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"JUST THE FACTS, MA'AM": THE EFFECT OF THE SUPREME COURT'S DECISION IN FEIST PUBLICATIONS, INC. v. RURAL TELEPHONE SERVICE CO. ON THE COLORIZATION OF BLACK AND WHITE FILMS

Michael F. Finn*

I. INTRODUCTION

In Feist Publications, Inc. v. Rural Telephone Service Co. (Feist), the Supreme Court held that the Intellectual Property Clause of the United States Constitution requires that a work be "original" to receive copyright protection. Specifically, a white pages telephone directory was found unworthy of copyright protection because it lacked the requisite level of "originality." If read broadly, Feist withholds copyright protection from certain works that society has a clear interest in seeing created but do not possess a sufficient amount of originality. In particular, Feist may leave some colorized films without copyright protection. Although colorizing films may clash with romantic notions of artistic creation and integrity, this article will argue that such films should remain worthy of copyright protection. Moreover, the large amounts of time, effort, and expense involved in colorizing films and society's

My thanks to Professor Rochelle Dreyfuss of New York University and to my wife Ellen for their invaluable comments and insight.
An earlier version of this paper received Second Prize in the ASCAP Nathan Burkan Memorial Competition at New York University.
3. Id. at 1288 ("Originality is a constitutional requirement.").
4. Id. at 1297; see discussion infra part II.B.
5. Specifically, Feist may affect colorized versions of black and white films in the public domain.

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demand for such films\(^6\) may provide some support in favor of copyright protection of such works, even in the aftermath of *Feist*. Without protection against copying, industry efforts in film colorization may be severely curtailed.

II. CONSTITUTIONAL BACKGROUND

A. Constitutional Basis for Copyright

Article I of the United States Constitution gives Congress the power to "'[p]romote 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.'" The premise of the Intellectual Property Clause is twofold.\(^8\) First, there is the implicit understanding that creative activity provides a public benefit.\(^9\) Second, there is the recognition that creative activity can be promoted and maximized by offering individual authors an economic incentive to create by way of the copyright monopoly, which serves as a reward for past efforts and as an incentive to future endeavors.\(^10\) While the immediate effect of copyright law is to provide authors with a fair return for their creative labor, the ultimate aim is to increase public welfare by encouraging artistic creativity.\(^11\) The reward to the owner, the copyright, is a secondary consideration;\(^12\) it is simply considered the best way to enhance the arts and sciences for the public good. Without the public benefit, no justification exists to grant a copyright monopoly.\(^13\)

Copyright protection is extended only to authors and their writings.\(^14\) Under the Constitution, an "author" has been interpreted to be "[h]e to whom anything owes its origin; originator, maker."\(^15\) Ac-

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6. See discussion infra part III.A.
7. U.S. CONST. art. I, § 8, cl. 8.
8. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-44.14 (1992) [hereinafter NIMMER].
9. Id.
12. NIMMER, supra note 8, § 1.03[A], at 1-44.13; see Aiken, 422 U.S. at 156 (stating that private motivation must ultimately serve to promote the public's access to literature, music and other arts).
13. NIMMER, supra note 8, § 1.03[A], at 1-44.14.
15. Burrow-Giles Lithograph Co. v. Sarony, 111 U.S. 53, 58 (1884); see also case cited infra note 19.
cording to Feist, originality, in addition to mere creation, is both constitutionally and statutorily mandated; a work must be the product of the author's independent creation.  

Courts have given a more expansive definition to the term "writings," interpreting it to mean any tangible expression of the author rather than being limited to words on paper. As the Supreme Court stated in Goldstein v. California, writings include any "physical rendering of the fruits of creative, intellectual, or aesthetic labor." 

B. The Feist Decision

In Feist, the Supreme Court examined whether copyright protection extended to the white pages of a phone directory. The parties in the case included Feist Publications, Inc. (Feist), who manufactured area-wide directories, and Rural Telephone Service Company (Rural), a certified public utility acting as the sole provider of telephone service to several communities in Kansas. In exchange for its position, Rural was required by Kansas law to annually issue updated telephone directories.

The directory at issue was manufactured my Feist and contained eleven different telephone service areas with approximately 47,000 listings as compared to 7,700 listings in Rural's directory. Rural declined to license its listings to Feist whereupon Feist copied them from Rural without permission. Although Feist had employees independently confirm listings from Rural's directory, Feist still

16. Feist, 111 S. Ct. at 1288, 1290, 1292-94. The current Copyright Act explicitly states the originality requirement by only conferring copyright protection to "original works of authorship." 17 U.S.C. § 102(a) (1988).

17. Feist, 111 S. Ct. at 1287; Alfred Bell & Co. v Catalda Fine Arts, 191 F.2d 99 (2d Cir.), aff'd as modified, 191 F.2d 99 (2d Cir. 1951); cf. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (deciding that slavish or mechanical copying is not original); Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983) (holding that "a derivative work must be substantially different from the underlying work to be copyrightable.").

18. E.g., Burrow-Giles, 111 U.S. at 58 (upholding copyright protection for photographs); see also 17 U.S.C. § 102 (defining general subject matter of copyright protection). § 102(a) of the Copyright Act protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

19. Goldstein v. California, 412 U.S. 546, 561 (1973). Additionally, it should be noted that § 102(a)(6) of the Copyright Act defines "works of authorship" to include motion pictures and other audiovisual works.

20. Feist, 111 S. Ct. at 1286.

21. Id.

22. Id.

23. Id.
copied some 1,300 of Rural’s listings, including four “dummy” listings used by Rural to ascertain copying.24

In reaching its decision, the Court focused on the notion that only original works of authorship are protected under copyright law.25 The Court stated that originality is required by the Constitution, emphasizing the importance of this proposition by repeating it at least seven times.26 Since facts are not original, the Court reasoned that no copyright can subsist in bare facts.27 Further, the Court concluded that the originality requirement cannot be met by showing that significant labor has been expended in creating a work, which clearly eliminates the “sweat of the brow doctrine” as a means to gain copyright protection.28 The Court noted that the only originality that can be found in a collection of facts is in the selection, coordination, or arrangement of those facts.29 Reading in the constitutional requirement of originality, the Court stated that “[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.”30

In applying this standard, the Court focused on the manner in which the collected facts had been selected, coordinated and arranged.31 In scrutinizing the directory, the Court found it to be “a garden-variety white pages directory.”32 The use of an alphabetical arrangement was considered to be nothing more than a common practice that is “firmly rooted in tradition” and “does not possess the minimal creative spark required by the Copyright Act and the Constitution.”33

C. Was the Constitutional Requirement Mandated?

Although the Court was clear in its belief that originality is constitutionally mandated, many commentators are both surprised and unhappy with the Feist decision.34 The Court’s grant of certio-

24. Id. at 1286-87.
25. Id. at 1288.
26. Id. at 1288-89, 1296-97.
27. Id. at 1289.
28. Id. at 1292.
29. Id. at 1289.
30. Id. at 1297.
31. Id. at 1296-97.
32. Id. at 1296.
33. Id. at 1297.
34. See Jane C. Ginsburg, No “Sweat”? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 350 (March 1992)
was not based on any constitutional issue. In general, the Court strives to avoid basing its holdings upon constitutional grounds. Furthermore, Professor Marci Hamilton notes that the jurisprudential approach of Justice O’Connor (who wrote the opinion for the Court in *Feist*) is usually restrained—she will seek a narrow holding rather than reach for a broader, constitutional one.

