualify for copyright protection.

As early as 1821, Justice Bushrod Washington, riding circuit, expressed the view that copyright must be limited to matters which were original to the plaintiff, and that if the elements comprising the work were not original, a copyright

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10. 1 JOHNSON, *supra* note 8 (defining “art” as “[t]he power of doing something not taught by nature and instinct,” and distinguishing “the liberal arts” from “a trade,” such as “the art of making sugar”); WEBSTER, *supra* note 8 (defining “art” as “[t]he disposition or modification of things by human skill” and distinguishing the “useful or mechanic” arts, “those in which the hands and body are more concerned,” from the “liberal or polite” arts, “those in which the mind or imagination is chiefly concerned; as poetry, music and painting”); *see also* Sean O’Connor, *The Lost “Art” of the Patent System*, 2015 U. ILL. L. REV. 1397, 1447–54 (documenting the changing meaning of “art”).

11. Malla Pollack, *What Is Congress Supposed to Promote? Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 794–809 (2001); *see also* 2 JOHNSON, *supra* note 8 (defining “progress” as “[c]ourse; procession” and “[a]dvancement; motion forward,” or “[i]ntellectual improvement; advancement in knowledge”); WEBSTER, *supra* note 8 (defining “progress” as “[a] moving or going forward; a proceeding onward” and “[a] moving forward in growth; increase” or “[a]dvance in knowledge; intellectual or moral improvement”).

12. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124.

13. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171.

14. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436.

15. GEORGE TICKNOR CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT* 169 (1847). Chapter V of Curtis’s treatise is titled “Of the Originality Necessary for a Valid Copyright.” *Id.*; *see also* WEBSTER, *supra* note 8 (defining “author” as “[o]ne who produces, creates, or brings into being”).

could only exist in an original selection or arrangement of them. He thus declined copyright protection to an engraving consisting in part of the coats of arms of the states, signatures copied from the Declaration of Independence, and three portraits copied from existing paintings:

It is then quite obvious, that neither the design . . . nor the parts which composed it, were the invention of the plaintiff. The former, which constitutes the combination, or arrangement of the parts, owed its conception and delineation to Mr. Bridport . . . The portraits, arms of the United States, and of the several states, were, long before the year 1816, printed or drawn, and were copied by the artists employed by the plaintiff, as were also the original signatures to the declaration.<sup>16</sup>

Similarly, in *Clayton v. Stone*, Justice Smith Thompson, riding circuit, declined to extend copyright protection to “the daily price-current or review of the market, compiled by plaintiffs,”<sup>17</sup> despite the effort the plaintiff expended in compiling the facts:

[T]he object [of the Copyright Act] was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. . . . Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.<sup>18</sup>

In *Emerson v. Davies*, Justice Joseph Story, riding circuit, explained that an original selection and arrangement of materials could be protected by copyright, even if the materials themselves were copied from other sources and were therefore not original:

The question is not, whether the materials which [the plaintiff] used are entirely new, and have never been used

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16. *Binns v. Woodruff*, 3 F. Cas. 421, 424 (C.C.D. Pa. 1821) (No. 1,424); see also *Webb v. Powers*, 29 F. Cas. 511, 517 (C.C.D. Mass. 1847) (No. 17,323) (“a prior compiler is not permitted to monopolize what was not original in himself, and what must be nearly identical in all such works on a like subject”); *Gould v. Hastings*, 10 F. Cas. 877, 877 (C.C.S.D.N.Y. 1840) (No. 5,639) (Thompson, J.) (“the question [is] whether these law reports are subjects of copyright; and, if they may be so to any extent, what parts are to be regarded *original* matter entitled to be so protected”) (emphasis added).

17. 5 F. Cas. 999, 999 (C.C.S.D.N.Y. 1829) (No. 2,872).

18. *Id.* at 1003. The U.S. Supreme Court later quoted this passage with approval in *Baker v. Selden*, 101 U.S. 99, 105 (1880), and in *Feist*, 499 U.S. 340, 364 (1991). See *infra* note 28.

before . . . The true question is, whether the same plan, arrangement and combination of materials have been used before . . . He may have borrowed much of his materials from others, but if they are combined in a different manner from what was in use before, . . . he is entitled to a copy-right in the book embodying such improvement.<sup>19</sup>

At the same time, there developed another line of cases that theorized instead that a person was entitled to a copyright solely as a result of the expenditure of labor, and that another who copied facts from the first “author,” instead of independently discovering the facts for himself or herself, was an infringer.<sup>20</sup> In *Blunt v. Patten*, for example, the plaintiff had undertaken to survey the northeastern coast of the United States and had discovered that the south shoal off the coast of Nantucket lay some twenty miles north of its previously reported location. The plaintiff published a marine chart, on which he secured a copyright, that included that information.<sup>21</sup> He sought an injunction against the publication by the defendant of a marine chart that purportedly copied the information from the plaintiff’s chart. Justice Thompson, riding circuit, instructed the jury as follows:

[T]he plaintiff could not, it was true, obtain a copyright in the shoal itself, nor in the original elements [i.e., natural features] of his charts; but . . . he had a right to the results of his labors and surveys. The defendant might resort to the original materials [i.e., natural features] of the chart, and survey for himself; but he could not avail himself, either in whole or in part, of the surveys of the plaintiff. The law was intended to secure to authors the fruits of their skill, labor and genius, for a limited time; and if in this instance the defendant had availed himself of the

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19. 8 F. Cas. 615, 618–19 (C.C.D. Mass. 1845) (No. 4,436); *see also id.* at 619 (“In truth, every author of a book has a copy-right in the plan, arrangement and combination of his materials, . . . if it be new and original in its substance.”).

20. *See generally* Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate Over Copyright in News*, 27 CARDOZO ARTS & ENT. L.J. 321, 328–32 (2009); Miriam Bitton, *Trends in Protection for Informational Works Under Copyright Law in the Nineteenth and Twentieth Centuries*, 13 MICH. TELECOMM. TECH. L. REV. 115, 123–27 (2006); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1875–79 (1990).

21. *Blunt v. Patten*, 3 F. Cas. 762, 762 (C.C.S.D.N.Y. 1828) (No. 1,579); *see also Blunt v. Patten*, 3 F. Cas. 763 (C.C.S.D.N.Y. 1828) (No. 1,580) (opinion in the same case denying a preliminary injunction, but issuing a permanent injunction after jury verdict of copying).



surveys of the plaintiff in compiling his chart, the plaintiff was entitled to a verdict.<sup>22</sup>

Likewise, Justice Story, riding circuit, agreed in dicta that a plaintiff could obtain a copyright in factual information obtained through a survey:

A man has a right to the copy-right of a map of a state or country, which he has surveyed or caused to be compiled from existing materials, at his own expense, or skill, or labor, or money. Another man may publish another map of the same state or country, by using the like means or materials, and the like skill, labor and expense. But then he has no right to publish a map taken substantially and designedly from the map of the other person, without any such exercise of skill, or labor, or expense.<sup>23</sup>

The tension between these two lines of cases was seemingly resolved by the U.S. Supreme Court in a series of cases decided under the 1870 Act.<sup>24</sup> In *The Trade-Mark Cases*, the Court held that the trademark portion of the 1870 Act was not authorized by the Copyright and Patent Clause, because “neither originality, invention, discovery, science, nor art is in any way essential to the right conferred by that act.”<sup>25</sup> The Court explained:

[W]hile the word *writings* may be liberally construed . . . it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected

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22. *Blunt*, 3 F. Cas. at 762; *see also Blunt*, 3 F. Cas. at 764 (“[T]he complainant has, by devoting his time and expending his money, discovered that error and corrected it in his chart, . . . and he ought to be protected in the enjoyment of the profits of his enterprise.”); *id.* at 764–65 (“[T]he natural objects from which the charts are made are open to the examination of all, and any one has a right to survey and make a chart. And if such surveys and charts are all correct, all will be alike, but no one would complain of his rights having been infringed . . . A right, in such a subject, is violated only when another copies from the chart of him who has secured the copyright, and thereby availing himself of his labor and skill.”).

23. *Emerson*, 8 F. Cas. at 619; *see also Gray v. Russell*, 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839) (No. 5,728) (Story, J.) (“[S]uppose a person has bestowed his time and skill and attention, and made a large series of topographical surveys in order to perfect such a map . . . It is clear, that notwithstanding this production, he cannot supersede the right of any other person to use the same means by similar surveys and labors to accomplish the same end. But it is just as clear, that he [i.e., the other person] has no right, without any such surveys and labors, to sit down and copy the whole of the map already produced by the skill and labors of the first party, and thus to rob him of all the fruit of his industry, skill, and expenditures.”).

24. Act of July 8, 1870, ch. 230, 16 Stat. 198. The 1870 Act covered “any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts.” § 86, 16 Stat. at 212.

25. 100 U.S. 82, 94 (1879).

are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like. The trade-mark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it. . . . [It] does [not] depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought.<sup>26</sup>

This language clearly indicates that copyright protection requires some “fancy or imagination, genius, or laborious thought”; and while it can be read to imply that labor can be protected,<sup>27</sup> the opinion emphasizes that it must be laborious *thought*, and *intellectual* labor, involving “the creative powers of the mind.” Thus, *The Trade-Mark Cases* imply that copyright cannot be conferred as a reward for the noncreative labor of recording or discovering facts.

In *Baker v. Selden*,<sup>28</sup> the Court held that the copyright in a book explaining a new system of bookkeeping was limited to the author’s expression in explaining the system, and did not extend to the system itself, *even assuming that the system was copied by another*:

[When] the teachings of science and the rules and methods of useful art . . . [are] embodied and taught in a literary composition or book, their essence consists only in their statement. This alone is what is secured by the copyright.<sup>29</sup>

In so holding, the Court distinguished between the originality required for a copyright and the novelty required for a patent:

The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing

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26. *Id.* (emphasis in original).

27. See Brauneis, *supra* note 20, at 326.

28. 101 U.S. 99 (1880). For the historical background and an analysis of the case, see Pamela Samuelson, *The Story of Baker v. Selden: Sharpening the Distinction Between Authorship and Invention*, in *INTELLECTUAL PROPERTY STORIES* 159 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006). While the Supreme Court in *Feist* did not rely on *Baker* as a principal authority to the degree that it did *The Trade-Mark Cases* and *Burrow-Giles Lithographing Co. v. Sarony*, it did end its opinion with a flourish by quoting from *Baker*: “[G]reat praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991) (quoting *Baker*, 101 U.S. at 105) (internal quotations omitted). The quote, not original to *Baker*, was drawn from *Clayton v. Stone*, 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2,872). See *supra* notes 17–18 and accompanying text.

29. *Baker*, 101 U.S. at 104.

described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. . . .

The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. . . . The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.<sup>30</sup>

Although *Baker* concerned the distinction between “Writings” and “useful Arts,” the same reasoning can be applied to facts. Indeed, *Baker* itself states that the same principles apply to both facts and methods: “Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.”<sup>31</sup> The Court gave no indication that the “truths of a science” (i.e., facts) could be protected by copyright, even if they were discovered by the “author.”

Finally, in *Burrow-Giles Lithographic Co. v. Sarony*,<sup>32</sup> the Court rejected an argument that the Copyright Clause did not permit Congress to extend copyright to photographs because “a photograph is not a writing nor the production of an author.”<sup>33</sup> In a key passage, the Court defined the constitutional terms:

An author . . . is “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.” Worcester. . . .<sup>34</sup> By writings in that clause is meant the literary productions of those authors, and congress very properly has declared these to include all forms of writing, printing, engraving, etching, [et]c., by which the ideas in the mind of the author are given visible expression. . . .

We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of

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30. *Id.* at 102, 105.

31. *Id.* at 100–01.

32. 111 U.S. 53 (1884). For the historical background and an analysis of the case, see Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004).

33. 111 U.S. at 56.

34. The Court actually misquotes Worcester’s definition, which reads “one who composes a work of science or literature” rather than “completes.” JOSEPH E. WORCESTER, *DICTIONARY OF THE ENGLISH LANGUAGE* 99 (1860) (emphasis added).

photographs, so far as they are representatives of original intellectual conceptions of the author.<sup>35</sup>

The Court then turned to the defendant's argument that the production of a photograph "involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction."<sup>36</sup> The Court responded by quoting the third finding of fact:

"... plaintiff made the same ... entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit." These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author.<sup>37</sup>

As a result of *Burrow-Giles*, the standard of copyright was firmly established. To qualify for copyright, a work had to be an "original intellectual conception," or "the product of [one's] intellectual invention." Merely recording facts, without adding any original thought, was not a sufficient basis for copyright protection.

In a coda to this line of cases, the Court held in *Higgins v. Keuffel* that copyright did not extend to the printed labels attached to bottles of ink:

The clause of the Constitution under which Congress is authorized to legislate for the protection of authors and inventors ... evidently has reference only to such writings and discoveries as are the result of intellectual labor. ... It does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles, and no possible influence upon science or the useful arts.<sup>38</sup>

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35. *Burrow-Giles Lithographic Co.*, 111 U.S. at 57–58.

36. *Id.* at 59.

37. *Id.* at 60.

38. 140 U.S. 428, 430–31 (1891) (citing *The Trade-Mark Cases* 100 U.S. 82 (1879)).

In so holding, however, the Court added a sentence of dicta that seemed to raise the level of originality even higher:

To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose *other than as a mere advertisement* or designation of the subject to which it is attached.<sup>39</sup>

This proposition would be challenged in the first Supreme Court copyright case decided in the 20th century.

*B. Early 20th Century: "Industrious Collection"*

In *Bleistein v. Donaldson Lithographing Co.*,<sup>40</sup> the plaintiff Courier Lithographing Company (of which Bleistein was a co-owner) was commissioned to create three posters advertising "The Great Wallace Shows," a circus.<sup>41</sup> The defendant reproduced the posters, which had been properly registered for copyright, as the statute then required.<sup>42</sup> The trial court directed a verdict for the defendant on statutory grounds, holding that the posters were not "pictorial illustrations or works connected with the fine arts" within the meaning of the statute.<sup>43</sup>

The Sixth Circuit affirmed, construing the statute in accordance with what it saw as the constitutional purpose, in light of the four Supreme Court cases discussed above:

What we hold is this: that if a chromo, lithograph, or other print, engraving, or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts,

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39. *Id.* at 431 (emphasis added).

40. 98 F. 608 (C.C.D. Ky. 1899), *aff'd sub nom.*, *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993 (6th Cir. 1900), *rev'd sub nom.*, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). For the historical background and an analysis of the case, see Diane Leenheer Zimmerman, *The Story of Bleistein v. Donaldson Lithographing Company: Originality as a Vehicle for Copyright Inclusivity*, in *INTELLECTUAL PROPERTY STORIES* 77 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2005) [hereinafter *Bleistein Story*].

41. *Courier*, 104 F. at 993; *Bleistein Story*, *supra* note 40, at 82. Bleistein was the former president and owner of the Buffalo Courier newspaper, of which Courier Lithographing was a spin-off. *Id.* at 81–82.

42. *Id.* at 993–94.

43. *Bleistein*, 98 F. at 610–11. The court also raised, but did not decide, a constitutional question: "Inasmuch as the constitutional provisions above referred to only authorizes congress to promote the 'useful arts,' the curious might moot the question of the power to promote any but the useful arts, and consequently the lack of power to legislate to give exclusive privileges respecting the fine arts." *Id.* at 611. The trial court's error in assuming that copyright was intended to promote the "useful Arts," rather than "Science," was repeated by both the Circuit Court of Appeals, 104 F. at 996, and the Supreme Court, 188 U.S. at 249. *See supra* notes 7–10 and accompanying text.

within the meaning of the constitutional provision, to protect the “author” in the exclusive use thereof, and the copyright statute should not be construed as including such a publication . . . [A work] must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act . . . amending the provisions of the copyright law.<sup>44</sup>

The Supreme Court, in an opinion by Justice Holmes, reversed.<sup>45</sup> It dismissed the constitutional argument in two brief sentences,<sup>46</sup> and then set forth an extremely modest standard of originality:

It is obvious also that the plaintiffs’ case is not affected by the fact . . . that the pictures represent actual groups—visible things. . . . [E]ven if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.<sup>47</sup>

The Court construed the statutory phrase “pictorial illustrations” broadly, and implicitly distinguished *Higgins v. Keuffel*:

[T]he act, however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to “illustrations or works connected with the fine arts” is not works of little merit or of humble degree, or illustrations addressed to the less educated

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44. *Courier*, 104 F. at 996.

45. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Justice Holmes was the newest member of the Court, having been appointed in 1902. The dissent, for two members of the Court, was written by Justice Harlan, who was the only Justice remaining from the Court that had decided *The Trade-Mark Cases*, *Baker v. Selden*, and *Burrow-Giles Lithographing Co. v. Sarony*.

46. We shall do no more than mention the suggestion that painting and engraving, unless for a mechanical end, are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs.

*Id.* at 249 (citing *Burrow-Giles Lithographing Co. v. Sarony*, 111 U.S. 53 (1884)).

47. *Id.* at 249–50 (citations omitted).

classes; it is “prints or labels designed to be used for any other articles of manufacture.” Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a real use—if use means to increase trade and to help to make money. A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement.<sup>48</sup>

Finally, in a famous passage, the Court set forth what is now known as the “aesthetic non-discrimination principle”:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.<sup>49</sup>

*Bleistein* was widely interpreted as lowering the standard of originality that had been established in the late 18th-century cases.<sup>50</sup> For example, in *Cleland v. Thayer*, the court held that a photograph of a natural landscape was copyrightable, without any inquiry into creativity.<sup>51</sup> Under *Bleistein*, catalogs of fashion designs and brass fixtures were held to be copyrightable,<sup>52</sup> as

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48. *Id.* at 251.

49. *Id.* at 251–52. For more on the aesthetic non-discrimination principle, see, for example, CRAIG JOYCE, TYLER OCHOA, MICHAEL CARROLL, MARSHALL LEAFFER & PETER JASZI, COPYRIGHT LAW 85 (10th ed. 2016).

50. *Bleistein* Story, *supra* note 40, at 101; Oren Bracha, *Commentary on Bleistein v. Donaldson Lithographing Co. (1903)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (2008), [http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary\\_us\\_1903](http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_us_1903) [<https://perma.cc/L3V3-BA83>]; see, e.g., *Ansehl v. Puritan Pharm. Co.*, 61 F.2d 131, 134–35 (8th Cir. 1932) (“The *Bleistein* case established a new and liberal standard with respect to the originality or artistic merit required to entitle illustrated advertising matter . . . to the protection of copyright statutes.”); *Empire City Amusement Co. v. Wilton*, 134 F. 132, 133 (C.C.D. Mass. 1903) (“The Supreme Court has lately shown a tendency to widen, rather than to narrow, the scope of the copyright act.”) (citing *Bleistein*, 188 U.S. 239 (1903)).

51. 121 F. 71 (8th Cir. 1903); see also *Edison v. Lubin*, 122 F. 240 (3d Cir. 1903) (upholding copyright in a short motion picture of the launching of a yacht).

52. See *Nat'l Cloak & Suit Co. v. Kaufman*, 189 F. 215 (C.C.M.D. Pa. 1911); *J.H. White Mfg. Co. v. Shapiro*, 227 F. 957 (S.D.N.Y. 1915).

were labels and advertisements for goods consisting primarily of text.<sup>53</sup> But the most significant effect of *Bleistein* was that it revived the notion that the investment of labor, by itself, was a sufficient basis for copyright protection.

Several features of Holmes's opinion in *Bleistein* suggested that labor alone may entitle a person to a copyright. First, in observing that "[o]thers are free to copy the original [but t]hey are not free to copy the copy,"<sup>54</sup> the opinion implied that second comers had to independently discover facts, rather than copying facts from previous sources.<sup>55</sup> Second, Holmes supported that statement by citing *Blunt v. Patten*, a case which had expressly held that labor in discovering facts was protected by copyright.<sup>56</sup> Third, the court stated that "[t]he least pretentious picture has more originality in it than directories and the like, which may be copyrighted."<sup>57</sup> Fourth, the opinion indicated that if a work had a commercial value, then it was protected by copyright, without regard to whether it had any aesthetic or educational value. Indeed, the Court added, "[t]hat these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights,"<sup>58</sup> thus allowing a lower court to infer copyright protection from the very fact of copying, without any independent inquiry into originality or creativity at all.<sup>59</sup>

Moreover, the 1909 Copyright Act could be read to support the labor theory of copyright. It offered protection to "all the writings of an author"<sup>60</sup> and specified categories for registration, starting with "(a) Books, including composite and cyclopaedic

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53. See *Ansehl*, 61 F.2d at 136; *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823 (8th Cir. 1924).

54. *Bleistein*, 188 U.S. at 249.

55. Indeed, the Supreme Court itself later cited *Bleistein* in holding that trade secret law could protect the prices of futures contracts traded on a public exchange. *Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905) ("The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's.") (citing *Bleistein*, 188 U.S. at 249–50).

56. 3 F. Cas. 762 (C.C.S.D.N.Y. 1828) (No. 1,579); see *supra* notes 20–22 and accompanying text.

57. *Bleistein*, 188 U.S. at 250.

58. *Id.* at 252.

59. See, e.g., *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823, 828 (8th Cir. 1924) (recipes printed on a product label "serve to advance the culinary art. Defendant has tacitly admitted this, by appropriating them and distributing them in connection with its own products").

60. Act of March 4, 1909, Pub. L. No. 60-349, § 4, 35 Stat. 1076.



works, directories, gazetteers, and other compilations.”<sup>61</sup> The statute thus suggested that directories and other compilations could be protected by copyright *without regard to originality*, except, of course, for the fact that previous case law had held that “originality” was implicit in the concept of “authorship.”

The Supreme Court did not address the matter directly in *International News Service v. Associated Press*,<sup>62</sup> but it did state in dicta that facts could not be copyrighted. Even though newspapers, like directories, were expressly mentioned in the 1909 Copyright Act,<sup>63</sup> and even assuming that a newspaper was properly published with notice and registered, the Court said:

[T]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress ‘to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries[,]’ intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.<sup>64</sup>

It nonetheless held that the systematic copying of facts published by a direct competitor in the news-gathering business was unfair competition, and the language that it used could be read to support a labor theory of copyright:

[Defendant] admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant’s members is appropriating to itself the harvest of those who have sown.<sup>65</sup>

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61. § 5(a), 35 Stat. at 1076.

62. 248 U.S. 215 (1918). For the historical background and an analysis of the case, see Douglas G. Baird, *The Story of INS v. AP: Property, Natural Monopoly, and the Uneasy Legacy of a Concocted Controversy*, in *INTELLECTUAL PROPERTY STORIES* 9 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2005).

63. § 5(b), 35 Stat. at 1076.

64. *Int’l News Serv.*, 248 U.S. at 234 (citations omitted).

65. *Id.* at 239–40.

Moreover, the Court expressly quoted two British cases endorsing a labor theory of copyright.<sup>66</sup>

The most important case supporting the labor theory of copyright was *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*<sup>67</sup> The plaintiff's work was a directory "contain[ing] the names and addresses of jewelers classified under different heads, arranged alphabetically, and opposite the name of each jeweler appeared the trade-names and trade-marks used by him."<sup>68</sup> Learned Hand, then a District Judge, held that the copyright was valid: "I think that the plaintiff's book is clearly a 'directory' or an 'other compilation,' and as such it falls within section 5(a) of the Copyright Act . . . [I]t is not necessary in such cases that the matter compiled should itself be copyrighted; it may be in the public domain."<sup>69</sup> He also emphasized that the defendant had to verify the facts independently and could not copy them from the plaintiff:

Any directory is a compilation, without opportunity for variety in the statement of the facts recorded. All are free to repeat those facts, just because they are facts. Strictly, it might have been logical, therefore, to deny it any protection, till the statute expressly granted one. . . . Yet in some way subsequent compilers must be allowed to state the same facts, and *the question became what independent work they must do to acquire the requisite knowledge.*<sup>70</sup>

Hand declined to decide the case on the basis of copying facts, however, and instead held that the defendant infringed *by copying the pictures of third-party trademarks included in the plaintiff's directory.*<sup>71</sup> Even if the plaintiff's pictures were themselves copied from drawings supplied by the trademark owners, Hand held, the photos were subject to copyright under *Bleistein*:

In those instances in which the trade-mark owners sent on illustrations which could be directly transferred to cuts by

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66. *Id.* at 244 (discussing *Kelly v. Morris*, L.R. 1 Eq. 697 (1866), and *Morris v. Ashbee*, L.R. 7 Eq. 34 (1868)).

67. 274 F. 932 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922), *cert. denied*, 259 U.S. 581 (1922).

68. *Id.* at 933.

69. *Id.* at 934.

70. *Id.* at 935 (emphasis added).

71. *Id.* ("It appears to me quite enough that here the defendant copied the illustrations made by the plaintiff. . . . The plaintiff's illustration was not the trade-mark itself, but a picture of it, prepared by the plaintiff. The defendant was . . . bound to make an independent picture of the object itself").

photography, . . . even as to these, [*Bleistein*] rules, because no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike. Moreover, this all seems to me quite beside the point, because under section 5(j) photographs are protected, *without regard to the degree of "personality" which enters into them.*<sup>72</sup>

On appeal, the Second Circuit affirmed, holding that directories were copyrightable per se under *Bleistein* and the 1909 Copyright Act.<sup>73</sup> The court expressly endorsed the labor theory of copyright protection:

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 material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright . . .<sup>74</sup>

The court also affirmed the finding that defendant infringed by copying pictures from the plaintiff's directory, after sending them to the trademark owners to verify they were correct; and it confirmed infringement of the facts by the presence of common errors.<sup>75</sup> It concluded:

No one can legally take the results of the labor and expense which another has incurred in the publishing of his work, and thereby save himself "the expense and labor of working out and arriving at those results by some independent road."<sup>76</sup>

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72. *Id.* at 934 (emphasis added).

73. *Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co.*, 281 F. 83, 85 (2d Cir. 1922). Note that the published Second Circuit opinion mistakenly moved the apostrophe in the plaintiff's name.

74. *Id.* at 88.

75. *Id.* at 93–94.

76. *Id.* at 95. The opinion erroneously asserts that the quote is from *Jeffreys v. Boosey* (1854) 10 Eng. Rep. 681, 4 H.L.C. 815. In fact, the quote is from *Morris v. Ashbee*, L.R. 7 Eq. 34 (1868). The same quote was used by the Supreme Court in *International News Service v. Associated Press*, 248 U.S. 215, 244 (1918).

*Jeweler's Circular* was echoed by the Ninth Circuit in *Leon v. Pacific Telephone & Telegraph Co.*<sup>77</sup> Defendant Leon had copied information from a standard telephone directory issued by the plaintiffs, and had rearranged the information in numerical order to publish a reverse-lookup telephone directory.<sup>78</sup> The court held that the copyright in plaintiff's directory was valid, relying on both *Bleistein* and *Jeweler's Circular*,<sup>79</sup> and emphasizing the labor that went into compiling the plaintiff's directory.<sup>80</sup> The court also held that the copyright was infringed by copying the facts, even though they were rearranged in numerical order:

[I]n preparing this book the defendants have utilized, wholesale and without permission, lists prepared by the plaintiffs at much trouble and expense. In so doing they have appropriated the result of this labor and expense to their own use, and even if they have injured the plaintiffs in no other way, they have at any rate deprived them of the advantage, which their copyright conferred on them.<sup>81</sup>

Thus, by the mid-20th century, it was seemingly well-established that labor alone was a proper basis of copyright protection, and that second comers could not copy facts gathered by another without doing independent research.

### C. A Detour: On the Origin of "Sweat of the Brow"

The phrase "sweat of the brow" was first used in a copyright case in *Amsterdam v. Triangle Publications*.<sup>82</sup> Ironically, however, in *Amsterdam* the district court *denied* copyright protection to the plaintiff's map, which had been photographically copied by the defendant, on the ground that the plaintiff had merely copied the information on its map from other maps, without doing any independent surveying:

. . . Neither the plaintiff nor anyone on his behalf made any actual surveys or investigations of any roads, county lines, township lines, creeks, rivers or railroad lines. All this information was obtained from other maps in the

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77. 91 F.2d 484 (9th Cir. 1937).

78. *Id.* at 484–85.

79. *Id.* at 486.

80. *Id.* at 485–86 ("It is obvious from this evidence that the business of getting out a directory is an expensive, complicated, well-organized endeavor, requiring skill, ingenuity, and original research.")

81. *Id.* at 487 (quoting *Weatherby & Sons v. Int'l Horse Agency & Exch. Ltd.* [1910] 2 Ch. 297 at 304 (Eng.)).

82. 93 F. Supp. 79 (E.D. Pa. 1950), *aff'd*, 189 F.2d 104 (3d Cir. 1951).

plaintiff's possession or in the possession of the township and municipal authorities. . . .

. . . The plaintiff spent considerable time and effort to assemble and prepare this information for publication but did very little, if any, original work. . . .

. . . The presentation of ideas in the form of books, movies, music and other similar creative work is protected by the Copyright Act. However, the presentation of information available to everybody, such as is found on maps, is protected only when the publisher of the map in question obtains originally some of that information by the sweat of his own brow. Almost anybody could combine the information from several maps onto one map, but not everybody can go out and get that information originally and then transcribe it into a map.

The Third Circuit affirmed the result on the opinion of the District Court,<sup>83</sup> adding: "We think there is no doubt that in order for a map to be copyrightable its preparation must involve a modicum of creative work."<sup>84</sup>

The reasoning and result in *Amsterdam* is the complete opposite of the industrious collection cases. The court expressly found that the plaintiff had expended labor in compiling its map, and that the defendant had photographed the defendant's map as a starting point, while adding various historic sites. Nonetheless, it denied copyright protection, announcing a standard of originality that would exclude virtually all compilations of information.

Fortunately, the "no mercy to compilers" approach adopted in *Amsterdam* appears to be something of a dead end in the case law. It was cited in only a handful of cases denying copyright protection,<sup>85</sup> and it was just as frequently cited in cases finding sufficient originality.<sup>86</sup> *Amsterdam* was expressly rejected by the court in *United States v. Hamilton*,<sup>87</sup> in which Judge (and future

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83. *Amsterdam*, 189 F.2d at 105–06.

84. *Id.* at 106.

85. See, e.g., *M.M. Bus. Forms Corp. v. Uarco, Inc.*, 472 F.2d 1137, 1139–40 (6th Cir. 1973) (denying copyright to business form); *Donald v. Zack Meyer's T.V. Sales & Serv.*, 426 F.2d 1027, 1030 (5th Cir. 1970) (denying protection to a paragraph of legal boilerplate, six sentences long, printed at the bottom of plaintiff's invoices, because "[t]he plaintiff did no original legal research which resulted in a significant addition to the standard conditional sales contract," but "he merely made trivial word changes by combining various forms and servilely imitating the already stereotyped language found therein").

86. See, e.g., *Andrien v. S. Ocean Cty. Chamber of Commerce*, 927 F.2d 132, 134 & n.1 (3d Cir. 1991); *City of Ventura v. Blackburn*, 362 F.2d 515, 520 (9th Cir. 1966).

87. 583 F.2d 448, 450–51 (9th Cir. 1978).

Justice) Anthony Kennedy correctly held that originality could consist of an original selection and arrangement of public domain elements:

We rule that elements of compilation which amount to more than a matter of trivial selection may . . . support a finding that a map is sufficiently original to merit copyright protection. . . . [T]he elements of authorship embodied in a map consist not only of the depiction of a previously undiscovered landmark or the correction or improvement of scale or placement, but also in selection, design, and synthesis.<sup>88</sup>

The first case to apply the label “sweat of the brow” to the industrious collection doctrine was *Southern Bell Telephone & Telegraph Co. v. Associated Telephone Directory Publishers*.<sup>89</sup> There, the court correctly held that originality of a Yellow Pages telephone directory (business listings classified by category, with illustrations) was satisfied “where the directory is the product of subjective ‘selection, organization, and arrangement of the preexisting materials,’”<sup>90</sup> and it agreed with the treatise *Nimmer on Copyright* that “‘industriousness of the efforts to develop the information’ is not relevant to a determination of originality under the copyright statute.”<sup>91</sup> In the next half-decade, however, other courts facing directory cases also began to refer to the industrious collection doctrine as “sweat of the brow,” either in upholding claims to copyright based on industrious collection<sup>92</sup> or in rejecting the industrious collection doctrine.<sup>93</sup>

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88. *Id.* at 452. The court did note, however, that “merely trivial additions to or omissions from a preexisting map will not support a copyright . . . For example, copying the outline of the United States and the boundaries of each state cannot be said to involve any element of original choice or arrangement.” *Id.* at 452 n.5. *Accord*, *Darden v. Peters*, 488 F.3d 277, 287–88 (4th Cir. 1990) (minor variations to U.S. census maps were not sufficiently original for purposes of copyright registration).

