

Caught in the Crossfire: *Cable News Network v. Video Monitoring Services* and the Nature of Copyright*

I. INTRODUCTION

On April 6, 1992, the United States Court of Appeals for the Eleventh Circuit, sitting en banc, dismissed an appeal of a preliminary injunction entered against the operator of a video newsclipping service.¹ Noting that the district court had entered a permanent injunction during the pendency of the appeal, the court concluded that consideration of the preliminary injunction would be inappropriate as the validity of the permanent injunction was not then before it.² In doing so, the court rendered moot one of the more remarkable—if short-lived—copyright law opinions to emerge in recent years and certainly the most notable since the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*³

This opinion, entered earlier by a three judge Eleventh Circuit panel in *Cable News Network v. Video Monitoring Services*,⁴ would have dramatically altered the scope and protection available to television news broadcasts. Prior to the panel's decision, courts had summarily held television newscasts to be entitled to copyright protection as compilations⁵ and that the scope of this protection could extend to future news broadcasts not presently created.⁶ The panel's decision, however, undermined this premise by directly challenging the

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¹ *Cable News Network v. Video Monitoring Servs.*, 959 F.2d 188 (11th Cir. 1992) (en banc).

² *Id.* at 188.

³ 111 S. Ct. 1282 (1991); *see infra* notes 61–89 and accompanying text.

⁴ 940 F.2d 1471 (11th Cir.), *vacated and reh'g granted*, 949 F.2d 378 (11th Cir. 1991) (en banc), *appeal dismissed*, 959 F.2d 188 (11th Cir. 1992) (en banc).

For purposes of this article, the Eleventh Circuit panel's reversal of the district court's injunction will be referred to as "the panel decision."

⁵ *See Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1493–94 (11th Cir. 1984) ("Editorial judgment makes a news presentation—which consists of self-contained news stories originating outside the studio, linked together by live commentary—an original work of authorship entitling it to copyright protection."), *cert. denied*, 471 U.S. 1004 (1985), *on remand*, 618 F. Supp. 469 (N.D. Ga. 1985), *aff'd*, 792 F.2d 1013 (11th Cir. 1986); *see also* *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); *KCNC-TV v. Broadcast Info. Servs., Inc.*, 717 F. Supp. 1449 (D. Colo. 1988).

⁶ *See, e.g., Pacific & S. Co.*, 744 F.2d at 1499 n.17; *Georgia Television v. TV News Clips of Atlanta*, 718 F. Supp. 939 (N.D. Ga. 1989).

capacity of district courts to enter injunctive relief against the taping of news programs not yet created and, at the same time, indirectly questioning the copyright status of news broadcasts. Although the panel's opinion represented the first decision to challenge either seriously, it also was the first decision to address the nature and the extent of the protection that copyright law affords to a compilation after *Feist*.

This article analyzes the Eleventh Circuit panel's opinion in terms of present day copyright law and the significance of the panel's reasoning to copyright law's treatment of compilations. Part II of this article describes basic copyright principles and the statutory basis for copyright protection. Part III specifically addresses copyright law's factual treatment of compilations. This section explains the split of authority that existed between the circuits before 1991 with respect to extending copyright protection to factual compilations. Part III concludes with a comprehensive review of the Supreme Court's decision in *Feist*, which resolved the conflict in the circuits and clarified the extent to which copyright protection is available to owners of compilations.

Parts IV, V, and VI address the *Cable News Network* panel's decision itself. After setting forth the facts and summarizing the issues presented in the case, Part IV analyzes the panel's holdings and its application of *Feist*, with a particular focus on the copyrightability of news broadcast compilations and the proper scope of injunctive relief against the copying of those broadcasts. Part V argues that, although the defendant's appeal was ultimately dismissed by the full court on procedural grounds, the panel's decision was correct in its broad application of *Feist*, and that *Feist* governs the scope of protection properly afforded to factual compilations such as CNN's news broadcasts. Part VI examines the nontraditional approach from which the panel's decision addressed the conflict between the parties in the case and explains how this approach departs from that taken by previous courts. This section argues that, under *Feist*, future courts should adopt the panel's approach and analysis in addressing copyright issues. The article concludes with a brief discussion of the significance of the panel's decision.