In *Feist*, the Court need not have reached the constitutional question, as several other options were available. The Court could have justified the originality requirement as being grounded in the Copyright Act. Section 102(a) of the Copyright Act states that copyright protection subsists in original works of authorship fixed in any tangible medium of expression. As Professor Paul Heald has noted, the Court could have justified its holding solely on the basis that telephone white pages are not “original works of authorship” within the meaning of the Act. Additionally, the Court could have based its decision on the fair use doctrine. Under this doctrine, since *Feist* copied only the names and addresses of Rural’s customers, it appropriated nothing save for facts which belong in the public domain. The use of these facts simply as a reference work could be considered

(assuming that *Feist* grossly neglects the incentive role of copyright); Paul J. Heald, *The Vices of Originality*, 1991 SUP. CT. REV. 143, 155-60 (1992) (arguing that *Feist* may prevent Congress from protecting “sweat of the brow” works which benefit the public welfare); Kristin Loeber, Feist Publications, Inc. v. Rural Tel. Serv. Co.: *Mopping the Sweat Off the Brow*, 44 BAYLOR L. REV. 409, 422-23 (1992) (suggesting that the result in *Feist* flies in the face of the ultimate goal of copyright law—to facilitate the flow of information into the marketplace of ideas); Philip H. Miller, *Life After Feist: Facts, the First Amendment, and the Copyright Status of Automated Databases*, 60 FORDHAM L. REV. 507, 521-23 (1991) (stating that *Feist* jeopardizes incentives to create databases).

35. Webster v. Reproductive Health Serv., 492 U.S. 490, 526 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (“Quite simply, it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”) (quoting Burton v. United States, 196 U.S. 283, 295 (1905)).

36. Marci A. Hamilton, *Justice O’Connor’s Opinion in Feist Publications, Inc. v. Rural Telephone Service Company: An Uncommon Though Characteristic Approach*, 38 J. COPYRIGHT SOC. 83, 87 (1991); see also Webster, 492 U.S. at 525 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (stating that since “there was no conflict with any of the Court’s past decisions concerning state regulation of abortion, there was no necessity to accept the State’s invitation to reexamine the constitutional validity of *Roe v. Wade.*”) (citation omitted).


38. Heald, supra note 34, at 147; see also Sherry Mfg. Co. v. Towel King of Fla., Inc. 753 F.2d 1565 (11th Cir. 1985) (new design on beach towel was too trivial to be considered original and hence unworthy of copyright protection).

That the Court rejected such approaches and instead based its holding on the Constitution demonstrates the strength of the Court’s belief in the constitutional origins of the originality requirement.

D. Historical Protection for Works of Labor

*Feist* essentially eradicates protection for works created from the “sweat of the brow.”\(^4\) Without protection, those who create a work purely by labor will gain no monopoly rights. Consequently, there exists little economic incentive to create such works. Thus, creators may not spend time and energy creating labor-intensive works since the works will immediately be available to free-riders who can copy the work with little effort and destroy the market for the original work.\(^5\)

Because of these problems with incentives, before *Feist*, the courts had long recognized the need to protect works created by industrious collection that benefit the general welfare.\(^6\) This “sweat of

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40. Heald, supra note 34, at 147; see Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., 768 F.2d 145, 149 (7th Cir. 1985).
41. *Feist*, 111 S. Ct. at 1292.
42. See William P. Farley, *Industry Impact of Feist*, in *FACT AND DATA PROTECTION AFTER FEIST* 41, 42 (Jon A. Baumgarten ed., 1991) (without protection, there will be greater difficulty in justifying major investments in certain compilation works. Some useful compilations will not be published); Heald, supra note 34, at 159 (the only way to stimulate investments in labor and research may be to provide limited protection to the facts and information thereby produced); Loeber, supra note 34, at 2 (individuals who would have researched important factual materials may not choose to invest their time and labor in a project which anyone may steal with impunity); see also Nash v. CBS, 899 F.2d 1537, 1542 (7th Cir. 1990) (there will be too few original investigations into history if all of the author’s work may be used without compensation); Miller v. Universal City Studio, 460 F. Supp. 984, 988 (S.D. Fla. 1978) rev’d, 650 F.2d 1365 (5th Cir. 1981) (an author can not be expected to expend time and money in gathering facts if he knows those facts and his profits may be pirated away).
43. Professor Jane Ginsburg observes that as early as 1790, the First Congress protected works which merely gather and report information by designating as copyright subject matter not only books, but also maps and charts. Ginsburg, supra note 34, at 380 n.202. Courts have found that copyright protection extends to maps and directories. E.g., United Tel. Co. v. Johnson Publishing Co., 855 F.2d 604, 607-09 (8th Cir. 1988) (telephone white pages directory); Hutchinson Tel. Co. v. Frontier Directory Co., 770 F.2d 128, 132 (8th Cir. 1985) (protecting telephone white page directory); Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., 768 F.2d 145, 149-50 (7th Cir. 1985) (plat maps); Schroeder v. William Morrow & Co., 566 F.2d 3, 6 (7th Cir. 1977) (gardening directory); Sampson & Murdoch Co. v. Seaver-Radford Co., 140 F. 539, 542 (1st Cir. 1905) (city directory of Boston); Rand McNally v. Fleet Mgmt. Systems 634 F. Supp. 604, 607 (N.D. Ill. 1983) (mileage date used in maps); National Bus. Lists, Inc. v. Dunn & Bradstreet, Inc., 552 F. Supp. 89, 91-95 (N.D. Ill 1982) (credit reports); c.f. Amsterdam v. Triangle Publications, 93 F. Supp. 79 (E.D. Pa. 1950) (finding that a map is copyrightable only if “the publisher of the map obtains originally some
the "sweat of the brow" doctrine had its roots in a 1922 decision by the Second Circuit wherein the Court stated that a copyright could be granted on the basis of 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 and thus obtain the exclusive right of multiplying copies of his work.44

In applying this standard, the court upheld a copyright given on a compilation containing the trademarks of many jewelry companies which the plaintiff had collected.45

Another famous example of the "sweat"-theory appears in Leon v. Pacific Telephone.46 The Leon court affirmed a finding of infringement where the defendant had taken information from the plaintiff's alphabetical directory and published it in a rearranged form according to numerical order of the numbers. In upholding the validity of the copyright, the court noted that creating a directory requires large amounts of research, time, and money.47 By using the addresses in the plaintiff's directory, the defendant's were attempting to unlawfully appropriate the fruits of the plaintiff's labor and expense.48 The court reasoned that this appropriation deprived the plaintiffs of the advantage of being able to publish their book at much less labor and expense than others.49 However, the defendants were free to publish their own directory as long as they received their data through their own labor.50

In the area of historical research, many courts felt ill at ease with the "sweat of the brow" theory.51 Protection for such works

45. Id.
46. Leon v. Pacific Tel., 91 F.2d 484 (9th Cir. 1937).
47. Id. at 485-86.
48. Id. at 487.
49. Id.
50. Id.
51. See, e.g., Narell v. Freeman, 872 F.2d 907, (9th Cir. 1989) (holding that historical facts and theories may be copied); Miller v. Universal City Studios, 650 F.2d 1365, (5th Cir. 1981) (holding that historical research is not copyrightable); Hoehling v. Universal City Studios, 618 F.2d 972, (2d Cir. 1980) (holding that interpretive theories of history are not copyrightable); Rosemont Enters. v. Random House, 366 F.2d 303, (2d Cir. 1966) (holding that historical facts and events are not copyrightable); Funkhouser v. Loews, Inc., 208 F.2d 185, (8th Cir. 1954) (deciding that historical subject matter is in the public domain); Suid v. News-
forced future researchers to go back to the author’s original sources and acted as a deterrent to later research. In effect, later historians were being asked to recreate the wheel.\textsuperscript{52} In disregarding the “sweat of the brow,” these courts noted the special benefit that the public receives from encouraging the development of historical and biographical works.\textsuperscript{53}

III. Colorized Films

A. Social Value and Mechanics of Colorized Films

To a large degree, modern audiences do not view black and white films.\textsuperscript{54} Thus, many works hailed as “works of genius” in their day now languish in studio vaults.\textsuperscript{55} However, by colorizing the film, the movie is able to reach out to a much larger audience and captivate an entirely new generation of viewers.