89. 756 F.2d 801, 809 n.9 (11th Cir. 1985). An earlier case, *Eckes v. Card Prices Update*, 736 F.2d 859 (2d Cir. 1984), had used the phrase in stating that “the fruits of another’s labor in lieu of independent research obtained through the sweat of a researcher’s brow, does not merit copyright protection absent, perhaps, wholesale appropriation,” *id.* at 862, but *Eckes* did not cite any of the industrious collection cases or any cases involving directories.

90. *Southern Bell*, 756 F.2d at 809 (quoting NEIL BOORSTYN, COPYRIGHT LAW § 2:19 (1981)).

91. *Id.* (quoting 1 NIMMER ON COPYRIGHT § 3.04 (1984)). *Nimmer* apparently was the first treatise author to question the “industrious collection” doctrine, as evidenced in the quoted passage above, although he did not refer to the doctrine by that name, nor did he use the phrase “sweat of the brow.”

92. See, e.g., *Hutchinson Tel. Co. v. Fronteer [sic] Directory Co.*, 770 F.2d 128, 131–32 (8th Cir. 1985); *Bellsouth Advert. & Publ’g Co. v. Donnelley Info. Publ’g, Inc.*, 719 F. Supp. 1551, 1557 (S.D. Fla. 1988), *rev’d*, 999 F.2d 1436 (11th Cir. 1993) (en banc); *Regents of*

Thus, by the time *Feist* was decided in 1991, the Supreme Court legitimately could say that “the underlying notion . . . that copyright was a reward for the hard work that went into compiling facts” was “known alternatively as ‘sweat of the brow’ or ‘industrious collection.’”<sup>94</sup> But that statement had been true for only about six years. Prior to that, the two doctrines were separate and stood for entirely opposite propositions. It is therefore somewhat ironic that *Feist* would forever equate the “industrious collection” doctrine with the label “sweat of the brow.”

*D. Late 20th Century: Precursors of Change*

During the second half of the 20th century, prior to *Feist*, some courts continued to apply the industrious collection doctrine in cases involving maps and directories.<sup>95</sup> In one notable example, the doctrine made an appearance in a case involving an extensively-researched biography of Hans Christian Andersen. In *Toskvig v. Bruce Publishing Co.*, the defendant was held to have infringed twenty-four passages (translated from Danish sources) from the plaintiff’s book in her own work.<sup>96</sup> In rejecting a claim of fair use, the court said: “The question is not whether [defendant] Hubbard could have obtained the same information by going to the same sources, but rather did she go to the same sources and do her own independent research?”<sup>97</sup>

In other cases involving factual research and nonfiction works, however, a number of courts cast doubt on the industrious

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the Univ. of Minn. v. Applied Innovations, Inc., 685 F. Supp. 698, 708 (D. Minn. 1987).

93. See, e.g., *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 201 n.2 (9th Cir. 1989); *Fin. Info., Inc. v. Moody’s Inv’rs Serv., Inc.*, 808 F.2d 204, 207 (2d Cir. 1986) (“To grant copyright protection based merely on the ‘sweat of the author’s brow’ would risk putting large areas of factual research material off limits and threaten the public’s unrestrained access to information.”).

94. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–53 (1991).

95. See, e.g., *Illinois Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081, 1086 (7th Cir. 1990), *vacated and remanded*, 499 U.S. 944 (1991); *Hutchinson Tel. Co. v. Fronteer [sic] Directory Co.*, 770 F.2d 128, 131–32 (8th Cir. 1985); *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145, 149 (7th Cir. 1985); *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5–6 (7th Cir. 1977). The doctrine also influenced the outcome in *West Publ’g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1227–28 (8th Cir. 1986), in which the court held that the arrangement of cases in West’s volumes was infringed by Lexis’s use of “star pagination” to indicate the page breaks in the published volumes. See *infra* notes 253–62 and accompanying text; see also L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989) (criticizing the decision).

96. 181 F.2d 664, 666 (7th Cir. 1950).

97. *Id.* at 667.

collection doctrine. A leading case was *Rosemont Enterprises, Inc. v. Random House, Inc.*, in which Howard Hughes bought the copyrights to a series of magazine articles and used them to sue Random House for allegedly infringing the copyrights in publishing an unauthorized biography of him.<sup>98</sup> In reversing a preliminary injunction against the book on the grounds of fair use, the court added:

One other aspect of the district court's decision bears discussion. While recognizing that historical fact and events in themselves are in the public domain and are not entitled to copyright protection, and that a writer may be guided by earlier copyrighted works, the court asserted in sweeping language that an author is not entitled to utilize the fruits of another's labor in lieu of independent research . . . With this conclusion we disagree as a matter of law. . . .

[We] cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent.<sup>99</sup>

Another important case in the Second Circuit was *Hoehling v. Universal City Studios, Inc.*,<sup>100</sup> which involved a claim that a historical novel, *The Hindenburg*, and a movie based on it, infringed plaintiff's nonfiction book, in which he concluded that the airship had been sabotaged. The plaintiff "claim[ed] that a number of specific facts, ascertained through his personal research, were copied by appellees."<sup>101</sup> The court rejected the infringement claim:

The cases in this circuit . . . make clear that factual information is in the public domain. Each appellee had the right to avail himself of the facts contained in Hoehling's book and to use such information, whether correct or incorrect, in his own literary work. Accordingly, there is little consolation in relying on cases in other circuits holding that the fruits of original research are copyrightable. . . .

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98. 366 F.2d 303, 305 (2d Cir. 1966).

99. *Id.* at 309–10. (internal quotations and citations omitted). The last sentence was adapted from Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1584 (1963) (criticizing *Toskvig*).

100. 618 F.2d 972, 980 (2d Cir. 1980).

101. *Id.* at 979.



In works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another . . . Knowledge is expanded as well by granting new authors of historical works a relatively free hand to build upon the work of their predecessors.<sup>102</sup>

The Fifth Circuit relied on both *Rosemont* and *Hoehling* in *Miller v. Universal City Studios, Inc.*<sup>103</sup> which involved plaintiff's book about a real-life kidnapping and a TV movie about the same incident, but allegedly copied from the book. The trial judge first correctly instructed the jury that "the facts themselves are not copyrightable but the form of expression of the facts and their arrangement and selection are copyrightable."<sup>104</sup> Then he added the challenged instruction: "Moreover, if an author, in writing a book concerning factual matters, engages in research on those matters, his research is copyrightable."<sup>105</sup> In other words:

The [trial] court interpreted the copyright law to reward not only the effort and ingenuity involved in giving expression to facts, but also the efforts involved in discovering and exposing facts. In its view, an author could not be expected to expend his time and money in gathering facts if he knew those facts, and the profits to be derived therefrom, could be pirated by one who could then avoid the expense of obtaining the facts himself.<sup>106</sup>

The Fifth Circuit began its doctrinal analysis of the question "Is Research Copyrightable?" with a basic proposition:

It is well settled that copyright protection extends only to an author's expression of facts and not to the facts themselves. . . . Obviously, a fact does not originate with the author of a book describing the fact. Neither does it originate with one who "discovers" the fact. "The discoverer merely finds and records. He may not claim that the facts are 'original' with him although there may be originality and hence authorship in the manner of reporting, i.e., the 'expression,' of the facts." [1 Nimmer on Copyright § 2.03(E), at 2-34 (1980).] Thus, since facts do not owe their

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102. *Id.* at 979 (relying on *Rosemont* and noting that it repudiated *Toskvig*); see also *id.* at 980.

103. 650 F.2d 1365 (5th Cir. 1981).

104. *Id.* at 1368.

105. *Id.*

106. *Id.* at 1369.

origin to any individual, they may not be copyrighted and are part of the public domain available to every person.<sup>107</sup>

The Fifth Circuit's opinion then acknowledged an obvious problem:

It is difficult to adequately distinguish some of the directory cases, and particularly the language of the opinions. A copyright in a directory, however, is properly viewed as resting on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information. See *Nimmer, supra*, at § 3.04. . . .

In any event, it may be better to recognize the directory cases as being in a category by themselves rather than to attempt to bring their result and rationale to bear on nondirectory cases.<sup>108</sup>

Nonetheless, it held that the trial judge's instruction was improper:

We find the approach taken by the Second Circuit in *Hoehling* and *Rosemont* to be more consistent with the purpose and intended scope of protection under the copyright law than that implied by *Toksvig*. The line drawn between uncopyrightable facts and copyrightable expression of facts serves an important purpose in copyright law. It provides a means of balancing the public's interest in stimulating creative activity, as embodied in the Copyright Clause, against the public's need for unrestrained access to information. It allows a subsequent author to build upon and add to prior accomplishments without unnecessary duplication of effort. . . .

The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if research is held to be copyrightable. There is no rational basis for distinguishing between facts and the research involved in obtaining facts. To hold that research is copyrightable is no more or no less than to hold that the facts discovered as a result of research are entitled to copyright protection. . . . We conclude that the district court erred in instructing the jury that research is copyrightable.<sup>109</sup>

Shortly thereafter, the Ninth Circuit also revisited the industrious collection doctrine. In *Worth v. Selchow & Righter*

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107. *Id.* at 1368–69.

108. *Id.* at 1369–70.

109. *Id.* at 1371–72.

Co.,<sup>110</sup> the plaintiff claimed that the defendants had infringed his trivia book in creating their hit board game *Trivial Pursuit*. The defendants acknowledged they had consulted Worth's book, along with numerous other sources, in developing their game, but denied infringement.<sup>111</sup> The court held that "facts, like ideas, are never protected by copyright law," because "[t]he discovery of a fact, regardless of the quantum of labor and expense, is simply not the work of an author."<sup>112</sup> Worth's selection had not been copied, because only 3,976 of his 12,000 entries had been used;<sup>113</sup> and Worth's arrangement was not copied, because Worth arranged his material in alphabetical order, while the defendants arranged their trivia questions in random order in six color-coded categories.<sup>114</sup> Finally, the court added, "to the extent that *Leon* suggests that research or labor is protectable, later cases have rejected that theory."<sup>115</sup>

Thus, by the time *Feist* was decided in 1991, both the Second and Ninth Circuits had repudiated the "industrious collection" doctrine that they had set forth in *Jeweler's Circular* and *Leon*, respectively. Other circuits, however, continued to apply the doctrine in cases involving maps and directories. This circuit split led the Court to grant certiorari in *Feist*, setting the stage for a fundamental reappraisal of originality in copyright law.

### III. ANALYZING *FEIST*

#### A. *The Parties and the Dispute*

The origin of the controversy in *Feist* is a fascinating case study of small business in the American heartland in the mid-20th century.<sup>116</sup> In February 1951, a group of farmers and businessmen in northwest Kansas incorporated Rural Telephone Service Company ("Rural") as a non-profit cooperative

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110. 827 F.2d 569 (9th Cir. 1984).

111. *Id.* at 570–71.

112. *Id.* at 572 (quoting 1 NIMMER ON COPYRIGHT § 2.11[E], at 2–169 (1987 ed.)).

113. *Id.* at 573 & n.6.

114. *Id.* at 573.

115. *Id.* at 573 (citing, *inter alia*, *Miller*, *Hoehling*, and *Rosemont*).

116. Before beginning, it may be helpful to clarify the nomenclature of references to the case at various levels of decision. As indicated in note 1, in this Essay the term "*Feist*", standing alone, refers to the opinion of the Supreme Court. Hereinafter, "*Rural I*" refers to the district court's opinion granting plaintiff's motion for summary judgment at 663 F. Supp. 214 (D. Kan. 1987), whereas "*Rural II*" refers to that court's ruling on defendant's counterclaim, alleging that plaintiff's refusal to license its white pages directory listings constituted a violation of federal antitrust law, at 737 F. Supp. 610 (D. Kan. 1990).

association, with the goal of providing improved telephone service for the region.<sup>117</sup> They sought funding from the federal Rural Electrification Administration, which, as a result of an amendment enacted sixteen months earlier, was empowered to make loans to finance the extension and improvement of telephone service in rural areas.<sup>118</sup> Three years later, Rural began providing service to 524 members in three Kansas towns.<sup>119</sup> Three decades after that, Rural was providing telephone service to about 4,700 members, spread over rural areas in several counties in northwest Kansas.<sup>120</sup>

Federal law stipulated that all telephone companies receiving federal funds would nonetheless continue to be subject to state regulation.<sup>121</sup> Accordingly, Rural was regulated by the Kansas Corporation Commission, which required all telephone companies in Kansas to issue a telephone directory annually.<sup>122</sup> Accordingly, in October of each year, Rural published a typical telephone directory, containing both white pages and yellow pages.<sup>123</sup> The white pages listed the names, towns, and telephone numbers of all of Rural's subscribers, arranged in alphabetical order by last name.<sup>124</sup> The yellow pages contained business

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117. NEX-TECH, <https://www.nex-tech.com/about.aspx> [<https://perma.cc/5ZXR-68VX>].

118. Act of Oct. 28, 1949, Pub. L. No. 81-423, ch. 776, § 5, 63 Stat. 948–49 (adding Title II, § 201, to the Rural Electrification Act of 1936), *codified as amended at* 7 U.S.C. § 922; U.S. Dept. of Agriculture, Rural Electrification Admin., Misc. Publ. No. 823: RURAL TELEPHONE SERVICE U.S.A.: A PICTORIAL HISTORY OF RURAL ELECTRIFICATION ADMINISTRATION'S TELEPHONE LOAN PROGRAM 2 (May 1960) [hereinafter RURAL TELEPHONE SERVICE].

119. NEX-TECH, <https://www.nex-tech.com/about.aspx> [<https://perma.cc/5ZXR-68VX>].

120. *Rural Tel. Serv. Co. v. Feist Publ'ns, Inc. (Rural I)*, 737 F. Supp. 610, 612 (D. Kan. 1990), *rev'd on other grounds*, 957 F.2d 765 (10th Cir. 1992); *see also id.* at 625 (map of Rural's service area). The facts are taken from the district court's opinion on the antitrust counterclaim in the same case. The record is unclear as to whether the number of subscribers cited was as of the date of the complaint (1983) or as of the date of the opinion (1990).

121. Pub. L. No. 81-423, § 5, 63 Stat. 949 (adding Title II, § 202) (codified at 7 U.S.C. § 923). This stipulation was important in securing passage of the amendment. RURAL TELEPHONE SERVICE, *supra* note 118, at 7.

122. *Rural II*, 737 F. Supp. at 612 (Finding of Fact No. 2); Kansas Corporation Commission, Directive of May 1, 1967, on Issuance of Telephone Directories ("all telephone companies operating in the State of Kansas [shall] issue at least annually a dated telephone directory"). The Commission's Directive is reproduced in Appendix 1.

123. *Rural II*, 737 F. Supp. at 612 (Finding of Fact No. 2); *id.* at 614 (Finding of Fact No. 13).

124. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 342 (1991). The district court opinions state that Rural's directory lists the addresses of its subscribers, *Rural Telephone Service Co. v. Feist Publications, Inc. (Rural I)*, 663 F. Supp. 214, 216 (D. Kan. 1987), *counterclaim addressed at* 737 F. Supp. 610, 612 (D. Kan. 1990) (Finding of Fact No. 2), but the actual directory for 1977–1978 shows that only the town names are listed.

listings, arranged alphabetically within various categories, together with classified advertisements of various sizes.<sup>125</sup> Like most phone companies, Rural used the advertising revenue from the yellow pages to subsidize the cost of publishing its directory.<sup>126</sup>

Feist Publications, Inc. (“Feist”), was a family-run corporation, founded by Tom and Roberta Feist of Spearville, Kansas, in 1977.<sup>127</sup> In rural Kansas, it was common for people to drive from one small town to another to buy necessities.<sup>128</sup> But because Kansas was covered by a patchwork quilt of telephone companies,<sup>129</sup> Tom, a farmer and former high school teacher, saw the need for a directory that combined information from all of the small towns in a larger area.<sup>130</sup> He partnered with Lawrence Vierthaler, publisher of the local newspaper, to produce the first Feist Area-Wide Directory, covering southwest Kansas, in 1978.<sup>131</sup>

Tom Feist next sought to publish a directory covering northwest Kansas. In order to do so, he offered to buy listings from the eleven telephone companies that provided service

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125. *Rural I*, 663 F. Supp. at 216; *Rural II*, 737 F. Supp. at 612 (Finding of Fact No. 2).