II. THE STATUTORY BASIS FOR COPYRIGHT LITIGATION

A. *Copyrightable Material*

Article I, section 8, clause 8, the copyright clause of the United States Constitution, grants Congress the power to enact copyright legislation "[t]o 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.”⁷ Under the current copyright law, the Copyright Act of 1976,⁸ section 102(a) and 103(a) together specify the requirements for protection of all types of works copyrightable under the Act, whether for literary and artistic works under section 102(a),⁹ or for compilations¹⁰ and derivative works¹¹ under section 103(a). Although both section 102 and section 103 works are

⁷ U.S. CONST. art. I, § 8, cl. 8. Section 106 of the 1976 Copyright Act gives the copyright owner the following rights:

- 1) to reproduce the work in copies;
- 2) to prepare derivative works;
- 3) to distribute the work in copies publicly;
- 4) to perform the work publicly; and
- 5) to display the work publicly.

17 U.S.C. § 106 (1988). These rights are exclusive and appear to be subject only to the limitations set forth in the sections following section 106 in Chapter One of the Copyright Act.

Although article I, section 8, clause 8 refers only to “writings” courts have never limited the scope of copyright to strictly written matter. *See, e.g.,* Burrow-Giles Lithographic Co. v. Saronoy, 111 U.S. 53 (1884) (“writings” encompasses the literary production of the authors).

⁸ Pursuant to the copyright clause, Congress adopted a copyright statute in 1790 and, since that time, has substantially revised or rewritten the copyright law four times—in 1831, 1870, 1909, and 1976. The 1976 Copyright Act applies to works authored after January 1, 1978.

⁹ Under section 102(a), “works of authorship” include the following categories: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings. 17 U.S.C. § 102 (1988). This list is “illustrative rather than exhaustive.” H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 [hereinafter 1976 House Report].

¹⁰ *See infra* notes 14–23 and accompanying text.

¹¹ As defined in section 101:

A ‘derivative work’ is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.

17 U.S.C. § 101 (1988). Although both compilations and derivative works involve use of preexisting materials, the distinction between the two is found in a compilation’s use of preexisting material or data, and a derivative work’s use of preexisting works. This article addresses only the copyrightability of compilations.

entitled to copyright protection, the scope of protection provided by a section 103 copyright is more limited.

Section 102(a), stating the two fundamental conditions for copyright under the 1976 Act, provides that "copyright protection subsists in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with aid of a machine."¹² Accordingly, all works eligible for statutory copyright protection must meet two fundamental criteria: (1) the work must be entirely an original work of authorship; and (2) the work must be fixed in a tangible medium of expression.¹³

Specifically included in the category of "work of authorship" are section 103 compilations.¹⁴ A compilation is defined as a "work formed by the

¹² *Id.* § 102(a).

¹³ A work is "fixed" in a tangible medium of expression,

when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

17 U.S.C. § 101 (1988) (defining "fixed"). According to the House Report accompanying the Act:

It makes no difference what the form, manner, or medium of fixation may be, whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device.

1976 House Report, *supra* note 9, at 52. The crucial element of this requirement is that there is a physical embodiment of the work.

¹⁴ 17 U.S.C. § 103(a) (1988). The relationship between section 102 and section 103 is treated explicitly in the legislative history accompanying the Copyright Act of 1976, which provides:

Section 103 complements section 102: A compilation or derivative work is copyrightable if it represents an 'original work of authorship' and falls within one or more of the categories listed in section 102. Read together, the two sections make plain that the criteria of copyrightable subject matter stated in section 102 [i.e., fixation and originality] apply with full force to works that are entirely original and to those containing preexisting material.

1976 House Report, *supra* note 9, at 57.

collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”¹⁵ Thus, there are three necessary conjunctive elements of a copyrightable compilation: “(1) a collection and assembly of preexisting material, facts, or data (2) that are then selected, coordinated, or arranged (3) into a work which by virtue of that may be said to be as a whole an ‘original work of authorship.’”¹⁶ The term “compilation” additionally includes independently copyrightable works known as collective works.¹⁷

As reflected in the definition, and in contrast to section 102 works, a compilation is not a wholly original work and, consequently, is entitled only to partial copyright protection. As set forth in section 103(b), “[C]opyright 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.”¹⁸ In other words, copyright protection extends only to elements of a compiled work that are original to the compilation author such as the selection, coordination, or arrangement of the contents. The other elements of the work, the contents themselves, receive no protection from the compilation copyright.¹⁹ Therefore, the key concept is discerning the “material contributed by the author” as opposed to the “preexisting material employed in the work.” The author of a compilation has an exclusive right in the former, but not the latter.²⁰

¹⁵ 17 U.S.C. § 101 (1988).