The colorization process has been compared to “painting by week Mag., 503 F. Supp. 146, (D.D.C. 1980) (deciding that historical research does not meet the standard of originality).

52. Rosemont Enter., 366 F.2d at 310 (“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 idea and facts . . . [is] designed to prevent.”).

53. Narell, 872 F.2d at 915 (noting that storytellers throughout time have used history as source material for works of imagination); Hoehling, 618 F.2d at 974 (“[T]he protection afforded the copyright holder has never extended to history . . . The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past.”); Rosemont Enter., 366 F.2d at 307 (finding a strong public interest in encouraging historical and factual works); Craft v. Kobler, 667 F. Supp. 120, 123 (S.D.N.Y. 1987) (holding that the law will not enforce efforts to hoard, suppress, sell, or license historical fact). Contra Toksvig v. Bruce Publishing Co., 181 F.2d 664, 667 (7th Cir. 1950) (protecting historical research into the life of Hans Christian Andersen, where the author’s research took over three years and was based on interviews and documents that the author had to translate into English); Holdredge v. Knight Publishing Corp., 214 F. Supp. 921, 923-24 (S.D. Cal. 1963) (protecting extensive historical research); cf Nash v. CBS, Inc., 899 F.2d 1537, 1542 (7th Cir. 1990) (stating that Hoehling reduces the incentives to do historical research and will result in fewer original investigations).


numbers only with computer sophistication.\footnote{Kohs, supra note 54, at 4.} First, the black and white film is transferred to a videotape. Then, a computer electronically scans the first frame of a scene and separates the frame into 525,000 "pixels,"\footnote{Michael C. Penn, Colorization of Films: Painting a Moustache on the "Mona Lisa"?, 58 U. CIN. L. REV. 1023, 1024 (1990).} with each pixel representing a portion of the picture. In some instances, a sensing device is then used to read the varying shades of black, white, and gray and separate them into the colors that were originally photographed.\footnote{Id. at 1024.} However, the color of sets, make-up, and clothes were often chosen on the basis of what would give the best rendition in black and white rather than the colors that would have been used had the movie been filmed in color.\footnote{Id. at 1024.} In these situations, the colorist must choose new colors by assigning one of approximately 50,000 hues to each pixel.\footnote{Id.}

To ensure the historical accuracy of the colors, researchers examine archives, refer to old photographs, talk to the original directors and actors and even search for the original sets and clothing.\footnote{Id. at 141.} Once the colorist has decided upon the proper hues for an entire frame, the computer monitors and colors each object as it moves from frame to frame until the scene changes at which point the process is repeated for the next scene.\footnote{Penn, supra note 57, at 1024.} It can take several hours to colorize even one minute of film\footnote{Lazzaro, supra note 54, at 400 n.23.} at a cost ranging from $2,000 to $5,000.\footnote{Id.}

As shown, colorization is achieved through a largely mechanical, labor-intensive process of discovering original colors or substituting those closest in spirit to the original by, for example, referring to old photographs or talking with the original director. To ensure that the proper colors are given to the computer, companies employ scores of researchers to seek out information and color cues about films that they intend to colorize.\footnote{Bader, supra note 55, at 141.}

B. Background of Protection for Colorized Films

In 1987, the Copyright Office announced that it would grant copyrights in colorized versions of black and white films as derivative

\begin{footnotes}
58. Id. at 1024.
59. Id.
60. Id.
61. The film's dialogue as well as costumes and other familiar objects may give clues about the correct colors. Bader, supra note 55, at 141.
62. Penn, supra note 57, at 1024.
63. Id.
64. Lazzaro, supra note 54, at 400 n.23.
65. Bader, supra note 55, at 141.
\end{footnotes}
works when created by the method previously described. However, in order to qualify for a derivative copyright, an existing work must be modified in such a way as to be an original work of authorship.

In promulgating its decision, the Copyright Office stated that it was a "close, narrow one," and was based on the selections made by the colorist. According to the Copyright Office, colorized films can be copyrighted as derivative works if the following criteria are met: (1) numerous color selections are made by human beings from an extensive color inventory; (2) the range and extent of the new colors represent more than a trivial variation; and (3) the overall appearance of the motion picture is modified. As with all derivative works, copyright extends only to the new material, which in the case of colorized films is the color selection.

C. Colorization in the Aftermath of Feist

Although decided prior to Feist, the Copyright Office had stated that colorization of films was worthy of copyright protection. A broad reading of Feist, however, tends to nullify that conclusion. While the Copyright Office based its decision to protect colorized films on the original selection of color by the colorist, it also implicitly recognized the amount of labor involved. Feist, however, explicitly states that labor is not a proper justification upon which to base copyright protection.

According to Feist, a copyright may be granted where the selec-


67. 17 U.S.C. § 101; see L. Batlin & Son v. Snyder, 536 F.2d 486, 490-91 (2d Cir. 1976), cert. denied, 429 U.S. 857 (1976) (holding that derivative works must possess a distinguishable variation to be worthy of copyright); cf. Saturday Evening Post v. Rumbleseat, 816 F.2d 1191, 1193 (7th Cir. 1987) (stating that a derivative work must have some incremental originality). But cf. Gracen v. Bradford Exch., 698 F.2d 301, 305 (7th Cir. 1983) (holding that a derivative work must be "substantially different" from the underlying work to be copyrightable).


69. The Copyright Office stated that its decision was based on the allegation that the typical colorized film is the result of the selection of 4000 colors drawn from a palette of 16 million colors. Id.

70. Id.

71. Id. (deciding that the copyright will cover only the new material, the selection of colors added to the original black-and-white film).

72. Id. at 23,444 (noting that colorists attempt to be faithful to the original coloring of the actors and actresses involved).

73. Feist, 111 S.Ct. at 1292; see also supra part II.B.
COLORIZATION OF FILMS

The colorization must be creative independent of the underlying motion picture. In most instances, colorization should meet this standard. For each frame, choices of color must be made for a variety of items, including wardrobe, flesh-tone, furniture, and lighting. The decisions involved in coloring a single frame containing only a green tree involves choices not only of color tone but also of shade, contrast, and depth. Since the colors are selected from over sixteen million palettes, colorization should demonstrate sufficient originality to qualify for copyright protection.