126. *Feist*, 499 U.S. at 342. Because Rural was a non-profit cooperative, all revenues that exceeded the cost of doing business were refunded to its member-subscribers through “capital credits” on their phone bills. *Rural II*, 737 F. Supp. at 612 (Finding of Fact No. 1).

127. *Yellow Book USA Acquires Feist Publications*, PR NEWSWIRE (Mar. 24, 2004), [www.thefreelibrary.com/Yellow+Book+USA+Acquires+Feist+Publications,+Inc.-a0114598205](http://www.thefreelibrary.com/Yellow+Book+USA+Acquires+Feist+Publications,+Inc.-a0114598205) [<https://perma.cc/D9TZ-W2B2>]

128. Tricia Pemberton, *City Branch of the Feist Family Enjoys Directory Business Role*, NEWSOK (Feb. 29, 2004, 12:00 AM), <http://newsok.com/article/1891993> [<https://perma.cc/FXY9-J8YM>].

129. For example, eleven different telephone companies provided service in the fifteen-county area of northwest Kansas. *Feist*, 499 U.S. at 343; *see also Rural II*, 737 F. Supp. at 625 (map of Rural’s service area).

130. Pemberton, *supra* note 128; Bill Wilson, *Feist Publications Patriarch Dies at 77*, WICHITA EAGLE (Jan. 20, 2011, 12:00 AM), <http://www.kansas.com/news/business/article1052756.html> [<https://perma.cc/2GVH-TLVP>]. Rural also saw this need, and began licensing listings in adjacent communities from other phone companies at a cost of 1 cent to 49 cents per name. *Rural II*, 737 F. Supp. at 613 (Finding of Fact No. 9). This accounts for the discrepancy between the number of Rural’s subscribers (4,700), *id.* at 612 (Finding of Fact No. 1), and the number of listings in Rural’s white pages directory (7,700). *Feist*, 499 U.S. at 343.

131. Wilson, *supra* note 130, ¶ 17–20. The NewsOK article, *supra* note 128, erroneously asserts that Feist was the owner of the publishing company and published the newspaper. In fact, Lawrence Vierthaler was the publisher of the newspaper and owned the printing equipment that was used by Feist for the first few years of operation. Telephone interview with Bruce Vierthaler, June 21, 2016 (notes on file with Author). After that, Feist contracted to publish its directories with R.R. Donnelly & Sons, Inc., of Chicago. *Id.*

within the fifteen-county area.<sup>132</sup> Ten of the telephone companies agreed to license their listings to Feist, at a cost of between 1 cent and 49 cents per name.<sup>133</sup> On April 28, 1978, Tom Feist attended a meeting of Rural's Board of Directors and offered to buy its listings for 10 cents per name.<sup>134</sup> After he left the meeting, the Board unanimously voted to table the request indefinitely.<sup>135</sup> In later ruling on Feist's antitrust counterclaim, the District Court specifically found that "[t]he refusal to deal was not motivated by a legitimate business reason, but by an intent to exclude competition in the yellow pages advertising market in the [Rural's] service area."<sup>136</sup>

Concerned that "omitting these listings would have left a gaping hole in its area-wide directory, rendering it less attractive to potential yellow pages advertisers,"<sup>137</sup> Feist obtained a copy of Rural's 1977–1978 Directory, eliminated all the listings outside Feist's coverage area, and sorted the remaining listings by town.<sup>138</sup> In the District Court's narration:

Feist then sent the various lists, broken down by towns, to verifiers it had hired in each of the towns that the directory would cover, with instructions to telephone each of the listings taken from [Rural's] directory, and to attempt to verify each name, address and telephone number. After the verifiers had carried out their instructions, they sent the lists back to Feist with penciled in notes reflecting deletions, additions and any other changes.<sup>139</sup>

Initially, Feist did not include any Rural subscribers that it had not independently verified.<sup>140</sup> As a result, the Feist directory was only about 70 percent complete within Rural's service area.<sup>141</sup>

For the next four years, Feist updated its directory using its own verifiers and made only minimal use of Rural's directory.<sup>142</sup> In 1983, however, Feist again used Rural's listings (from its

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132. *Feist*, 499 U.S. at 343.

133. *Rural II*, 737 F. Supp. at 612 (Finding of Fact No. 5).

134. *Id.* at 612–13 (Finding of Fact No. 6).

135. *Id.*

136. *Id.* at 613 (Finding of Fact No. 7).

137. *Feist*, 499 U.S. at 343.

138. *Rural Tel. Serv. Co. v. Feist Publ'ns, Inc. (Rural I)*, 663 F. Supp. 214, 217 (D. Kan. 1987), *aff'd mem.*, 916 F.2d 718 (10th Cir. 1990), *rev'd*, 499 U.S. 340 (1991).

139. *Id.* at 217.

140. *Rural II*, 737 F. Supp. at 613 (Finding of Fact No. 10).

141. *Id.* at 614 (Finding of Fact No. 15).

142. *Rural I*, 663 F. Supp. at 217.

1982–1983 directory) as a starting point for the names within Rural’s service area.<sup>143</sup> After removing the listings outside its coverage area, Feist “hired personnel to investigate the 4,935 that remained.”<sup>144</sup> In the words of the Supreme Court:

As a result, a typical Feist listing includes the individual’s street address; most of Rural’s listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist’s 1983 directory were identical to listings in Rural’s 1982–1983 white pages. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.<sup>145</sup>

On March 23, 1983, Rural filed suit against Feist in the U.S. District Court for the District of Kansas, alleging copyright infringement.<sup>146</sup> Feist filed an antitrust counterclaim based on Rural’s refusal to license its white page listings.<sup>147</sup> With regard to the copyright claim, the District Court granted summary judgment to Rural, explaining that “courts have consistently held that telephone directories are copyrightable”<sup>148</sup> and citing a string of lower court decisions, including *Leon*. In an unpublished opinion reproduced in Appendix 3 to this Article, the Tenth Circuit affirmed “for substantially the reasons given by the District Court.”<sup>149</sup> The Supreme Court granted certiorari “to determine whether the copyright in Rural’s directory protected the names, towns, and telephone numbers copied by Feist.”<sup>150</sup> Specifically, the grant was “limited to Question 3 presented by the petition,”<sup>151</sup> namely: “Does the copyright in a telephone directory by the telephone company prevent access to that directory as a source of

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143. *Id.*

144. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 343 (1991).

145. *Id.* The covers of the two directories are shown in Appendix 2.

146. Docket, *Rural Tel. Serv. Co. v. Feist Publ’ns, Inc.*, Case No. 5:83-CV-04086, U.S. District Court, District of Kansas.

147. The District Court granted summary judgment to Feist on its antitrust counterclaim, awarding \$33,000 in damages, trebled to \$99,000 (about 16 times what it awarded to Rural on the copyright infringement claim). *Rural Tel. Serv. Co. v. Feist Publ’ns, Inc.*, 737 F. Supp. 610, 623-24 (D. Kan. 1990). After the Supreme Court’s ruling on the copyright claim, however, the Tenth Circuit reversed, holding that anticompetitive intent was not sufficient without evidence of actual injury to competition. *Rural Tel. Serv. Co. v. Feist Publ’ns, Inc.*, 957 F.2d 765, 768-69 (10th Cir. 1992). The Supreme Court denied Feist’s petition for certiorari on the antitrust counterclaim. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 506 U.S. 984 (1992).

148. *Rural I*, 663 F. Supp. at 218.

149. *Feist*, 499 U.S. at 343.

150. *Id.*

151. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 498 U.S. 808 (1990) (granting certiorari).

names and numbers to compile a competing directory, or does copyright protection extend only to the selection, coordination, or arrangement of those names and numbers?”<sup>152</sup>

### B. *The Opinion and Its Sources*

The opening sentence of Justice O’Connor’s decision for a unanimous Court<sup>153</sup> reads: “This case requires us to clarify the extent of copyright protection available to telephone directory white pages.”<sup>154</sup> That description of the opinion to come is deceptively simple and dramatically understates what follows. As the organization of the opinion and its penultimate paragraph,<sup>155</sup> in particular, make clear, *Feist* is really two opinions for the price of one.

The opinion ultimately concludes that, “[a]s a *statutory* matter, 17 U.S.C. § 101 [defining a ‘compilation’] does not afford protection from copying *to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality.*”<sup>156</sup> That construction of 17 U.S.C. § 101, however,

152. Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at i; Brief for the Petitioner at \*i, 1990 WL 513112 (Nov. 15, 1990).

153. *Feist*, 499 U.S. 340. Chief Justice Rehnquist, and Justices White, Marshall, Stevens, Scalia, Kennedy, and Souter joined in the judgment and in O’Connor’s opinion. Justice Blackmun concurred in the judgment but not in the opinion. The papers of Justices currently open to the public at the Library of Congress do not explain why Justice Blackmun declined to join the opinion; but Blackmun’s notes indicate that, initially, both he and Chief Justice Rehnquist were inclined to affirm the 10th Circuit’s opinion. The opinion by Justice O’Connor then proceeded through three drafts: February 7, February 21, and March 25. In response to the second draft, Chief Justice Rehnquist indicated on February 22, 1991 that he would join the O’Connor opinion. On the same date, Justice Blackmun advised simply in a letter to O’Connor: “At the end of your opinion, would you please note that I concur in the judgment.” Blackmun Papers, *supra* note 3.

Justice O’Connor’s papers currently reside in a “Raiders of the Lost Ark”-style warehouse in Washington, D.C.’s Maryland suburbs. According to the Library of Congress, they will not be opened, per the Justice’s instructions, while any Justice who participated in the decision of a particular case continues to serve on the Supreme Court. Justice O’Connor’s instructions were likely influenced by Chief Justice William H. Rehnquist’s letter criticizing the Library of Congress for opening the papers of Justice Thurgood Marshall to researchers only four months after his death, even though many of the cases discussed in his files had been decided by members of the Court then still sitting. See Neil A. Lewis, *Chief Justice Assails Library on Release of Marshall Papers*, N.Y. TIMES (May 26, 1993), <http://www.nytimes.com/1993/05/26/us/chief-justice-assails-library-on-release-of-marshall-papers.html> [<http://nyti.ms/2endXIu>]; see also Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1680–86 (2013).

154. *Feist*, 499 U.S. at 342.

155. *Id.* at 363–64.

156. *Id.* (emphasis added). Indeed, the oral argument in the case contained a portent of things to come:



depends upon not only the statutory provision cited but also upon the last word of the foregoing sentence: originality. Yet “originality” is *not* defined by Title 17. Where to turn next? The obvious answer is: the Constitution and the case law. But because neither was entirely clear on the matter, the Court in *Feist* was left mostly to its own devices to provide its other conclusion: “As a constitutional matter, copyright protects *only those constituent elements of a work* [not just a compilation but *any work*] *that possess more than a de minimis quantum of creativity.*”<sup>157</sup>

From a Justice often known for the narrowness and precision of her opinions, the constitutional aspect of *Feist* seems quite remarkable.<sup>158</sup> Chief Justice Roberts has described “the cardinal principle of judicial restraint” as follows: “if it is not necessary to decide more, it is necessary not to decide more.”<sup>159</sup> In *Feist*, Justice O’Connor and her fellow Justices apparently perceived that, in the case presented, the Court was *required* to do more than construe the meaning of the word “compilation” in 17 U.S.C. § 101. To resolve the case, it was *necessary* for the Court to define the word “originality,” one of the two specified prerequisites to copyright protection in § 102(a),<sup>160</sup> as a proxy for the constitutional injunction to accord copyright protection only to “Authors.”<sup>161</sup>

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QUESTION [by Justice O’Connor]: Don’t we now have in the ‘76 act a definition of compilation that we have to look to?

MR. CAPLINGER [for Respondent Rural Telephone Service Company]: Yes, Justice O’Connor. The—

QUESTION: And we have to apply that section, 101, I take it?

MR. CAPLINGER: No, Justice O’Connor.

QUESTION: No?

MR. CAPLINGER: No. . . .

QUESTION: . . . [Y]ou think we don’t have to apply the definition in the act of what is a compilation?

MR. CAPLINGER: Justice O’Connor, I don’t think you have to, but I would recommend that the Court do—do so.

QUESTION: Well, I would think that’s exactly where we’d look.

Transcript of Oral Argument at 29–30, 1991 WL 636568 (Jan. 10, 1990).

157. *Feist*, 499 U.S. at 363 (emphasis added).

158. See, e.g., Marci A. Hamilton, *Justice O’Connor’s Opinion in Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.: An Uncommon Though Characteristic Approach*, 38 J. COPYRIGHT SOC’Y U.S.A. 83, 87–88 (1991) [hereinafter Hamilton, *Characteristic Approach*]; Marci A. Hamilton, *Justice O’Connor’s Intellectual Property Opinions*, 13 WOMEN’S RIGHTS L. REP. 71, 73–74 (1991) [hereinafter Hamilton, *Intellectual Property Opinions*].

159. *PDK Laboratories v. U.S. Drug Enforcement Administration*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).

160. 17 U.S.C. § 102(a): “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .” Besides originality, the second prerequisite for protection, obviously, is the fixation of a “Writing.”

161. See *infra* notes 162–75 and accompanying text.

Here, then, are the two issues addressed by the opinion in *Feist*, in the sequence advanced by the Court itself.

1. *The Constitutional Issue*

a. *Analyzing the Opinion.* In the opening paragraphs of Part II.A of her opinion, Justice O'Connor described the facts presented to the Court as involving an "undeniable tension" between "two well-established propositions": "The first is that facts are not copyrightable; the other, that compilations of fact generally are."<sup>162</sup>

In support of the first proposition, O'Connor cited her own opinion in *Harper & Row, Publishers, Inc. v. Nation Enterprises*: "No author may copyright his ideas or the facts he narrates."<sup>163</sup> In support of the second proposition, Justice O'Connor referenced generally the Copyright Acts of 1909 and 1976, both of which expressly mention "compilations."<sup>164</sup>

According to the opinion, the key to resolving the tension between the two propositions identified lies in understanding *why* facts are not copyrightable.

The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. See *Harper & Row, supra*, [471 U.S.] at 547–549. Original, as the term is used in copyright, means only 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*. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990). . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. . . . 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.<sup>165</sup>

The source of the *sine qua non*, the opinion continues, is the Constitution ("Originality is a constitutional requirement"), as

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162. *Feist*, 499 U.S. at 344.

163. *Id.* at 345 (quoting *Harper & Row Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)).

164. *Id.* at 345; see Act of March 4, 1909, Pub. L. No. 60-349, § 5(a), 35 Stat. 1076; 17 U.S.C. § 103(a).

165. *Feist*, 499 U.S. at 345 (emphasis in third sentence added).

construed in two decisions from the late 19th century: *The Trade-Mark Cases* and *Burrow-Giles Lithographic Co. v. Sarony*.<sup>166</sup> *The Trade-Mark Cases* are cited for the principle that, for a particular work to be classified “under the head of writings of authors, . . . originality is required.”<sup>167</sup> According to *Feist*, that opinion “explained that originality requires independent creation plus a modicum of creativity.”<sup>168</sup> *Burrow-Giles* “distilled the same requirement from the Constitution’s use of the word ‘authors,’” defining that term, “in a constitutional sense, to mean ‘he to whom anything owes its origin; originator; maker.’”<sup>169</sup>

Summing up its review of the foundational cases and moving on to the present, the *Feist* Court thus observed:

The originality requirement . . . remains the touchstone of copyright protection today. . . . Leading scholars agree on this point. As one pair of commentators succinctly puts it: “The originality requirement is *constitutionally mandated* for all works.” Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719, 763, n.155 (1989) (emphasis in original) (hereinafter Patterson & Joyce). Accord, *id.*, at 759–760, and n. 140; Nimmer § 1.06[A] (“[O]riginality is a statutory as well as a constitutional requirement”).<sup>170</sup>

The Court then explained that “[i]t is this bedrock principle of copyright that mandates the law’s seemingly disparate treatment

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166. *Id.* at 346. The opinion cites *The Trade-Mark Cases*, 100 U.S. 82 (1879), and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). Both cases are discussed extensively in Part II.A. above.

167. *Feist*, 499 U.S. at 346 (citing *The Trade-Mark Cases*, 100 U.S. at 94).

168. *Feist*, 499 U.S. at 346. *Feist* does not define what a “modicum of creativity” might mean, particularly in the context of compilations. In the block quote in the text immediately above, the opinion notes that the requisite level of creativity is “extremely low” and that “a slight amount will suffice . . . no matter how crude, humble or obvious” that creativity might be. *Id.* at 345. Elsewhere in Part II.A., the opinion observes that, while copyright protection for factual compilations is “thin,” it may be merited by the author’s “choices” and “subjectiv[ity]” regarding the “selection and arrangement” of the preexisting materials included in the compilation. *Id.* at 348–49.

169. *Id.* at 346 (quoting *Burrow-Giles*, 111 U.S. at 58).

170. *Feist*, 499 U.S. at 347. The appeal of the Patterson and Joyce article to the Court may have been attributable to two possible reasons. First, like telephone white pages directories, the computer databases in *West Publishing Co. v. Mead Data Central*, 799 F.2d 1219 (8th Cir. 1986), *cert denied*, 479 U.S. 1070 (1987), are the subject of limited protection under the Copyright Act of 1976 as compilations. Second, the article directly attacks various applications of the doctrine of “industrious collection” (or “sweat of the brow”), including in the telephone directory cases in the Seventh and Eighth Circuits that preceded *Feist*. See Patterson & Joyce, *supra* note 95, at 772 n.184, 773–77 (“D. Section 103(b): Limitations on Copyright Protection for Compilations”).

of facts and factual compilations.”<sup>171</sup> To put the point succinctly, “Facts do not owe their origin to an act of authorship,” because facts are discovered, not created.<sup>172</sup> “Factual compilations, on the other hand, may possess the requisite originality,” because “[t]he compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers.”<sup>173</sup>

Before passing onto the statutory issue of which factual compilations do (and do not) qualify for copyright protection, however, a word about the sources of the *Feist* opinion on the constitutional issue.

b. *Sources of the Constitutional Analysis.*<sup>174</sup> As to case law, the opinion relies strongly on *The Trade-Mark Cases* and *Burrow-Giles v. Sarony*. Nonetheless, to put primary emphasis on those decisions would be to misperceive *Feist*’s most important case-law source: *Harper & Row v. Nation Enterprises*.<sup>175</sup> *Harper & Row* is the first-cited, and by far most often-cited, decision in the *Feist* opinion. It is Justice O’Connor’s own opinion for a 6-3 Court, handed down less than a decade before *Feist* itself.

*Harper & Row* involved a magazine, *The Nation*, “scooping” a book publisher, Harper & Row, by publicly disseminating excerpts from former president Gerald R. Ford memoir (including his pardon of Richard M. Nixon after the Watergate scandal), obtained by what the Court described as a “purloined” manuscript, before Harper & Row itself could publish the book.<sup>176</sup> In resolving the matter before the Court, in addition to making all of the constitutional points reiterated in *Feist*,<sup>177</sup> Justice O’Connor quietly dropped a seemingly off-point observation which, in retrospect, appears to be highly prescient:

Perhaps the controversy between the lower courts in this case over copyrightability is more aptly styled a dispute over whether *The Nation*’s appropriation of unoriginal and

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171. *Feist*, 499 U.S. at 347.

172. *Id.* But see Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007). Indeed, although the seven-digit telephone numbers at issue in *Feist* were not created by Rural, the assignment of those numbers to particular individuals or households arguably was.

173. *Feist*, 499 U.S. at 348.

174. The constitutional analysis in the Court’s opinion, as discussed above, is contained in Part II.A.

175. 471 U.S. 539 (1985).

176. *Id.* at 542.

177. *Id.* at 547 (“Creation of a nonfiction work, even a compilation of pure fact, entails originality.”).

uncopyrightable elements encroached on the originality embodied in [A Time to Heal] as a whole. Especially in the realm of factual narrative, *the law is currently unsettled regarding the ways in which uncopyrightable elements [can] combine with the author's original contributions to form protected expression.*<sup>178</sup>

It took six more years, and a certiorari grant to consider an unpublished, two-paragraph decision by the Tenth Circuit,<sup>179</sup> but the Justice finally found the case to decide that “unsettled” question. “Reach Out and Touch Someone,” indeed.<sup>180</sup>

Regarding *Feist's* reliance of secondary authority for its constitutional analysis, as to treatises there is no contest. Melville and David Nimmer's *Nimmer on Copyright*, still hugely cited today, was even “bigger” in the federal court copyright opinions of the 1980s and 1990s.<sup>181</sup> With respect to articles concerning copyrightability, this section of *Feist* cites to a veritable “Who's Who” of scholars, including Robert C.

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178. *Id.* at 548 (emphasis added).

179. Only one paragraph of the Tenth Circuit's opinion was substantive. It contained a brief statement of facts, and a string cite to prior directory cases holding such works copyrightable by virtue of industrious collection (or “sweat of the brow”). The opinion is reprinted in Appendix 3.

180. See *supra* note 4. See also *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981), cited by Justice O'Connor in *Feist* and in fact anticipating her point about the noncopyrightability of facts in factual compilations. Shortly after the grant of certiorari in *Feist*, a young law professor in Houston, Texas, wrote a brief piece pinpointing what was at stake in the Court's impending decision:

The Supreme Court now has the attention not only of the copyright bar throughout the country, but of all the copyright industries which, in small or large part, have relied upon their labor—or “sweat of the brow”—to justify the copyright monopoly which the Constitution permits Congress to secure only to “Authors.” The Supreme Court has an historic opportunity to set copyright law back on a proper footing in all of these industries, and in so doing to ensure that the rewards bestowed upon authors are again properly proportioned to the original contributions such persons make to the common weal.

Should the Court hang up on copyright for “white pages” directories? As Cliff Robertson likes to say in the current AT&T commercials: it's “The Right Choice.”

Craig Joyce, “Reach Out and Touch Someone”: *Should the Supreme Court Hang Up on Copyright Protection for “White Pages” Directories?*, 10 U. HOUS. L. CTR BRIEFCASE, Issue No. 2, at 6 (1991).

181. According to Westlaw, the Supreme Court cited the Nimmer treatise nine times in the two decades before 2000 and six times since. Patry's treatise (first published in 1994) was cited twice in the 1990s and four times since. Goldstein's treatise (first published in 1989) was cited twice in the 1990s and once since. For all courts, in the two decades before 2000, Nimmer was cited in 1,011 published opinions, Goldstein in 74, Patry in 34, and Abrams (first published in 1991) in 10. Since 2000, Nimmer has been cited in 944 published opinions, Patry in 113, Goldstein in 85, and Abrams in 12.

Denicola,<sup>182</sup> Jane C. Ginsburg,<sup>183</sup> Craig Joyce,<sup>184</sup> William F. Patry,<sup>185</sup> and L. Ray Patterson.<sup>186</sup> It would be a difficult undertaking (and unwise) to attempt to sort out the relative influences of the various contributions to the literature.<sup>187</sup>

## 2. *The Statutory Issue*

a. *Analyzing the Opinion.* With her constitutional analysis as a predicate, Justice O'Connor next addressed the statutory question on which the Court, in fact, had granted certiorari.<sup>188</sup> In effect, the opinion construed the statutory provision, and answered the question presented, through its just-established constitutional prism.

In the immediate aftermath of the opinion in *Feist*, some scholars expressed surprise at this approach. Marci A. Hamilton, for example, wrote:

Justice O'Connor's jurisprudential approach . . . is usually restrained. She generally refuses to reach for the broad holding when a more narrow and precise holding will do. The surprising quality of her *Feist* opinion lies in its sweep.

. . .

Given that the interpretation of the statute alone could have resolved the issues presented to the Court, that the question on which the Court granted certiorari was not cast in constitutional terms, and that the decision below was not

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182. *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981) (cited in Brief for the Respondent, 1990 WL 513113, at \*30 and Reply Brief for the Petitioner, 1990 WL 513114, at \*12).

183. *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990).

184. Patterson & Joyce, *supra* note 95 (cited Brief for Petitioner, *supra* note 152, at \*17, and Brief for the Respondent, *supra* note 182, at \*34).

185. *Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable)*, 12 COM. & LAW 37 (Dec. 1990) (cited in Reply Brief for Petitioner, *supra* note 182, at \*3).

186. Patterson & Joyce, *supra* note 95.

187. Not that no one has tried. In *Justice O'Connor's Intellectual Property Opinions*, Hamilton, *supra* note 158, Hamilton, herself a former law clerk to Justice O'Connor, asserts that the source of the Court's "quite remarkable" and "pervasive" constitutional analysis "appears to be Professors Patterson's and Joyce's article on the scope of protection for compilations." *Id.* at 74 & n.28. It should be noted, however, that *Feist* had specifically cited *Nimmer*, and that District Court had specifically rejected *Nimmer's* approach. *Rural Tel. Serv. Co. v. Feist Publ'ns, Inc. (Rural D)*, 663 F. Supp. 214, 218 (D. Kan. 1987). In any event, Hamilton does offer what she perceives to be a fascinating contrast between the analytical approaches taken by Justice O'Connor in *Harper & Row* and *Feist*. Hamilton, *Intellectual Property Opinions*, *supra* note 158, at 72-76.

188. See notes 150-54 and accompanying text.

based on constitutional grounds, the Court's pervasive constitutional analysis is quite remarkable; it is especially arresting where the author of the opinion is Justice O'Connor.<sup>189</sup>

Given, however, that O'Connor (and the Court) were deciding the scope of compilations under 17 U.S.C. § 103 ("Subject matter of copyright: Compilations and derivative works"), that § 103 is conditioned by § 102 ("Subject matter of copyright: In general") and § 101 ("Definition[]" of "compilations"), and that both §§ 102 and 101 require an "*original* work of *authorship*" for copyrightability, the methodology of the *Feist* opinion—twenty-five years in hindsight, at least—seems, at a minimum, highly defensible.

Part II.B. of the opinion, after linking itself directly to Part II.A., declared that "[t]he Court's decisions announcing [the constitutionally mandated requirement of originality for all works] predate[d] the Copyright Act of 1909," but that ambiguous language in that Act "caused some lower courts temporarily to lose sight of this requirement":<sup>190</sup>

Most courts construed the 1909 Act correctly . . . They understood from this Court's decisions that there could be no copyright without originality. See *Patterson & Joyce* 760–761. As explained in the Nimmer treatise: "The 1909 Act neither defined originality nor even expressly required that a work be 'original' in order to command protection. However, the courts uniformly inferred the requirement from the fact that copyright protection may only be claimed by 'authors.' . . . It was reasoned that, since an author is 'the . . . creator, originator,' it follows that a work is not the product of an author unless the work is original." Nimmer § 2.01 (footnotes omitted) (citing cases).

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189. Hamilton, *Intellectual Property Opinions*, *supra* note 158, at 73–74 (citations omitted). By way of contrast, on February 8, 1991, the day after Justice O'Connor circulated her first draft opinion, a clerk to Justice Blackmun sent his boss a memorandum to the following effect. Blackmun had voted in conference to affirm but had said to the clerk afterwards that he did not find his vote "satisfactory" (Blackmun's term). "You then indicated that you might join an opinion reversing the court below if it were narrowly crafted to apply only to telephone books." Analyzing the opinion received the day before from Justice O'Connor, the clerk found it "quite narrow" and of "limited scope" (referring to the "narrowness of the Court's holding" *as to the copyrightability of white pages* without commenting on the breadth of the rest of the opinion). The clerk urged: "[U]nless you feel strongly that the Court's determination is incorrect as applied to white pages listings, I recommend that you join SOC's opinion . . ." Blackmun ultimately decided not to, concurring only in the judgment. See Blackmun Papers, *supra* note 3.

190. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991).

But some courts misunderstood the statute. . . .<sup>191</sup>

To illustrate how lower courts “temporarily” had lost sight of the Supreme Court’s 19th century precedents, the *Feist* Court cited two cases from the early 20th century: *Leon v. Pacific Telephone & Telegraph Co.*<sup>192</sup> and *Jeweler’s Circular Publishing Co. v. Keystone Publishing Co.*<sup>193</sup> The choice of *Leon* as an example was no accident: *Leon* had served as the great-grandparent to a string of telephone white pages directory cases, all of which upheld copyright in such works, and had been featured in the string cite in the Tenth Circuit’s opinion in *Feist*. *Leon*, in turn, had relied on *Jeweler’s Circular*. These cases not only had strayed from the path of *The Trade-Mark Cases* and *Burrow-Giles v. Sarony* but, “[m]aking matters worse,” had “developed a new theory . . . known alternatively as ‘sweat of the brow’ or ‘industrious collection,’” to justify the collection of factual compilations.<sup>194</sup>

Among the numerous flaws in such decisions, the *Feist* Court specified (consistent with its determination of the constitutional issues in the case) as “most glaring” that the “sweat of the brow” cases “extended copyright protection in a compilation . . . beyond the compilers *original* contributions [which, it had already noted, could extend only to the selection and arrangement of preexisting materials] to the facts themselves.”<sup>195</sup> In short, and “[w]ithout a doubt,” the “sweat of the brow” doctrine “flouted basic copyright principles.”<sup>196</sup>

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191. *Id.* at 351–52.

192. 91 F.2d 484 (9th Cir. 1937); *see supra* notes 77–81 and accompanying text.

193. 281 F. 83 (2d Cir. 1922); *see supra* notes 67–76 and accompanying text.

194. *Feist*, 499 U.S. at 352. As noted earlier, *supra* text accompanying notes 82–94, “sweat of the brow” and “industrious collection” not only were not synonymous, but in fact had borne quite opposite meanings, for almost the entire history of the prior case law. They were, however, conflated in the Petitioner’s brief, Brief for the Petitioner, *supra* note 152, at 19, which may explain why, in *Feist*, the Court seemed to regard the two terms as equivalent.

195. *Feist*, 499 U.S. at 353 (emphasis added). For good measure, *Feist* identified *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981), as a recent lower court decision which *had* properly observed that distinction. Other cases noted for commendation: *Financial Information, Inc. v. Moody’s Investors Service, Inc.*, 808 F.2d 204 (2d Cir. 1986); *Financial Information, Inc. v. Moody’s Investors Service, Inc.*, 751 F.2d 501 (2d Cir. 1984) (Newman, J., concurring); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *see supra* notes 98–11 and accompanying text. Oddly, the Court also cited *International News Service v. Associated Press*, 248 U.S. 215 (1918), which is perhaps best regarded as a “copyright case without a copyright,” for the proposition that facts could not be copyrighted. *Feist*, 499 U.S. at 353–54 & n\*. In creating the common-law doctrine of misappropriation, however, *INS* had done more to advance the “labor” theory of copyright than any other case in the 20th century, and had, in fact, been cited for support in *Jeweler’s Circular*. *See supra* notes 62–76 and accompanying text.

196. *Feist*, 499 U.S. at 354 (citing *Harper & Row Pub., Inc. v. Nation Enters.*, 471



Here, Justice O'Connor's opinion has been criticized for ignoring the 19th-century cases that had espoused the "labor" theory of copyright (albeit without the labels "industrious collection" or "sweat of the brow").<sup>197</sup> Those decisions had been implicitly overruled by *The Trade-Mark Cases* and *Burrow-Giles*; but the earlier cases *had* been decided by Supreme Court justices, riding circuit; and the Court's own opinion in *Bleistein*, an early 20th-century case, had been partially responsible for reviving them.<sup>198</sup> Leaving them out of the *Feist* opinion strengthened the opinion rhetorically, but it does leave readers with a somewhat less-than-full view of the complexity of copyright history.

Part II.C. of O'Connor's opinion banished the "sweat of the brow" doctrine, applied both in cases (like *Jeweler's Circular*) decided under the 1909 Act and in those (like the Tenth Circuit's decision in *Feist*) decided under its successor,<sup>199</sup> and replaced it with doctrine squarely based on the language of the 1976 Act regarding compilations.