While a film colorized according to one's artistic taste should be able to meet the selection, coordination, and arrangement criteria espoused by Feist, many colorized films strive for strict historical accuracy. By doing so, the range of color choices is severely curtailed, thereby diminishing the selective choices made by the colorist. The less selection and arrangement exhibited by the colorist, the more difficult it is for a colorized film to meet the higher standard of originality required for derivative works. Furthermore, the Copyright Office has stated that registration is not justified based on a claimed "'arrangement' or 'combination' of the colors where the original

74. Feist, 111 S.Ct. at 1289.
76. Lazzaro, supra note 54, at 406.
77. See supra note 69 and accompanying text.
78. For a post-Feist case which is analogous to colorizing, see Lipton v. Nature Co., 781 F. Supp. 1032 (S.D.N.Y 1992), wherein the court found that a valid copyright existed in a portion of a book that contained a compilation of collective terms of venery (terms relating to hunting and nature). The compilation was assembled by combining those terms in the public domain with other venery terms that the author found by examining fifteenth century texts and manuscripts and translating them into Modern English from Middle English. Id. at 1034. The court noted that while considerable labor and research are not entitled to copyright protection, creative product and subjective selection are. Id. Thus, the court found that the compilation was worthy of copyright protection since the author: (1) used his own judgment in terms of selecting the venery terms for his book; (2) chose how to spell each term, and (3) arranged the terms according to his own sense of their lyrical and poetical potential. Id.; see also, SAS Institute, Inc. v. S & H Computer Sys., Inc., 605 F. Supp. 816, 827 (M.D. Tenn. 1985) (finding a computer program demonstrated enough originality to sustain a valid copyright even though the program was based upon another program that had entered the public domain).
79. Bader, supra note 55, at 139 n.29 (stating that the colorist's intent is to preserve the spirit of old works in their original form). The Copyright Office was aware of this as well. See supra note 166-71 and accompanying text.
80. Lazzaro, supra note 54, at 407 n.69 (noting that a film crew was sent to Macy's to "see exactly" what color the granite was when preparing to colorize Miracle on 34th Street).
81. See supra note 67 and accompanying text for a discussion of the standard of originality for derivative works.
black and white film predetermines the arrangement of the colors."82

As shown, historical accuracy in color selection is nothing more than the pursuit of public domain facts—the original colors—by the colorist.83 These facts are then "painted" onto the black and white film via computer.84 Since Feist prohibits protection for either facts or labor,88 and since there is no copyright in color per se,86 the only basis for protecting colorized films would be for expression added by the colorist. For those colorists striving to duplicate exactly the original colors of a film through the use of public domain factual sources and mechanical processes, no original expression is being added.87 The greater the role of historical accuracy, the more the colorist relies on factually determined colors. Thus, Feist would grant little or no protection.88
Unless there is some original expression, no copyright could be granted for the months of research and labor involved in locating the original color scheme and transferring it onto the black and white film. Without the benefit of the copyright monopoly, it is highly unlikely that anyone would put forth the huge sums of money and time needed to colorize films and make them interesting to a modern day audience. In the absence of copyright, other entrepreneurs would be free to appropriate and exploit the work for their own gain, effectively destroying potential markets available to the creator. Prior to the *Feist* case, one court held that “[if a work has] merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection.”

**IV. METHODS OF PROTECTING COLORIZED FILMS**

**A. Use of the Commerce Clause**

One method in which colorized films could be protected is through Congressional regulation under the Commerce Clause. Congress could pass legislation specifically preventing the copying of colorized films, or it could legislate protection by barring the copying of any work of intense labor and compilation.

However, the use of the Commerce Clause presents some difficulties. According to Nimmer, no judicial or legislative authority exists which would allow such legislation by Congress. Additionally, in *Railway Labor Executors Ass’n v. Gibbons*, the Court unanimously held that the Commerce Clause could not be used to make an end-run around the Bankruptcy Clause’s requirement of uniform bankruptcy laws. It seems likely that the same rationale present in *Gibbons* would also bar any type of Commerce Clause legislation right to two similar but differently colored dolls. Holding to its belief that colors are not copyrightable, the Copyright Office registered only one of the dolls. *Id.*

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91. U.S. CONST. art. I, § 8, cl. 3. For a more complete discussion of Congress’s power under the Commerce Clause and its relation to the Intellectual Property Clause, see Heald, supra note 34, at 168-75.

92. Nimmer, supra note 8, § 1.90, at 1-60.


94. *Id. at 471* (refusing to permit Congress to allow employees of a bankrupt railroad to receive payments from the railroad’s estate in bankruptcy as this would remove from the Constitution a limitation on Congress’s power to enact bankruptcy laws).
aimed at removing limitations of the Intellectual Property Clause.

B. State Action

Although Congress's power to protect colorized films may be in doubt, state protection may be appropriate. Since originality is required by the federal Constitution, states may be able to legislate protection for works considered "unoriginal" under *Feist*. In order to do so, however, any state legislation must pass a federal preemption examination.95

The recent decision in *Bonito Boats v. Thunder Craft Boats*96 concerning preemption under the federal patent system indicates that state protection would be preempted. In *Bonito Boats*, Florida had narrowly drawn a statute to prevent the reverse-engineering of boat hulls by any direct molding process.97 The law was aimed at promoting the creation of new boat hull designs by preventing copying only through the most inexpensive method, the direct molding process.98 Although other forms of reproduction were acceptable under the Florida law, the Court stated that this did not remove the statute's conflict with the federal scheme.99 Thus, the Court upheld the invalidation of the statute since it provided protection without any of the standards required by the patent law such as novelty or usefulness.100

Additionally, Section 301 of the Copyright Act preempts all state causes of action which grant rights equivalent to those in the Copyright Act for subject matter covered by the Act.101 In light of the *Bonito Boats* ruling that the federal patent law preempts the

95. *See* U.S. CONST. art. VI, § 2.
97. *Id.* at 144-45.
98. *Id.* at 158-59.
99. *Id.* at 160.
100. *Id.* at 158-59.
101. 17 U.S.C. § 301 (1988). For a full discussion of the effect of § 301 on state right causes of action, see *Nimmer*, *supra* note 8, § 1.01[B] at 1-25 to 1-30; Ginsburg, *supra* note 34, at 355-61; Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 155 n.22 (1992) (stating that § 301 could be applied to pre-empt state protection); *see* Baltimore Orioles v. Major League Baseball Players Ass'n, 805 F.2d 663, 676 (7th Cir. 1986) (finding that § 301 prevents states from protecting works which lack sufficient creativity because Congress has concluded such works should be in the public domain); Mayer v. Josiah Wedgwood & Sons, 601 F. Supp. 1523 (S.D.N.Y. 1985) (holding that conversion and misappropriation claims are preempted by Copyright law); Avco Corp. v. Precision Air Parts 210 U.S.P.Q. (BNA) 894 (M.D. Ala. 1980) (finding that misappropriation is pre-empted by § 301(a)), *aff'd on other grounds*, 676 F.2d 494 (11th Cir. 1982).


states from offering substantial protection to utilitarian and design ideas unprotected by the patent laws and the preemptive powers of Section 301 of the Copyright Act, it would seem that no matter how carefully drawn, any state statute attempting to protect colorized films would also be preempted.

C. Narrowly Reading Feist

Although the broad language of Feist seems to render both Congress and the states powerless to protect colorized films, the courts may be able to continue to protect such works by giving Feist a narrow reading. For example, extraordinary labor and skill could be seen as evidence of creativity. Such evidence when coupled with the colorist's selection and arrangement of color hues could constitute original authorship.