The opinion gave due credit to the Copyright Office and to Congress for deciding early in the drafting of the Copyright Act of 1976 to "overhaul the copyright statute generally" and to "clear up the confusion in the lower courts as to the basic standard of copyrightability."<sup>200</sup> The Register of Copyrights had explained in his first report to Congress that "originality" was a "basic requisit[e] of copyright under the 1909 Act," but that the absence of any reference to originality in the 1909 Act "seems to have led to misconceptions as to what is copyrightable matter." The Register had suggested making the originality requirement explicit, and Congress had taken the Register's advice.<sup>201</sup>

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U.S. 539, 563 (1985)), and Robert A. Gorman, *Fact or Fancy: The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y U.S.A. 560 (1982).

197. Marci Hamilton observed, shortly after the opinion in *Feist* was handed down, that "[t]he Court stretch[ed] to make this point despite a rather impressive historical basis for courts' use of 'sweat of the brow' as a justification for copyright protection." Hamilton, *Intellectual Property Opinions*, *supra* note 158, at 74; *see also* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 339–41 (1992); *cf.* Ginsburg, *Creation and Commercial Value*, *supra* note 20, at 1875–81 (discussing the history in more detail).

198. *See supra* notes 40–61 and accompanying text.

199. *Feist*, 499 U.S. at 359–60 ("[T]he 1976 revisions to the Copyright Act leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works. *Nor is there any doubt that the same was true under the 1909 Act.*") (emphasis added).

200. *Id.* at 354–55.

201. *Id.* at 355 (citing Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., p. 9 (H. Judiciary Comm. Print 1961)).

In making explicit the originality requirement, however, Congress announced that it was merely clarifying existing law:

The two fundamental criteria of copyright protection [are] originality and fixation in tangible form. . . . The phrase “original works of authorship,” *which is purposely left undefined*, is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute.<sup>202</sup>

Thus, the Court in *Feist* found itself faced with the task (in a compilations case but with ramifications throughout all of copyrightability law) of setting parameters for the meaning of a term, “originality,” which Congress itself had chosen deliberately not to define.

With respect to identifying the originality protected in compilations, Congress, besides cleaning up 1909 Act ambiguities, took two critical steps in enacting the 1976 Act. First, it specifically included compilations as copyrightable subject matter in § 103. Second, it defined the term “compilations” in § 101.

Section 103(a) explains that “[t]he subject matter of copyright . . . includes compilations,”<sup>203</sup> but also, in § 103(b), that

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202. *Id.* at 355 (quoting H.R. Rep. No. 94-1476, at 51 (1976); S. Rep. No. 94-473, at 50 (1975), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664) (emphasis added by Authors; emphasis by *Feist* Court omitted). The Court’s emphasis highlighted the “without change” language of the Congressional documents, but those documents manifestly left unclear *which* courts had established the standards Congress meant to incorporate “without change.” The Supreme Court had not itself spoken on the question of originality since before the 1909 Act had been enacted, other than the tangential reference in *International News Service v. Associated Press*.

203. 17 U.S.C. § 103(a). The term “subject matter of copyright” refers back to § 102 (“Subject matter of copyright: In general”). Section 102(a) lays out eight types of works of authorship: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. Thus, compilations may take the form, for example, of “literary works,” which are defined in § 101 as “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.” Notably for the future, although not for *Feist* itself, this rubric is broad enough to comprehend not only white pages telephone directories but also computer databases. Section 102(b) identifies specifically those elements of a work for which copyright is not available: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Feist*, 499 U.S. at 356, citing, again, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985), notes that § 102(b) “is universally understood to prohibit any copyright in facts.”

copyright protects only the author's original contributions—not the facts or information conveyed:

The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.<sup>204</sup>

Thus, even if a work qualifies as a copyrightable compilation, it receives only limited protection under § 103 of the Act: a compilation author may not keep others from using the facts or data he or she has collected.

But what *is* a compilation? Section 101 defines a “compilation,” with emphasis by the *Feist* Court, as follows: “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.”<sup>205</sup>

The reason for the Court's rendition of the statute as shown above becomes clear when the opinion declares, immediately afterwards, that its emphases reveal the definition's purpose—to make clear that collections of facts are “not copyrightable *per se*”—by emphasizing “its tripartite structure.”<sup>206</sup> Read properly, then:

The purpose of the statutory definition is to emphasize that collections of facts are not copyrightable *per se*. It conveys this message through its tripartite structure, as emphasized above by the italics. The statute identifies three distinct elements, and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of preexisting material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an “original” work of authorship. “[T]his tripartite conjunctive structure is self-evident, and should be assumed to accurately express the legislative purpose.” [William F.] Patry[, *Copyright in Compilations of Facts (or Why the “White Pages” Are Not Copyrightable)*, 12 Com. & Law 37,] 51 [(Dec.1990)], quoting *Mills Music[, Inc. v. Snyder]*, 469 U. S. [153,] 164 [(1985)].<sup>207</sup>

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204. 17 U.S.C. § 103(b).

205. *Feist*, 499 U.S. at 356 (quoting 17 U.S.C. § 101 (defining “compilation”)) (emphasis added by the Court).

206. *Feist*, 499 U.S. at 357.

207. *Id.*

The opinion next proceeds to consider, individually, the elements of the tripartite structure. The first element is important because, apart from describing what one normally thinks of as a compilation, namely, a collection of pre-existing material, facts, or data, the integration of this element into the larger structure of the definition makes clear that the first requirement “is not the *sole* requirement. To satisfy the statutory definition, [a compilation] must get over two additional hurdles.”<sup>208</sup>

The third element “emphasizes that a compilation, like any other work, is copyrightable only if it satisfies the originality requirement (‘an *original* work of authorship’).”<sup>209</sup> According to Justice O’Connor, although § 102 states plainly that originality as a constitutional prerequisite applies to *all* works, Congress in its § 101 definition of compilations emphasized that requirement again, “to ensure that courts would not repeat the mistake of the ‘sweat of the brow’ courts by concluding that fact-based works are treated differently . . .”<sup>210</sup>

The “key” to the statutory definition, however, is its second element. It requires that, in determining whether a fact-based work is an original work of authorship, courts should focus “on the manner in which the collected facts have been selected, coordinated, and arranged.”<sup>211</sup> Returning to the primary theme from Part II.A. of its opinion, the Court described the second element of the statutory definition as “a straightforward application of the *originality requirement*.”<sup>212</sup> Because “[f]acts are never *original*,” a compilation author “can claim *originality*, if at all, only in the way the facts are presented.”<sup>213</sup> And to that end,

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208. *Id.*

209. *Id.* (emphasis added).

210. *Id.* Underlying the ultimate opinion in the case were several critical “sweat of the brow” colloquies during oral argument. For example:

QUESTION [by Justice Souter]: . . . [T]he copyright in a compilation . . . extends only to the material contributed by the author. And my suggestion is that [§ 103(b)] implies something about the content of the work rather than something about the effort that goes into producing the work. My question is . . . what is the material in your directory that is contributed by the author?

MR. CAPLINGER: Okay, Justice Souter, to answer that question is that the—again, the bits of factual information alone are not copyrightable. What the contribution is of the author in the form of collective work of a compilation is the hard work or labor as you put it. . . .

QUESTION: That’s effort. . . .

Transcript of Oral Argument, *supra* note 156, at 52.

211. *Feist*, 499 U.S. at 358 (quoting 17 U.S.C. § 101 (definition of “compilation”).

212. *Id.* at 358 (emphasis added).

213. *Id.* (emphasis added).

the statute dictates “that the principal focus should be on whether the selection, coordination, and arrangement *are sufficiently original to merit protection*.”<sup>214</sup>

What is clear from the statutory definition of compilations, therefore, is that “[n]ot every selection, coordination, or arrangement will pass muster.”<sup>215</sup> From this, and “in accordance with the established principle that a court should give effect, if possible, to every clause and word of a statute,”<sup>216</sup> the Court determined that the statute to be applied to the facts of the case at hand “envisions that there will be some fact-based works in which the selection, coordination, and arrangement are *not sufficiently original* to trigger copyright protection.”<sup>217</sup>

In summary, the 1976 revisions to the Copyright Act of 1909 “leave no doubt that originality, not ‘sweat of the brow,’ is the touchstone of copyright protection” in directories and other fact-based works.<sup>218</sup>

All that remained was to dispose of the case at bar.

*b. Sources of the Statutory Analysis.*<sup>219</sup> *Feist’s* statutory analysis, like its constitutional analysis, relies principally on *Harper & Row v. Nation Enterprises*<sup>220</sup> and *Miller v. Universal City Studios*,<sup>221</sup> together with reinocations of *The Trade-Mark Cases*<sup>222</sup> and *Burrow-Giles v. Saroni*,<sup>223</sup> plus a solitary reference to *Bleistein v. Donaldson Lithographing*.<sup>224</sup>

As to *Feist’s* reliance of secondary authority for its statutory analysis, *Nimmer on Copyright* remains not just king of the hill but also the only occupant of the hill. With respect to articles

214. *Id.* at 358 (emphasis added).

215. *Id.* (emphasis added).

216. *Id.* (citing *Moskal v. United States*, 498 U.S. 103, 109–10 (1990), for the “established principle” stated).

217. *Feist*, 499 U.S. at 358 (emphasis added).

218. *Id.* at 359–60.

219. The statutory analysis in the Court’s opinion, as discussed above, is contained in Parts II.B. and II.C.

220. *See supra* note 175.

221. *See supra* note 103.

222. *See supra* note 25.

223. *See supra* note 32.

224. *See supra* note 40; *see Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358–59 (1991) (“Presumably, the vast majority of compilations will pass [the ‘minimal level of creativity’] test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. *See generally* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (referring to ‘the narrowest and most obvious limits’). Such works are incapable of sustaining a valid copyright.”).

concerning compilations in history and as defined by the 1976 Act, all of the scholars represented in Part II.A. on constitutional analysis reappear, along with Robert A. Gorman.<sup>225</sup> In the Court's statutory analysis, however, clearly the lead authority is William F. Patry.<sup>226</sup> His argument that the "tripartite conjunctive structure" of the § 101 definition of "compilations" is "self-evident, and should be assumed to 'accurately express the legislative purpose,'" is without doubt the scholarly lynchpin of the Court's approach to the statute.<sup>227</sup>

### 3. *Deciding the Case*

Part III of the *Feist* opinion resolves, in the context of copyright for factual compilations, the "undeniable tension" described by Justice O'Connor at the outset of Part II.

In taking 1,309 names, towns, and telephone numbers from Rural's white pages, did Feist copy anything that was "original" to Rural and protected by copyright law? The answer is no. "The originality requirement 'rule[s] out protecting . . . names, addresses, and telephone numbers of which the plaintiff, by no stretch of the imagination, could be called the author.'"<sup>228</sup>

Still, under the Court's construction of the relevant provisions of the 1976 Act, a second question remained: Did Rural achieve a modicum of protection, which Feist infringed, by selecting, coordinating, or arranging uncopyrightable facts in an original way? Again, the answer is no. "The standard of originality is low, but it does exist."<sup>229</sup> Rural's selection of preexisting material, which in no way could be deemed authored, was "mechanical," "routine," and "entirely typical" of all

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225. *Fact or Fancy?: The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y U.S.A. 560 (1982) (cited in Brief for Petitioner, *supra* note 152).

226. Patry, *supra* note 185. Interestingly but understandably, only the Reply Brief for Petitioner discussed this particular scholarly authority, which was published in December 1990, late in the process of filing the briefs.

227. Patry, *supra* note 185, at 51. Marci Hamilton suggests that "[t]he Court's confident conclusion that industrious collection should never be a basis for copyright protection . . . appears to rely especially on [Patterson & Joyce]." See Hamilton, *Intellectual Property Opinions*, *supra* note 158, at 74 n.33. The reality, however that may be, is that slaying the "sweat of the brow" dragon for copyright in compilation protection is the *destructive* work of *Feist*. Establishing a viable alternative thereto, based on the relevant portions of the Copyright Act of 1976, is the major *constructive* work of Justice O'Connor's opinion. That lasting accomplishment of *Feist* rests squarely on the analytical approach to the statute offered by Patry, then a policy planning advisor to the Register of Copyrights.

228. *Feist*, 499 U.S. at 361 (citing Patterson & Joyce, *supra* note 95, at 776).

229. *Id.* at 362 (citing Patterson & Joyce, *supra* note 95, at 760 n.144).

telephone directory white pages.<sup>230</sup> Its arrangement, in alphabetical order by last name, contained “nothing remotely creative,” and was “not only unoriginal” but “practically inevitable.”<sup>231</sup>

Thus, Rural did not have a valid copyright in the materials copied by Feist,<sup>232</sup> and hence it had suffered no infringement. Bringing together the two parts of the opinion (constitutional and statutory), Justice O’Connor determined that:

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230. *Id.* Moreover, as the Court noted, Rural was *required* to publish a directory containing all of the subscribers in its area by the Kansas Corporation Commission. *Id.* at 363. Thus, the selection did not even owe its origin to Rural, without regard to the “minimal amount of creativity” needed.

231. *Id.* at 363. The matter of the purported originality of “arrangement, in alphabetical order by last name,” and related matters, occasioned no little hilarity at oral argument:

QUESTION [by Justice Kennedy]: If we can assume, and I think it’s true, that the name and the address and the number are a fact that’s not copyrightable . . . what elements of originality have you added to those facts that make this a work of original authorship under 101? . . . You’ve alphabetized, which I think we could talk about, but I don’t think that’s very original. What else? . . .

MR. CAPLINGER: . . . We also decide what name, because my full name might be a fact. But I go by several names, James, Jim, Jay, JR, et cetera. And—

QUESTION: I’m not stunned by the originality so far. (Laughter.) . . .

MR. CAPLINGER: . . . All directories, and the encyclopedia included, are a compilation. That’s what a compilation is. These are books of facts. What makes them original is how the author arranges that information . . . He gathers all this factual information. But if he doesn’t then somehow make a decision on how to put that in a compilation, it’s not—it’s not a useable compilation. . . .

QUESTION [by Justice Scalia]: He has to say, ah-hah, I am going to put this in there alphabetically. (Laughter.)

Transcript of Oral Argument, *supra* note 156, at 33–36.

232. At the outset of Part III in her second, penultimate draft opinion on February 15, O’Connor observed that, in order to establish infringement, a plaintiff must establish two points: (1) ownership of a valid copyright and (2) copyright of constituent elements of the work that are original. Point 1, she noted, was “not at issue here” because Feist had conceded that Rural’s directory, “considered as a whole,” was copyrightable “because it contains [in addition to the white pages] some foreword text, as well as original material in the yellow pages advertisements.” The draft then proceeded to point 2. On March 22, Justice Scalia requested a clarification regarding point 1 and the draft’s “We conclude” paragraph, which led with a statement that the Court had determined that Rural’s *white pages* were “incapable of sustaining a valid copyright” without reiterating Rural’s entitlement to copyright on the directory *as a whole*. As a result, O’Connor revised the paragraph in question in her third and final draft. The new language made clear that “the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore *were not protected by the copyright in Rural’s combined white and yellow pages directory.*” *Feist*, 499 U.S. at 365 (emphasis added). Scalia then joined the opinion. O’Connor noted to the Chief Justice that the case was now ready for announcement, and Rehnquist promptly calendared its release for March 27, 1991. Blackmun Papers, *supra* note 3.

[A]s a *constitutional* matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a *statutory* matter, 17 U.S.C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality.<sup>233</sup>

In an observation doubtless of little consolation to Rural (or other claimants in thin or nonexistent compilation copyrights), *Feist* concluded: "This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort."<sup>234</sup> Why? Because the Constitution and the statute so required.

#### IV. AFTER *FEIST*

##### A. *Feist's Impact on Directories and Databases*<sup>235</sup>

On the Monday following the *Feist* decision, the Supreme Court granted certiorari in *Illinois Bell*, another directory case, vacated the decision, and remanded for reconsideration in light of *Feist*.<sup>236</sup> On remand, the Seventh Circuit held that *Feist* "forecloses Illinois Bell's legal argument," and it remanded the case to the District Court "for the entry of judgment in favor of Haines on Illinois Bell's copyright claims."<sup>237</sup>

After *Feist* and *Illinois Bell* were decided, database providers and some commentators complained that the Court had "stripped

233. *Feist*, 499 U.S. at 363–64 (emphasis added).

234. *Id.* at 364.

235. *Feist* is unquestionably one of the Court's landmark decisions on copyright. A full examination of its effect on the law of originality, and on the law of compilations in particular, would fill another article. For brevity's sake, we focus here on only one aspect of *Feist's* legacy: its impact on directories and databases.

236. See *Ill. Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081 (7th Cir. 1990), *cert. granted, decision vacated and remanded for reconsideration*, 499 U.S. 944 (1991). Justice Stevens had urged the Court to grant certiorari in *Illinois Bell* rather than in *Feist*. See *supra* note 3. On March 25, 1991, two days before *Feist's* announcement by the Court, Justice O'Connor wrote a memorandum to her colleagues:

[*Illinois Bell*] was held pending our decision in *Feist*. . . . In *Feist*, we reject the 'sweat of the brow' approach and hold that a typical white pages directory lacks the modicum of originality required for copyright protection. The Seventh Circuit's decision [in *Illinois Bell*] is inconsistent with our holding. Accordingly, I will vote to GVR [grant, vacate, and remand] in light of *Feist*.

Blackmun Papers, *supra* note 3.

237. *Ill. Bell Tel. Co. v. Haines & Co.*, 932 F.2d 610, 611 (7th Cir. 1991).



away or sharply reduced the copyright protection afforded a variety of ‘information products,’ from directories and mailing lists to computerized databases.”<sup>238</sup> Moreover, the prospects for state-law protection were dubious, notwithstanding the persistence in some states of a “misappropriation” doctrine based on *International News Service v. Associated Press*,<sup>239</sup> because of the express preemption clause in the 1976 Act.<sup>240</sup> Thus, many database providers began lobbying for a federal statute against copying factual information from databases. Indeed, in the dozen years after *Feist*, multiple bills were introduced in Congress to protect database providers against unauthorized uses of data they had compiled.<sup>241</sup> But because the Court in *Feist* had declared that “[o]riginality is a Constitutional requirement” under the Copyright Clause,<sup>242</sup> these bills triggered fierce debate over whether Congress could enact “database protection” under some other power, such as the Interstate Commerce Clause.<sup>243</sup>

But a funny thing happened to the federal database bills proposed in the wake of *Feist*: they failed to secure a majority in Congress. The bills were opposed by the U.S. Chamber of Commerce and by a number of database providers, including AT&T, Yahoo!, Bloomberg, and Charles Schwab.<sup>244</sup> It appears that many databases meet the “minimal degree of creativity”

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238. Ginsburg, *No “Sweat”?*, *supra* note 197, at 339.

239. *Id.* at 354–55; see also Edmund J. Sease, *Misappropriation is Seventy-Five Years Old: Should We Bury It or Revive It?*, 70 N.D. L. REV. 781 (1994); Gary Myers, *The Restatement’s Rejection of the Misappropriation Tort: A Victory for the Public Domain*, 47 S.C. L. REV. 673 (1996); Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 641 (2003) (“Clarity of analysis would be enhanced if the doctrine and the very word were banished from discussions of intellectual property law.”).

240. 17 U.S.C. § 301(a); see Ginsburg, *No “Sweat”?*, *supra* note 197, at 355–61 (analyzing the question); Patterson & Joyce, *supra* note 95, at 777–81 (ditto).

241. See, e.g., Database and Collections of Information Misappropriation Act, H.R. 3261, 108th Cong. (2003); Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1999); Consumer and Investor Access to Information Act, H.R. 1858, 106th Cong. (1999); Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1997); Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. 3531, 104th Cong. (1996).

242. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

243. For a flavor of the debate, see Ginsburg, *No “Sweat”?*, *supra* note 197, at 367–74; Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119; Justin Hughes, *How Extra-Copyright Protection of Databases Can Be Constitutional*, 28 U. DAYTON L. REV. 159 (2002); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47 (1999).

244. Joseph A. Loy, *Database and Collections of Information Misappropriation Act of 2003: Unconstitutionally Expanding Copyright Law?*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 449, 458 (2004).

standard announced in *Feist*, and/or that many database providers successfully use contract law to restrict competitors' access to and use of their data, thus rendering *sui generis* database protection unnecessary. No doubt, also, many would-be publishers find it more convenient to license data in a computer-ready format than to copy it from a published source. Finally, if measured empirically, *Feist* seems to have served the Copyright and Patent Clause's constitutional purpose, "to promote the Progress of Science," by encouraging competition in the market for databases:

Between 1991, the year *Feist* was decided, and 1997, the number of databases increased from 7,637 to 10,338—an increase of thirty-five percent. The number of files contained in these databases increased from 4 billion to 11.2 billion—an increase of 180%. There are, therefore, more and bigger databases seven years after *Feist*.<sup>245</sup>

By contrast, the European Union, not bound by the *Feist* case, did adopt a *sui generis* right in its 1996 Database Directive.<sup>246</sup> Article 7(1) of the Directive gives the owner of a database the right "to prevent extraction and/or re-utilization of the whole or of a substantial part . . . of the contents of that database," but only if there has been "a substantial investment in either the obtaining, verification or presentation of the contents" of the database.<sup>247</sup> The European Court of Justice has interpreted the "substantial investment" clause narrowly, so that it does not apply to the investment involved in creating the data initially, only in obtaining it.<sup>248</sup> The EU had hoped that the Directive would "stimulate the production of databases in Europe";<sup>249</sup> but a study nine years later concluded that the Directive "has had no proven impact on the production of databases."<sup>250</sup> Indeed, four years after the Directive was implemented in 2001, the U.S. share of the worldwide database market increased from 60% to 72%, while the European share of the market fell from 34% to

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245. William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 386–87 (1999).

246. Directive 96/9/EC, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 077) 20 (EC).

247. *Id.* Art. 7(1).

248. Case C-203/02, *British Horseracing Bd. v. William Hill Org.*, 1 C.M.L.R. 15, ¶¶ 40–42 (2005).

249. Commission of the European Communities, DG Internal Market and Services Working Paper, *First Evaluation of Directive 96/9/EC on the Legal Protection of Databases*, at 20 (2005), [http://ec.europa.eu/internal\\_market/copyright/docs/databases/evaluation\\_report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf) [<https://perma.cc/4ZGH-5VDE>].

250. *Id.*

24%.<sup>251</sup> The report concluded that “[w]ith respect to ‘non-original’ databases, the assumption that more and more layers of IP protection means more innovation and growth appears not to hold up.”<sup>252</sup>

One example will suffice to demonstrate the effect of *Feist* on competition in databases: star pagination. Before *Feist* was decided, West Publishing had sued its primary competitor in the online database market, Mead Data Central (providers of LEXIS), over Mead’s practice of indicating in its online reports the page numbers in West’s bound volumes of judicial reports.<sup>253</sup> A majority of the Eighth Circuit panel relied in part on the “industrious collection” doctrine in affirming the lower court’s preliminary injunction in favor of West, stating: “[A]ccess to these particular numbers—the ‘jump cites’—would give users of LEXIS a large part of what West has spent so much *labor and industry* in compiling.”<sup>254</sup> The Supreme Court denied certiorari,<sup>255</sup> and the parties settled the lawsuit (with Lexis reportedly paying West “tens of millions of dollars”) before there was a final ruling on the merits.<sup>256</sup> The decision likely deterred competitors from entering the market for computer-aided legal research, because many courts require citations to the page numbers in the official reporters (published by West) when filing briefs in court.<sup>257</sup>

After *Feist*, two competitors to West, Matthew Bender and Hyperlaw, sought a declaratory judgment that “star pagination” was *not* protected by West’s copyright in its published volumes, so that they could indicate page breaks when publishing compilations of judicial opinions on CD-ROM.<sup>258</sup> The Second Circuit noted that “West concedes that the pagination of its volumes . . . is determined by an automatic computer program,

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251. *Id.* at 22–23.

252. *Id.* at 24.

253. *West Publ’g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986).

254. *Id.* at 1227; *see also id.* at 1228 (citing *Hutchinson Tel. Co. v. Fronteer [sic] Directory Co.*, 770 F.2d 128 (8th Cir. 1985)). *See generally* Patterson & Joyce, *supra* note 95 (criticizing the decision).

255. *Mead Data Cent., Inc. v. West Publ’g Co.*, 479 U.S. 1070 (1987).

256. Stephen Labaton, *Westlaw and Lexis Near Truce*, N.Y. TIMES, July 19, 1988, at D5.

257. Patterson & Joyce, *supra* note 95 at 726–27 (stating “the result in *West Publishing* in theory gives one publisher veto power over whether the profession, and thus the public, shall enjoy the full benefits of enhanced access to law which computer-assisted legal research offers”) & 726–27 n.21 (documenting the jurisdictions in which citation to a West Reporter is required).

258. *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693 (2d Cir. 1998). Specifically, Matthew Bender filed suit, and Hyperlaw intervened as a plaintiff. *Id.* at 698.

and West does not seriously claim that there is anything original or creative in that process.”<sup>259</sup> As a result, it disagreed with the Eighth Circuit and affirmed the District Court’s ruling that “star pagination” did *not* infringe:

At bottom, *West Publishing Co.* rests upon the now defunct “sweat of the brow” doctrine. . . . [T]he Eighth Circuit in *West Publishing Co.* erroneously protected West’s industrious collection rather than its original creation. Because *Feist* undermines the reasoning of *West Publishing Co.*, . . . we decline to follow it.<sup>260</sup>

In a companion case,<sup>261</sup> the Second Circuit also held that West’s “enhancements” to the judicial opinions (putting the caption into a standard format, and adding names of counsel, subsequent history, and parallel citations) were “lacking even minimal creativity” and were also not protected under *Feist*.<sup>262</sup> In other words, only the syllabus, headnotes, and West’s key numbers were copyrightable,<sup>263</sup> so that a competitor could copy the judicial opinions from West’s bound volumes (or from Westlaw), strip out the protected features, and use the edited opinions to compete with West, without infringing West’s copyright in its bound volumes.<sup>264</sup> The Supreme Court denied certiorari in both cases.<sup>265</sup>

### B. *Feist’s Place in Copyright History*

Twenty-five years after it was handed down, few commentators would gainsay the proposition that *Feist v. Rural*

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259. *Id.* at 699.

260. *Id.* at 708. The ruling was 2-1, with Judge Sweet, a district judge sitting by designation, dissenting. *Id.*

261. *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 674 (2d Cir. 1998). Although Matthew Bender remained on the caption, only Hyperlaw sought to copy this information and defended the case on appeal.

262. *Id.* at 677. The court also noted that the choices West made were “obvious,” *id.*, which, unfortunately, tends to suggest the patent standard of “non-obviousness.” See 35 U.S.C. § 103. The court was on firmer ground when it quoted from *Feist* in finding West’s choices “typical,” *id.* at 677, and “garden variety,” *id.* at 682–83.

263. *Id.* at 676–77; see also *id.* at 688 (“West’s overall decision to add attorney information, subsequent history, and additional citation information exhibits little, if any, creative insight; most courts already provide attorney information, and opinion accuracy mandates inclusion of subsequent history.”).

264. *Id.* at 677 (HyperLaw sought “a judgment declaring that the individual West case reports *that are left after redaction of the first category of alterations (i.e., the independently composed features)*, do not contain copyrightable material”) (emphasis added).

265. *West Publ’g Co. v. HyperLaw, Inc.*, 526 U.S. 1154 (1999) (enhancements); *West Publ’g Co. v. Matthew Bender & Co.*, 526 U.S. 1154 (1999) (star pagination).

is “deservedly famous”<sup>266</sup> (although some have suggested that its legacy should be made more precise while others have decried its influence as “far from benign”).<sup>267</sup> One might go further. At least arguably, *Feist* is the most important copyright decision of the 20th century, certainly from the Supreme Court of the United States—which is, after all, supreme.

There are, of course, other worthy candidates for that distinction. Taking them chronologically, one might begin with *Bleistein v. Donaldson Lithographing Co.*,<sup>268</sup> decided in 1903 and, like *Feist*, a decision concerning authorship. But, while adopting a notably low threshold for protection, in his opinion for the Court majority in *Bleistein* Justice Holmes, himself a discerning connoisseur of the arts,<sup>269</sup> seems to have been less concerned with the parameters of authorship and copyrightability generally<sup>270</sup> than with what has been called the principle of “aesthetic non-discrimination.”<sup>271</sup> That principle posits that, in evaluating issues of copyrightability, judges must avoid taking into account their own judgments as to the aesthetic *quality* of the works under consideration.<sup>272</sup> Quite apart from that assessment of the hierarchy of *Bleistein*’s concerns, if the decision *was* primarily about authorship generally, it has effectively been overruled by *Feist*, the Court’s most recent pronouncement on the subject.

Other possible candidates for “most important copyright decisions of the century” have their own problems. *Bobbs-Merrill Co. v. Straus*,<sup>273</sup> decided in 1908, established the first-sale

266. See generally William W. Fisher III, *Recalibrating Originality*, 54 HOUS. L. REV. 437, 439 (2016).

267. See Pamela Samuelson, *Functional Compilations*, 54 HOUS. L. REV. 321, 357–58 (2016); Shyamkrishna Balganes, *The Folklore and Symbolism of Authorship in American Copyright Law*, 54 HOUS. L. REV. 403, 410–11 (2016); *Bleistein Story*, *supra* note 40.

268. 188 U.S. 239 (1903); see *supra* notes 40–59 and accompanying text.

269. See *Bleistein Story*, *supra* note 40, at 94–100.

270. To the contrary regarding the focus and impact of the case, see *Bleistein Story*, *supra* note 40. Zimmerman notes that:

[l]ower court judges both understood the case as setting the threshold for copyrightability at a very low level, and appreciated the pragmatic virtues of this approach. . . . [W]ithin thirty years, an appellate court could list dozens of decisions and cite to major treatises all agreeing that *Bleistein* required only ‘a low degree of originality and artistic or literary merit’ to obtain copyright.

*Bleistein Story*, *supra* note 40, at 101–02 (citing *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131, 136 (8th Cir. 1932)).

271. See *supra* text accompanying note 49.

272. “It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obviously limits.” *Bleistein*, 188 U.S. at 251.

273. 210 U.S. 339 (1908).

doctrine in copyright law; but it was superseded by the statutory codifications of that doctrine in the 1909 Act<sup>274</sup> and the 1976 Act,<sup>275</sup> the latter being sufficiently unclear that it has required two Supreme Court opinions (and an unsuccessful attempt) to determine its meaning.<sup>276</sup> *International News Service v. Associated Press*,<sup>277</sup> decided in 1918, involved copyright only tangentially, and the common-law doctrine that it announced not only had no limiting principle and was often ignored by lower courts<sup>278</sup> but, for good measure, was abrogated (along with all other general federal common law) by the 1938 decision in *Erie Railroad Co. v. Tompkins*.<sup>279</sup> *Fred Fisher Music Co. v. M. Witmark & Sons*,<sup>280</sup> a 1943 decision, affected the ownership of literally thousands of renewal copyrights, but it was probably wrongly decided as a matter of Congressional intent.<sup>281</sup> *Mazer v. Stein*<sup>282</sup> was a valiant 1954 attempt to deal with the problem of protectibility for expressive aspects of useful articles, but it was thoroughly displaced by the 1976 Act and its legislative history.<sup>283</sup> *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>284</sup> a 1984 decision, and *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>285</sup> decided the following year, had fascinating things to say about competition policy and fair use, but both required correction by a subsequent pronouncement of the Court, *Campbell v. Acuff-Rose Music, Inc.*,<sup>286</sup> within a decade. *Campbell* itself, handed down in 1994, has been called “the rescue of fair

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274. Act of Mar. 4, 1909, Pub. L. No. 60-349, § 41, 35 Stat. 1084.

275. 17 U.S.C. § 109.

276. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013); *Quality King Distrib., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135 (1998); *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008), *aff'd by an equally divided Court*, 562 U.S. 40 (2010).

277. 248 U.S. 215 (1918).

278. See, e.g., *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280 (2d Cir. 1929) (L. Hand, J.) (“[T]here are cases where the occasion is at once the justification for, and the limit of, what is decided. [INS] appears to us such an instance. . . . The difficulties of understanding it otherwise are insuperable.”); see also Baird, *supra* note 62, at 32–34.

279. 304 U.S. 64 (1938).

280. 318 U.S. 643 (1943).

281. See, e.g., WILLIAM F. PATRY, 1 PATRY ON COPYRIGHT § 2:41, 3 PATRY ON COPYRIGHT § 7:12 (2016 ed.).

282. 347 U.S. 201 (1954).