Historically, there is nothing unusual about lower courts narrowing broad intellectual property pronouncements by the Supreme Court. For example, many commentators feared that the broad language in Sears, Roebuck & Co. v. Stiffel Co. and Compco Corp. v. Day-Brite Lighting, Inc. signaled the evisceration of design protection and heralded revolutionary changes in the copyright and unfair competition law. However, these feared outcomes never came to pass, largely due to lower courts narrowly reading the Sears and Compco Corp. decisions. Even today, lower courts continue to pro-

102. Allen-Myland v. IBM, 770 F. Supp. 1004, 1012 n.11 (E.D. Pa. 1991). The idea that labor can be indicative of creativity existed pre-Feist. See Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959) (stating that copyright results from the skill and originality used in producing an accurate scale reproduction of the original Rodin's Hand of God Sculpture, because great skill and originality is called for when one seeks to produce a scale reduction of great work with exactitude); Kuddle Toy, Inc. v. Pussycat Toy Co., 183 U.S.P.Q. (BNA) 642, 658 (E.D.N.Y. 1974) ("The more the mezzotints in Bell v. Catalda approached perfection of copying, the more brilliantly 'original' within their own special art of copying . . . ").

103. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 228-30 (1964) (holding that states may not prohibit the copying of unpatented and uncopiertghted articles).

104. Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 238 (1964) (holding that states cannot enjoin the act of copying or selling unpatented or uncopyrighted products even if the copied features are nonfunctional and not essential to the use of the article).

105. Professor Milton Handler thought that Sears and Compco Corp. presaged the discarding of state unfair competition law. Milton Handler, Product Simulation, 64 COLUM. L. REV. 1183, 1190 (1964). Similarly, Professor Walter Derenberg noted that at first glance, Sears and Compco Corp. were tantamount to "[t]he roof [falling] in" on various preceedents of intellectual property law. Walter J. Derenberg, Product Simulation, 64 COLUM. L. REV. 1192, 1192 (1964). Professor Ralph S. Brown, Jr. believed that the Court had repudiated the longstanding rule prohibiting the copying of an article's nonfunctional design features. Ralph S. Brown, Jr., Product Simulation, 64 COLUM. L. REV. 1216, 1220-21 (1964).

106. See, e.g., cases cited infra note 107.
tect various works of aesthetic functionality despite the broad language of Sears and Compco Corp., which allowed the copying of an article's nonfunctional design.\textsuperscript{107}

Just as the courts have declined to give a broad reading to Sears and Compco Corp., many courts view the broad language in Feist as simply acting as a brake on the expansion of copyright protection for works of sweat. In particular, Feist is seen as overruling the result in West Publishing Co. v. Mead Data Central,\textsuperscript{108} which gave protection to West's page numbering of its reporters.\textsuperscript{109} Thus, while a first glance at Feist indicates that it bars protection for works of sweat, in practice, Feist's impact has been limited largely to works lacking both creativity and sweat. In examining cases subsequent to Feist, it seems that film colorization, like other works made by intensive labor, should continue to receive copyright protection.

1. Computer Programs

In the arena of computer programs, the narrowing of the Feist rationale is readily apparent. In Allen-Myland v. IBM,\textsuperscript{110} the court examined the infringement of computer code. In finding the code to be original, the court stated in a footnote that Feist does not render

\textsuperscript{107} W.T. Rogers Co. v. Keene, 778 F.2d 334, 340, 342-43 (7th Cir. 1985) (noting in a discussion of the functionality of a plastic stacking tray, that ornamental or fanciful shapes and patterns are protected if nonfunctional); In re Morton-Norwich Products, Inc., 671 F.2d 1332, 1341-44 (C.C.P.A. 1982) (noting that since no evidence indicated that the specific design of the spray bottle at issue was one of the best methods of design, it could not be said to be functional); In re World's Finest Chocolate, Inc., 474 F.2d 1012 (C.C.P.A. 1973) (granting design protection to a candy bar wrapper, despite its having structural or packaging functions, since its primary purpose was to distinguish and identify the product). Like containers, buildings have been granted trademark protection as long as problems of distinctiveness and functionality can be overcome. Fotomat v. Cochran, 437 F. Supp 1231, 1236 (D. Kan. 1977) (holding that despite serving functional purposes, Fotomat building is distinctive and constitutes valid service mark).

\textsuperscript{108} West Publishing Co. v. Mead Data Central, 799 F.2d 1219, 1227 (8th Cir. 1986) (holding that LEXIS had infringed West's copyright in the arrangement of its cases by referring to West's page numbers in LEXIS cases), cert. denied, 479 U.S. 1070 (1987).

\textsuperscript{109} See Harriette K. Dorsen, Compilations and Factual Narrative Works After Feist Publication v. Rural Telephone Service, 317 PLI/PAT 401, Sept. 20, 1991, available in WESTLAW, Journal and Law Review Database (questioning whether West's arrangement would be sufficiently creative under Feist); Gordon, supra note 101, at 274 n.471 (stating that, after Feist, the Eighth Circuit may have reached a different outcome and not found infringement); Heald, supra note 34 at 160-61 (“The 8th Circuit's decision in West Publishing Co. v. Mead Data Central, Inc. is almost certainly a casualty of Feist.”); Peter Jaszi, 505 and All That—The Defendant's Dilemma, 55 SPG LAW & CONTEMP. PROBS. 107 (1992) (stating that Feist casts considerable doubt on the rationale of West).

effort "utterly irrelevant" in determining originality. The court held that evidence showing that the microcode required 1,500 person years of effort was "probative . . . of the creative nature" of the work. The court also found that IBM's choices of whether and how to use various computer code structures and arrangements demonstrated sufficient intellectual labor and creativity.

In Apple Computer, Inc. v. Microsoft Corp., the court narrowed the Feist doctrine in its application of the "substantial similarity" test of copyright infringement. The court held that "unprotectible" elements should not be excluded from the substantial similarity of expression analysis. The court stated that if works are deemed substantially similar, copyright infringement is established even though the copyrighted work is composed of unprotectible elements. By doing so, the Court grants de facto protection to the portions of a work that are undeserving of copyright. The court reasoned that there can be no other logical way of protecting an innovative arrangement or the "look" and "feel" of certain works.

As far as computer programs are concerned, the use of labor as an indication of creativity undoubtedly constricts the Feist decision. Although labor cannot substitute for creativity, it seems that if extensive skilled labor has been expended, courts may stretch to find some creativity occurred as well. Similarly, the use of unprotectible elements in the infringement analysis assists someone who has expended great effort in protecting her work even if much of the work is actually unprotectible. By considering the sweat portions of a work in an infringement analysis, courts provide some de facto protection to the sweat of one's brow.

111. Id. at 1012 n.11.
112. Id.
113. Id. at 1012.
115. Id. at 135.
116. Id. at 136.
117. Id.
118. Id.
119. See J.H. Reichman, Electronic Information Tools—The Outer Edge of World Intellectual Property Law, 17 U. DAYTON L. REV. 797, 818 n.113 (1992) (stating that courts are subtly circumscribing Feist and providing greater protection to computer data bases); Allen-Myland, Inc. v. IBM, 770 F. Supp. at 1012 n.11.
120. See, e.g., Allen-Myland, Inc., 770 F. Supp at 1012 n.11. For a pre-Feist case with a similar holding, see Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959).
2. Yellow Pages Cases

While courts have continued to find white pages directories un-original,121 the outcome has been different with respect to yellow pages. Subsequent to Feist, the Second Circuit has held that valid copyrights exist in yellow pages directories.122 The Eleventh Circuit had also reached the same conclusion in Bellsouth Advertising & Publishing Corp. v. Donnelly, a decision later vacated and now awaiting rehearing en banc.123

In Key Publications v. Chinatown Today Publishing Enterprises,124 the originality of yellow pages directories aimed at Chinese-Americans was questioned. Key Publications ("Key") had collected business cards from those establishments which it felt would be of interest to Chinese-Americans and had sorted them into one of 260 categories with a total of 9,000 listings.125 The defendant's directory contains approximately 2,000 listings spread among 28 categories, of which 1,500 were also listed in the Key directory.126

The court stated that the directory met the minimal levels of originality127 and noted that copyright would hinge on the selection and arrangement of the data.128 Regarding selection, the court found that "thought and creativity" went into the selection of businesses

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121. E.g., Illinois Bell Tel. Co. v. Haines & Co., 932 F.2d 610, 611 (7th Cir. 1991) (following the decision in Feist).
122. See infra text accompanying notes 124-32.
123. Bellsouth Advertising & Publishing Corp. v. Donnelly Info. Publishing, 933 F.2d 952 (11th Cir. 1991), reh'g granted and opinion vacated, 977 F.2d 1435 (11th Cir. 1992). In upholding the copyright in a yellow pages directory, the panel noted that several acts of selection by Bellsouth rendered the directory "original." Id. at 958. Such acts included the following: deciding which geographic areas would be included, choosing a "close date" after which no more listings would be accepted, creating and picking which business classifications would be included, coordinating the informational components of a particular business into a complete business listing, and arranging these listings into the various categories. Id. at 957-58. Thus, the panel held that the yellow pages were "sufficiently distinct" from the white pages in Feist and were "original." Id. at 958.
125. Id. at 511.
126. Id.
127. Id. at 512-13 (stating that "original means not copied and exhibiting a minimal amount of creativity," which means a prohibition on actual copying).
128. Id. at 513.
since Key excluded those businesses which it felt "would not remain open for very long, such as insurance brokers and take-out restaurants, and traditional Chinese medical practitioners." Similarly, the court found that the arrangement was not mechanical, but that it involved creativity, as Key decided which categories to include and under what name. Thus, the copyright was valid. However, the court found that no infringement had occurred by only comparing protected elements in the substantial similarity analysis.

Despite the narrow infringement analysis employed by the Second Circuit, its decision can still be seen as a narrowing of the *Feist* doctrine. In most respects, there is little difference between the yellow and white pages directories. Both involve decisions about geographic limitations and closing dates. Both use alphabetical order—the white pages by last name, the yellow pages by product category and then by business within the category. Both also arrange listings in the "garden variety" manner of name, address, and phone

129. *Id.*
130. *Id.* at 514.
131. *Id.*
132. *Id.* at 514-16. Unlike those courts whose infringement analysis assists in protecting works of labor by including unprotectible elements, see *supra* text accompanying notes 114-18, the Second Circuit examined substantial similarity between only those elements which provide copyrightability to the infringed work. *Key Publications*, 945 F.2d at 514-16. Hence, the court examined only the selection or arrangement of the listings, stating that to hold otherwise would bring back the "sweat" doctrine and give a *de facto* copyright to the facts. *Id.* at 516. Thus, the defendants were free to copy the listings in the Key directory as long as they were operating under different principles of selection. *Id.* Since the defendants did not duplicate in total any of the categories, the court decided that there was no infringement. *Id.* at 517.
133. See Heald, *supra* note 34, at 161-62 (stating that *Feist* appears to jeopardize the protection for yellow pages). The original decision of the Eleventh Circuit panel to uphold the copyright in yellow pages certainly constricted the decision in *Feist*. Professor Ginsburg had characterized *Bellsouth* as demonstrating the Eleventh Circuit's resistance to the abolition of sweat-based copyright. Ginsburg, *supra* note 34, at 352. Others have described *Bellsouth* as a subtle and ingenious effort to circumvent *Feist*. Reichman, *supra* note 119, at 818 n.113. Whether or not the *Bellsouth* decision is dead will depend on the rehearing of the case en banc. It may very well be that the other members of the Circuit agreed with the rationale behind granting copyright to yellow pages directories, but did not agree with the panel's test of substantial similarity, which allowed the court to scrutinize all elements of the work, including those produced by "sweat," and ultimately resulted in a decision of infringement by the defendant. See *supra* note 123 and accompanying text.
The directories differ only in the use of business headings and in the amount of labor expended in compiling the listings. Although *Key Publications* emphasizes that the choice of headings and the selection of listings within each heading constitute originality, Professor Heald has pointed out that almost all yellow pages adhere to a standardized format proposed by the National Yellow Pages Service Organization. Thus, the choice of business headings would seem to be quite limited and "garden variety." As to the selection of listings, it would seem that the idea and the expression of many such listings would be merged. For example, there are only so many ways to express such things as boat repair or hair cutting, such as boat mechanic, nautical repair, barber, salon, beauty parlor.

The only real difference between the yellow and white pages directories is the amount of labor expended in creating them. Unlike Rural in the *Feist* case, which simply reproduced its subscriber list into a white pages directory, Key expended labor in creating its work by locating, soliciting, and compiling advertisers for its yellow pages directories. Given that the only true difference between the directories is in the labor expended in soliciting listings, the upholding of the copyright in yellow pages demonstrates that courts continue to be influenced by the amount of labor involved in creating a


136. Heald, *supra* note 34, at 162; see also Ginsburg, *supra* note 34, at 5 (In order to make yellow pages user-friendly, the number of possible combinations of classifications are decreased, thereby reducing the opportunities for creativity.).

137. Heald notes that the format of yellow pages directories would seem to be unprotectible as a practice "firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course." Heald *supra* note 34, quoting *Feist*, 111 S. Ct. at 1297; see Warren Publishing v. Microdos Data Corp., No. CIV.A.1: 90-CV-1654J, 1992 WL 235745, at *9 (N.D. Ga. Mar. 31, 1992) (stating that since the type of information desired by subscribers to publications on the cable industry are fairly standard, the selection of the data fields to be published does not have enough creativity to warrant protection, because the data fields are obvious).

138. In copyright, the doctrine of idea-expression merger prevents copyright protection for the expression of an idea if the idea can only be expressed in a very limited number of ways. See, e.g., Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967) (finding that a sweepstakes entry form has limited number of expressions); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971) (finding that the idea of a jeweled bee pin merges with expression).

139. *See* American Direct Mktg., Inc. v. Azad Int'l, Inc., 783 F. Supp. 84, 95 (E.D.N.Y. 1992) (expressing that the dangers of tooth plaque are merged with the idea).

140. In return for the monopoly rights to local phone service, Rural was required to compile and produce a white pages directory. To do so, it simply reproduced its customer records. *Feist*, 111 S. Ct. at 1286.