283. 17 U.S.C. § 101 (definition of “pictorial, graphic, and sculptural works”); H.R. Rep. No. 94-1476, at 54–55 (1976). The Supreme Court will consider a circuit split involving this statutory section in the October 2016 Term. See *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 1823 (2016).

284. 464 U.S. 417 (1984).

285. 471 U.S. 539 (1985).

286. 510 U.S. 569 (1994).

use”<sup>287</sup> and might be the only other plausible candidate for “case of the century” celebration.<sup>288</sup>

*Feist* is a towering decision, in all of U.S. copyright history (not just the 100 years from 1901 to 2000, in quite another way. The three most difficult-to-construe copyright-related terms in the Copyright and Patent Clause of the Constitution<sup>289</sup> are “Authors,” “Writings,” and “limited Times.” In the 19th century, in *Burrow-Giles Lithographing Co. v. Sarony*,<sup>290</sup> the Supreme Court declined to place any limitations on what might or might not constitute a “Writing” within the language adopted by the Framers.<sup>291</sup> *Burrow-Giles* thus left U.S. copyright law open to the recognition of any non-*de minimis* expression (other than one made orally and not recorded in any manner) as a “Writing.”<sup>292</sup> Similarly, in the 21st century, Justice Ginsburg for a Court majority in *Eldred v. Ashcroft*,<sup>293</sup> in passing on the constitutionality of certain provisions of the Copyright Term Extension Act of 1998,<sup>294</sup> declined to place any restraints on *how long* a term the IP clause might permit under the Framers’ rubric “limited Times,”<sup>295</sup> thus arguably allowing, by virtue of future Congressional accretion, the creation of “perpetual copyright on the installment plan.”<sup>296</sup> In short, as to two of the three key terms in the Clause, the Court in its critical decisions has made no serious attempt to set parameters.

This history makes all the more remarkable the fact that *Feist*, Justice O’Connor’s “deservedly famous” 20th-century

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287. Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter’s Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19 (1994); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449 (1997).

288. See Pierre N. Leval, *Campbell as Fair Use Blueprint?*, 90 WASH. L. REV. 597, 597 (2015) (“I submit *Campbell* is a beautifully reasoned opinion, which has demonstrated in its twenty-one years that it provides a healthy framework for fair use analysis.”).

289. Again, for easy reference: “The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

290. 111 U.S. 53 (1884).

291. *Id.* at 58 (“Writings” include “all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression.”).

292. See *Goldstein v. California*, 412 U.S. 546, 561 (1973) (“Writings” include “any physical rendering of the fruits of creative intellectual or aesthetic labor.”).

293. 537 U.S. 186 (2003).

294. Pub. L. 105-298, 112 Stat. 2817.

295. 537 U.S. at 242 (Stevens, J., dissenting) (“Fairly read, the Court has stated that Congress’ actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable.”).

296. Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 303 (1996).

opinion, not only explicates key statutory terms such as “original” and “compilation” but also insists repeatedly that “[o]riginality is a Constitutional requirement” inherent in the terms “Authors” and their “Writings.”<sup>297</sup> The opinion is broad, particularly for Justice O’Connor, but apparently, in her view and the view of a unanimous Court, for good cause shown. Is it an opinion beyond criticism? Certainly not. But surely it is among the greatest opinions in all of U.S. copyright history.

## V. CONCLUSION

Twenty-five years have passed since the opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.* was handed down. What has changed since?

In the law itself, *Feist* dominates any discussion of the law of originality generally, and the law of compilations in particular.<sup>298</sup> *Feist* was decided by a unanimous Supreme Court, remains unchallenged (not surprisingly) in the lower courts or by the Court itself, and is, for the reasons stated, a landmark in the history of the American law of copyright.

What of the members of the Court that decided *Feist*? Among the Justices who participated in the decision, Justice O’Connor, the author of the opinion, is retired but has not resigned (meaning that she is no longer a member of the Supreme Court itself but remains eligible to serve by designation as a judge of a U.S. Court of Appeals or a District Court). Justices Stevens and Souter also are retired, while Justices Rehnquist, White, Marshall, Scalia, and Blackmun have now moved to the Highest Court of All. Only Justice Kennedy remains sitting on the Court, 28 years into his tenure.

Finally, as to the parties themselves. In 1999, Rural Telephone Service Company re-branded itself as “Nex-Tech.”<sup>299</sup> Operating under that name, Rural continues to supply telephone service, along with Internet, TV, wireless, and security services, in northwest Kansas.<sup>300</sup>

*Feist Publications* continued to publish area-wide directories, expanding into Missouri, Oklahoma, and Texas.<sup>301</sup> By 2004, it was the fifth-largest independent publisher of telephone

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297. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

298. According to Westlaw, *Feist* has been cited in over a thousand decisions in the 25 years since it was decided. (Search performed Oct. 10, 2016).

299. NEX-TECH, <https://www.nex-tech.com/about.aspx> [<https://perma.cc/5ZXR-68VX>].

300. *Id.*

301. *Yellow Book USA Acquires Feist Publications*, *supra* note 127, at paras. 1, 6, 8.



directories in the country, with a staff of 272 people, publishing 20 directories with a total circulation of 4 million.<sup>302</sup> In 2004, Feist Publications was acquired by Yellow Book USA, the oldest and largest independent publisher of telephone directories in the United States.<sup>303</sup> Tom Feist, the founder, died in 2011.<sup>304</sup> His family said that his Supreme Court victory in *Feist* was his “proudest achievement.”<sup>305</sup>

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302. *Id.* at para. 6.

303. *Id.* at paras. 1, 7.

304. Bill Wilson, *Feist Publications Patriarch Dies at 77*, THE WICHITA EAGLE (Jan. 20, 2011, 12:00 AM), <http://www.kansas.com/news/business/article1052756.html> [<https://perma.cc/2GVH-TLVP>].

305. *Id.* at para. 22.

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APPENDIX 1:  
THE KANSAS CORPORATION  
COMMISSION'S DIRECTIVE

STATE CORPORATION COMMISSION  
OF KANSAS

DIRECTIVE

May 1, 1967

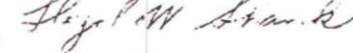
SUBJECT: Issuance of  
Telephone Directories

TO ALL TELEPHONE COMPANIES:

Commission Conference was held on April 27, 1967 and it was determined that all telephone companies operating in the State of Kansas issue at least annually a dated telephone directory.

Yours very truly,

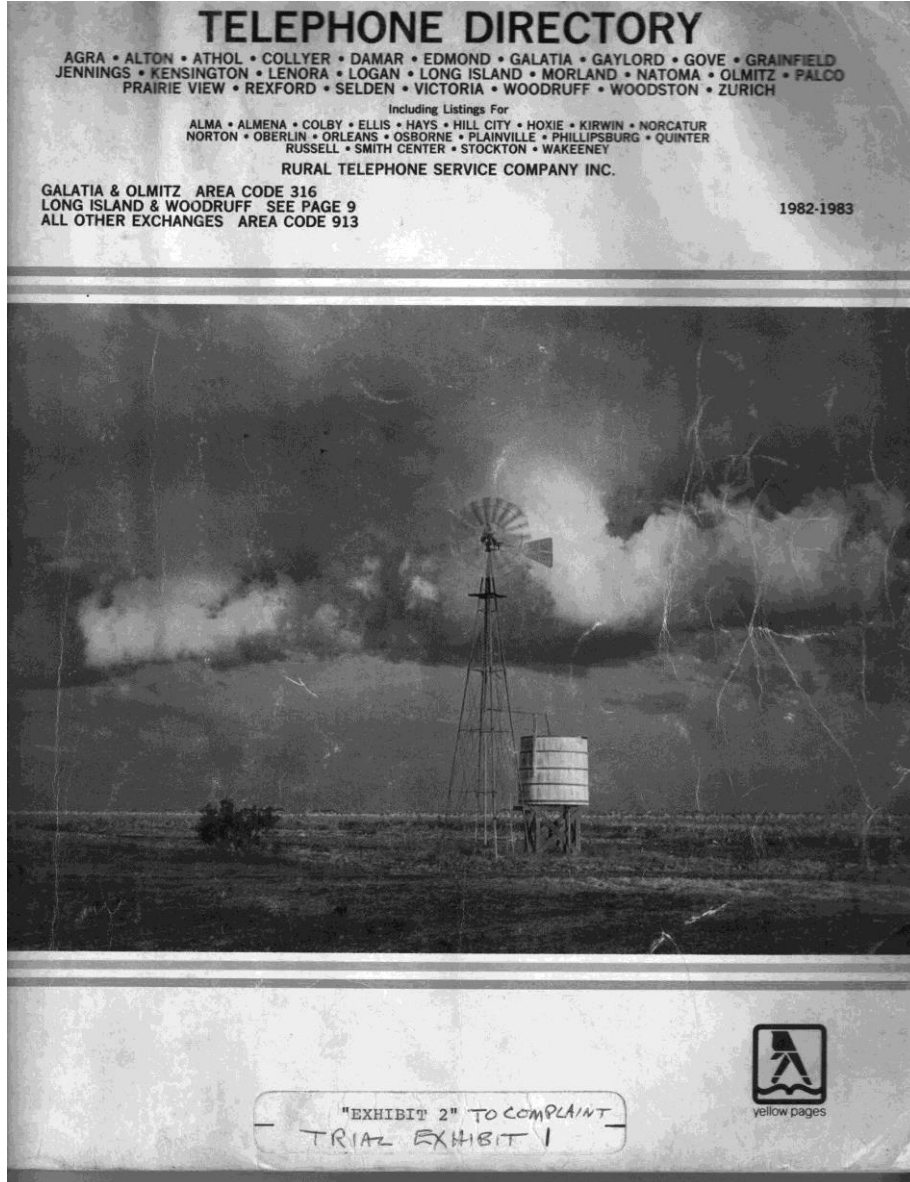
STATE CORPORATION COMMISSION



Lloyd W. Shank  
DIRECTOR AND ACTING CHIEF ENGINEER

Attachment A

APPENDIX 2:  
THE DUELING  
TELEPHONE DIRECTORIES\*



\* Images courtesy of William Patry.

Feist Publications, Inc.  
Box 38  
Spearville, Kansas 67276  
POSTMASTER: If undeliverable,  
do not return.

BOUND PRINTED  
MATTER-BLK RT  
US POSTAGE  
Spearville, Kansas  
Permit No. 1

## Northwest Kansas AREA-WIDE Telephone Directory

1983

POSTAL CUSTOMER

AGRA  
ALMENA  
ANTONINO  
ATWOOD  
BIRD CITY  
BOGUE  
BREWSTER  
CATHERINE  
CLAYTON  
CODELL  
COLBY  
COLLYER  
DAMAR  
DENSMORE  
DRESDEN  
EDMOND  
EDSON  
ELLIS  
GEM  
GLADE  
GOODLAND  
GOVE  
GRAINFIELD  
GRINNELL  
HAYS  
HERNDON  
HILL CITY  
HOXIE  
JENNINGS  
KANORADO  
KIRWIN  
LENORA  
LEVANT  
LOGAN  
LONG ISLAND  
LUDELL  
McDONALD

yellow pages

MENLO  
MONUMENT  
MORLAND  
NEW ALMELO  
NORCATUR  
NORTON  
OAKLEY  
OBERLIN  
OSALAH  
PALCO  
PARK  
PENOKEE  
PFEIFER  
PHILLIPSBURG  
PLAINVILLE  
PRAIRIE VIEW  
QUINTER  
REXFORD  
RUSSELL SPRINGS  
ST. FRANCIS  
SCHOENCHEN  
SELDEN  
SEGUIN  
SHARON SPRINGS  
STOCKTON  
STUDLEY  
STUTTGART  
VICTORIA  
WaKEENEY  
WALKER  
WALLACE  
WESKAN  
WHEELER  
WINONA  
WOODRUFF  
WOODSTON  
ZURICH

SCHOOLS & GOVERNMENT OFFICES  
(BLUE PAGES)  
\* COMMUNITY INTEREST PAGES  
(RED SECTION)

"EXHIBIT 3"

APPENDIX 3:  
THE TENTH CIRCUIT'S OPINION

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

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RURAL TELEPHONE	)	
SERVICE COMPANY, INC.,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 88-1679
	)	(D.C. No. 83-4086)
FEIST PUBLICATIONS, INC.,	)	(D. Kan.)
	)	
Defendant-Appellant.	)	

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ORDER AND JUDGMENT\*

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Before TACHA and EBEL, Circuit Judges, and  
KANE, District Judge.\*\*

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This appeal is from an order of the district court awarding summary judgment in favor of plaintiff Rural Telephone Service Company, Inc., (Rural), finding that

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\* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

\*\* The Honorable John L. Kane, Jr., District Judge, United States District Court for the District of Colorado, sitting by designation.

defendant Feist Publications, Inc. (Feist) violated the federal copyright laws by copying the white pages of Rural's 1982-83 telephone directory. After a Rule 54(b) certification by the district court on the copyright infringement issue, defendant appeals alleging that the district court erred in finding that Feist's activities in compiling the independent telephone directory constituted a copyright infringement and in awarding attorney's fees and damages. We affirm.

As a part of its telephone service to its cooperative members in Northwest Kansas, Rural compiles, publishes and distributes an annual telephone directory covering its telephone service area. The 1982-83 Rural telephone directory was marked with an appropriate copyright notice identifying Rural as the copyright proprietor and indicating the year of publication. Feist publishes and distributes a northwest area-wide telephone directory which covers some of the same geographical areas as Rural's directory. The undisputed facts show that Feist was unable to purchase the Rural white page listings so Feist took the Rural telephone directory, edited it, and used only the listings that covered its area of service. Those listings were sorted by towns and alphabetized. The lists were then sent to verifiers in each of the communities to verify the telephone numbers and addresses. Feist's directory contained the information derived in this way. The district court relied on the substantial precedent which holds that a telephone directory is a compilation copyrightable under the United States copyright laws. *E.g.*, *United Tel. Co. v. Johnson Publishing Co.*, 855 F.2d 604, 607-08 (8th Cir. 1988); *Hutchinson Tele. Co., v. Frontier Directory Co.*, 770 F.2d 128, 132 (8th Cir. 1985); *Southern Bell Tele. & Tele. Co. v. Associated Tele. Directory Publishers*, 756 F.2d 801, 809-10 (11th Cir. 1985); *South-*

*ern Bell Tele. Co. v. Nationwide Indep. Directory Serv., Inc.*, 371 F.Supp. 900, 905 (W.D. Ark. 1974). The district court found that the use of Rural's materials by Feist was neither de minimis, e.g., *Warner Bros. Inc. v. American Broadcasting Cos., Inc.*, 720 F.2d 231, 242 (2d Cir. 1983) (de minimis rule allows copying of small and usually insignificant portion of copyrighted work), nor "fair use" and therefore constituted an infringement of the copyright laws, e.g., *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145, 149-50 (7th Cir. 1985) (copying map compilation), *cert. denied*, 476 U.S. 1061 (1986); *Central Tele. Co. v. Johnson Publishing Co.*, 526 F.Supp. 838, 843 (D. Colo. 1981) (copying telephone directory). We find no error in these determinations of the district court. We further agree with the district court that allegations of antitrust violations do not constitute defenses to a claim of copyright infringement. E.g., *Harms, Inc. v. Sansom House Enters.*, 162 F.Supp. 129, 135 (E.D. Pa. 1958), *aff'd sub nom. on other grounds, Leo Feist, Inc. v. Lew Tandler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959); *Buck v. Cecere*, 45 F.Supp. 441, 441-2 (W.D. N.Y. 1942); *Buck v. Newsreel, Inc.*, 25 F.Supp. 787, 789 (D. Mass. 1938). *Contra M. Witmark & Sons v. Jensen*, 80 F.Supp. 843, 850 (D. Minn. 1948), *appeal dismissed*, 177 F.2d 515 (8th Cir. 1949). Statutory damages and attorneys' fees are within the discretion of the district court. E.g., *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 122 (8th Cir. 1987) (copyright attorneys' fees award reviewed under abuse of discretion standard); *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984) (copyright statutory damages award reviewed under abuse of discretion standard). Under the circumstances of this case, we find no abuse of discretion in the award of statutory damages of

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**\$6,000 and attorneys' fees. We AFFIRM for substantially the reasons given by the district court.**

**ENTERED FOR THE COURT**

**Deanell Reece Tacha  
Circuit Judge**