141. *Key Publications*, 945 F.2d at 513.
work and, therefore, are willing to stretch their understanding of "creativity" to acknowledgement of that work.142

3. Charts and Tables

In Armond Budish v. Harley Gordon,143 Judge Alice M. Batchelder granted a preliminary injunction against a defendant who copied certain tables regarding Medicaid from the plaintiff's book.144 The plaintiff had created his tables by culling and rearranging data and footnotes from a lengthy and cumbersome government report together with information compiled from other sources.145 Although the facts were all in the public domain, the court agreed with the plaintiff that the defendant had impermissibly copied its facts from the plaintiff's book.146

In effect, the outcome is the same as that which would occur under a "sweat of the brow" test. Under the "sweat" doctrine, the copyright would be upheld as a reward for the labor expended in sifting through and rearranging the government report. Post-Feist, the court upholds the copyright on the basis of the author's original selection and arrangement of data, all of which was compiled from public domain sources.147 This selection and arrangement is tantamount to "labor" under the old doctrine and "creativity" or "originality" under the new doctrine. It seems that all the plaintiff did was to choose specific data and arrange it in a more user-friendly fashion. Such actions are not generally considered creative.148

In another recent case involving charts, Kregos v. Associated Press,149 the Second Circuit reversed a summary judgment finding

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142. Most commentators believe that yellow pages directories exhibit no extra creativity as compared to white pages. See supra text accompanying notes 133-37. Depending on the outcome of the rehearing in BellSouth, the Eleventh Circuit may be in disagreement with these commentators. See supra note 123.
144. Id. at 1338.
145. For example, the author winnowed through hundreds of information categories and chose eight for one of his tables. Another table was created by discarding nine of seventeen categories. Id. at 1324-27, 1333.
146. Id. at 1337.
147. See id. at 1332-33. Budish relied on information in government reports. Id. at 1326.
148. See Matthew Bender & Co. v. Kluwer Law Book Publishers, 672 F. Supp. 107, 108, 112 (S.D.N.Y. 1987) (holding that a 635 page chapter in a nine-volume treatise on tort awards organized alphabetically by body part, state, and adequacy of the reward, was insufficiently original to be creative because the ways in which the material could be arranged so as to be useful to the practitioner were very limited).
that no copyright could subsist in plaintiff's baseball pitching form.\textsuperscript{150} The Second Circuit found that the plaintiff's form contained enough selectivity to satisfy the requirement of originality because the plaintiff chose nine specific categories out of "scores of available statistics."\textsuperscript{151} In examining the form's arrangement, the court held that it was a "garden-variety" pitching form since the statistics were organized into columns and grouped in the same manner as most other forms.\textsuperscript{152} Thus, the court held that the only potentially protectible element is the selectivity of the statistics, which the plaintiff is entitled to test at trial.\textsuperscript{153}

Like \textit{Armand Budish}, the chart in \textit{Kregos} is compiled by gathering public information and rearranging it to make it more appealing and useful to the public. Under the "sweat" doctrine, labor bestowing a benefit upon society is deserving of protection.\textsuperscript{154} In truth, the plaintiffs merely winnowed through various public domain facts and emerged with their own charts. Referring to this as "original" is simply the language of "sweat" couched in new terms.\textsuperscript{155}

The Second Circuit's invalidation of a racing chart in \textit{Victor Lalli Enterprises, v. Big Red Apple, Inc.}\textsuperscript{156} is not inconsistent with the idea that certain labor intensive works deserve protection. Rather, the decision is consistent with the view that works involving no real labor such as West's pagination efforts deserve no protection.\textsuperscript{157} Thus, in \textit{Victor Lalli Enterprises}, the court refused to grant protection to a chart created by subjecting public domain numbers to

\begin{itemize}
  \item[151.] \textit{Kregos}, 937 F.2d at 704-05.
  \item[152.] \textit{Id.} at 709.
  \item[153.] \textit{Id.} at 709-10.
  \item[154.] \textit{See} discussion \textit{supra} part II.D (discussing protection given under the "sweat of the brow" doctrine).
  \item[155.] Since \textit{Kregos} is seen as an ingenious effort to limit \textit{Feist}, Reichman, \textit{supra} note 119, at 818 n.113, it is not surprising that the court in \textit{Kregos} reaches the same conclusion that it would have under a "sweat" analysis, albeit through different terminology.
  \item[157.] It should be noted that West's pagination efforts received protection from the Eighth Circuit. \textit{See} \textit{supra} notes 108-09 and accompanying text. However, as noted previously, many commentators believe that the Court in \textit{Feist} intended to brake the expansion of copyright protection by leaving works of such minor effort unprotected. \textit{See}, \textit{e.g.}, Gordon, \textit{supra} note 101, at 154 (\textit{Feist} may check the expansive willingness of courts); Reichman, \textit{supra} note 119, at 805 n.38 (It remains to be seen if \textit{Feist} checks the budding expansionist treatment of derivative factual works.). In other words, it is one thing to create a map or solicit advertising for a yellow pages but quite another to simply mark pages in numerical order.
\end{itemize}
COLORIZATION OF FILMS

a simple mathematical format. The court noted that all publishers of the charts used the same format that the information was "derived from commonly ascertainable external sources." Thus, since the publishers exercised no independent judgment, there was no reason to grant copyright protection.

4. Books

In Warren Publishing Inc. v. Microdos Data Corp., the plaintiff published a national directory of cable systems in alphabetical order by state. Although this method of arrangement was standard practice within the trade, the plaintiff argued that its method of defining a cable system was unique—the plaintiff defined a cable system as being composed of one or more residential communities where a cable company offers the same service at the same price. After defining the cable systems, the plaintiff determined the principal community for each cable system by asking the cable companies for their major residential community. The plaintiff then published its cable guide by listing other communities within a cable system alphabetically following their principal community. The court found this selection to be original and held that the defendant's use of these same cable systems in a database infringed the plaintiff's copyright.

In Lipton v. Nature Co., the court again used "selection" as a term of art to replace "labor." The plaintiff had written a book that used seventy-six "terms of venery" (collective terms relating to nature and hunting). The defendant sold hunting equipment imprinted with seventy-three words or "multitudes," of which seventy-two were exact replications of the plaintiff's terms of venery. In making its preliminary findings, the court noted that while some of

158. Victor Lalli Enters., 936 F.2d at 672-73.
159. Id. at 672.
160. Id. at 673.
162. Id. at *4.
163. Id.
164. Id.
165. Id. at *7.
167. Id. at 1033.
168. Id.
the terms in plaintiff's compilation are known and in the public domain, many others were creatively interpreted from Middle English and are products of plaintiff's imagination. The plaintiff used his own judgment in selecting and arranging the terms based on such factors as their "lyrical and poetic potential" and their "fluidity of language." The court noted that while considerable labor would not be enough to merit copyright protection, the plaintiff's actions appeared to render the work copyrightable.

A similar use of judgment by the plaintiff is seen in another unpublished opinion, NADA Services Corp. v. CCC Information Services, Inc. The plaintiff publishes an Official Guide to Used Cars that is created by gathering sales information from around the country. The company then chooses a "benchmark car" for every model which forms the basis for pricing all other models of that car. The price is derived from comparing statistical data, analyzing the economy and market trends, and the company's own judgment. The court noted the great expense and labor involved in collecting the data and even recognized that individual judgment is called upon. However, since the NADA Guide is marketed as containing "average values based on actual transactions," the court found the evidence of creativity to be mixed. While the court acknowledged that the company had some likelihood of proving at trial that these prices are original, it refused to grant a preliminary injunction against the defendant's copying as the equities favored the defendant.

Much like the cases involving charts, these book cases deal with information gathered from the public domain and reshaped to be more appealing and useful to the public. That a court can suggest that picking a principal community or choosing a benchmark car is original signals that courts seem to be substituting the language of "selection" and "arrangement" for that of "sweat" and "labor."

169. Id. at 1034.
170. Id.
171. Id.
173. Id. at *1.
174. Id.
175. Id.
176. Id. at *1.
177. Id. at *3.
178. Id. at *3-5.
5. Designs and Sculptures

In *Folio Impressions, Inc. v. Byer California*,\(^{179}\) the court examined the issue of whether a pattern of roses placed in straight lines and facing various directions was copyrightable.\(^{180}\) The arrangement was created by cutting out photocopies of the rose and pasting them over a background.\(^{181}\) Since the background had been copied from public domain sources, it was unoriginal.\(^{182}\) However, the arrangement of roses did possess some minimal standard of creativity in that the artist decided to place them in straight rows.\(^{183}\) The court found no evidence that the decision to place the roses in rows was copied from any other source.\(^{184}\) In holding the work copyrightable, the court stated that while the work required little creative input, it was still original to the plaintiff.\(^{185}\) Thus, protection was warranted for both the rose and the arrangement of roses.\(^{186}\) However, infringement did not exist as there was evidence that the design was arrived at independently.\(^{187}\)

In *Folio Impressions*, the court protects a design which seems as garden variety as the placing of names in alphabetical order. The court did so despite recognizing that copyright protects neither the idea of placing roses in straight lines nor the idea of a rose itself.\(^{188}\) Although the court says that copyright will protect the particular rose placed in a straight line, this is a peculiar statement since the court also states that "by the rose's very nature, one artist's rendering of it will closely resemble another artist's work."\(^{189}\) Thus, since roses tend to look alike and since there is no protection for straight line arrangements, it seems that the work should fall outside of copyright protection. That it does not indicates that courts are indeed being influenced by artistic labor as a means of earning copyright

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179. *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991). *But see Homer Laughlin China Co. v. Oman*, No. 90-3160, 1991 WL 154540 (D.D.C. July 30, 1991) (rejecting the plaintiff's contention that commercial success, expense, human effort, professional skills, and artistic recognition qualify the design for a copyright and instead upholding the Register of Copyright's refusal to register a chinaware design pattern which combined simple geometric shapes into one design).
180. *Folio Impressions*, 937 F.2d at 761.
181. *Id.* at 763-64.
182. *Id.*
183. *Id.* at 765.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 766.
188. *Id.* at 765.
189. *Id.* at 766.
D. Revisiting Protection for Colorized Films

As long as courts narrowly construe the *Feist* decision, colorized films should continue to receive copyright protection.190 For those artists who base their selection of colors on personal taste or reasons other than factual accuracy, colorized films should be able to demonstrate the requisite level of originality.191 Ample case law exists for this conclusion because color selection is no less original than choosing a principal community, adopting geographical or date limitations, picking data from government social security tables, or arranging roses in a straight line.192

For those films colorized according to historical accuracy, copyright protection poses a more difficult question. Unlike the mezzotints in *Alfred Bell & Co. v. Catalda Fine Arts*,193 the use of computers precludes any originality based on "defective musculature or shocks caused by claps of thunder."194 However, this does not mean that copyright protection cannot subsist in these works. Protection could be available under the rationale of *Alva Studios v. Winninger* and *Allen-Myland v. IBM*195 in which courts recognize that creativity may be evidenced by prolonged, highly skilled labor. In other words, over the length of time needed to colorize a film, some creativity must occur. This argument is bolstered by realizing that human beings are by nature imperfect. Therefore, it would be impossible for a human colorist to duplicate exactly the original colors of a film. No matter how hard one tries, the resulting film will reflect selections individually chosen by the colorist, even if by accident.

Other commentators would argue that copyright is justified since colorized films bestow a unique public benefit in terms of increased access to inaccessible works.196 Much like the reproduction

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190. As noted previously, many commentators believe that *Feist* was intended to check the expansion of copyright to include numerical paging or alphabetical order. See supra notes 108-09 and accompanying text. As such, it is not improper to construe *Feist* narrowly.

191. See supra text accompanying notes 56-64.

192. See supra part IV.C.


194. *Id.* at 105; see discussion supra note 82. With a computer, it is possible to correct any errors of this nature that might occur.

195. See cases cited supra note 102.

196. See Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT Soc'y 209, 212 (1983) (arguing that copyright in art reproductions is justified due to the public benefit of increased access to otherwise inaccessible works). Heald, supra note 34, at 163 (discussing post-*Feist* protection for maps and concluding that since the framers
of the Rodin sculpture in *Alva Studios*, colorized films bring inaccessible works to the public eye. To deny copyright protection to these films would force colorists to "add something" in order for their work to be perceived as original.\(^{197}\) This would not only increase the costs of the work,\(^{198}\) but it would also deprive audiences from seeing a colorized film that remains true to its original. Further, allowing a copyright in colorized films will not result in decreased access to information which courts with historical research feared;\(^{199}\) the "color" would actually result in increased public interest and access.\(^{200}\) Therefore, granting copyright to colorized films based on historical fact does not impact upon the greater need to disseminate factual works as compared to works of fiction or fantasy;\(^{201}\) the original black and white film remains in the public domain and the new version is protected only to the extent of the colors chosen.\(^{202}\)

V. Conclusion

As shown, the most feasible and logical technique for protecting colorized films is to continue to read *Feist* narrowly. The aftermath of the *Sears* and *Compco Corp.* cases\(^{203}\) demonstrates that historical precedent exists for lower courts constricting broad intellectual property declarations by the Supreme Court. Given the apparent narrowing of the *Feist* decision by the lower courts, it seems that this precedent is being followed and that colorized films remain eligible for

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\(^{197}\) Ginsburg, *supra* note 34, at 347 (to sustain copyright, compilers will be forced to add "original" content to their work in order to justify copyright).

\(^{198}\) *Id.*

\(^{199}\) *See supra* text accompanying notes 51-53.

\(^{200}\) Films are colorized with the idea of presenting them to the public for viewing, thereby earning profits. In order to achieve this goal, the colorist will need to release the new version as a television or studio film, or sell the film to secondary markets such as videocassette stores. In any event, the net result is increased public access.

\(^{201}\) Penelope v. Brown, 792 F. Supp. 132, 137 (D. Mass. 1992) (quoting Harper & Row v. Nation Enters., 471 U.S. 539, 563). Additionally, it may be argued that colorized films are closer in spirit to works of fiction or fantasy because the films most in demand to be colorized are of this exact nature, i.e., fiction.

\(^{202}\) Thus, a person could theoretically take the public domain version and then color it to his or her own tastes or simply view the colorized version and then choose out of the millions of palettes whatever colors she finds most appealing.

\(^{203}\) *See supra* text accompanying notes 103-07.
For most colorized films, the color selections made by artists can be seen as their personal expression, which should meet the standard of originality required for derivative works under *Feist*. For those films which strive for historical accuracy, the outcome should be no less certain. Evidence of creativity can be found in the tremendous skill and labor involved. The recognition of their social value and the acknowledgment that without incentives such works will not be created also adds to the argument in favor of protection.

By construing *Feist* as a retreat from the highly criticized decision in *West Publishing Co. v. Mead Data Central*,\(^2\) courts allow authors the incentive to continue to create works involving minimal originality, high labor costs, and great social benefits which will not otherwise be created. In doing so, the courts benefit the public welfare and effectuate the underlying policy of copyright protection. Harkening back to the twin bases of copyright law, protecting colorized films, even those colorized according to historical fact, rewards the artist for his creative efforts and more importantly, furthers the promotion of the arts by breathing new life into black and white films which have been all but abandoned by modern day audiences.

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