¹⁶ WILLIAM PATRY, *LATMAN'S THE COPYRIGHT LAW* 63–64 (6th ed. 1986).

¹⁷ As defined in section 101: “A ‘collective work’ is a work, such as a periodical, issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” 17 U.S.C. § 101 (1988).

¹⁸ *Id.* § 103(b). This subsection further provides that the copyright in a compilation “is independent of, and does not affect or enlarge the scope . . . or subsistence of, any copyright protection in the preexisting material.” *Id.*

¹⁹ The legislative history of the 1976 Act also supports the conclusion that Congress intended to protect only the original contributions of a compiler. Both the House and Senate reports indicate that the copyrighting of a compilation was not intended to preclude others from using the underlying data: “The most important point here is one that is commonly misunderstood today, copyright in a ‘new version’ covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.” 1976 House Report, *supra* note 9, at 57; S. REP. No. 473, 94th Cong., 1st Sess. 55 (1975). For a discussion of the legislative history of the Act, see William Patry, *Copyright in Collections of Facts: A Reply*, 6 COMM. & L., Oct. 1984, at 11, 18–25.

²⁰ This is reflected in the copyright registration requirements, which provide that in an application for copyright registration a compilation work shall include “an identification of any preexisting work or works that it is based on or incorporates, and a brief, general

Additionally, both compilations and section 102 works are subject to further statutory provisions that may limit the extent of copyright protection. The most significant limitation is set forth in section 102(b), which provides, "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."²¹ This section codifies the age-old idea/expression dichotomy that copyright protection extends only to the expression of ideas, but not to the ideas themselves.²² By explicitly prohibiting copyright in ideas, facts, or information, section 102(b) insures that the public will not be deprived of access to these elements, regardless of their embodiment in a work subject to copyright protection.²³

statement of the additional material covered by the copyright claim being registered." 17 U.S.C. § 409 (1988).

²¹ *Id.* § 102(b).

²² The idea/expression dichotomy was explained by the late Register of Copyright Abraham Kaminste in his 1961 Report on the General Revision of the U.S. Copyright Law:

Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary, musical, graphic or artistic form in which the author expresses intellectual concepts. It enables him to prevent others from reproducing his individual expression without his consent. But anyone is free to create his own expression of the same concepts, or to make practical use of them, as long as he does not copy the author's form of expression.

REPORT OF THE REGISTER OF COPYRIGHT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (July 1961).

²³ Section 102(b) is complemented by section 107, which also insures that the public will not be deprived of access to certain elements regardless of their embodiment in a work subject to copyright protection. Section 107 codifies the judicially evolved doctrine of "fair use" which is often defined as the "privilege in others than the owner to use the copyrighted material in a reasonable manner" without consent, "notwithstanding the monopoly granted to the owner." *Rosemount Enters. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

Although the Copyright Act provides no express definitions of fair use, section 107 establishes that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (1988). In determining whether the use made of a work in a particular case is a fair use the factors to be considered shall include:

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

B. Copyright Formalities—Registration, Deposit, and Notice

In addition to being an original work of authorship and fixed in a tangible medium of expression, there are statutory formalities such as registration, deposit, and notice²⁴ which must be met. Registration of a copyright claim can be obtained “at any time during the subsistence of copyright in any published or unpublished work.”²⁵ To register a copyright claim the owner of the copyright, or of any exclusive right in the work, must file a copyright registration form with the Copyright Office,²⁶ pay a registration fee,²⁷ and deposit a copy of the copyrighted work to be registered with the Copyright Office.²⁸ Registration, however, is not a condition of copyright protection.²⁹ Copyright itself arises by operation of law when any original work of authorship is fixed in a tangible medium of expression from which it can be perceived.³⁰ Accordingly, copyright protection will exist despite lack of registration or deposit.

Registration and deposit, however, do have significant legal consequences,³¹ the most notable being that registration is a jurisdictional

17 U.S.C. § 107 (1988). Although the Eleventh Circuit panel referred to the “fair use” doctrine, the issue in *Cable News Network* does not involve “fair use” and, therefore, that subject is beyond the scope of this article.

²⁴ The notice provision must only be complied with by copyright owners who publicly distributed their work before March 1, 1989. *See* 17 U.S.C. § 401 (1988). March 1, 1989, is the effective date of the Berne Convention Implementation Act of 1988, which eliminated many of the copyright formalities, such as notice, that existed under the 1976 Act. *See generally* The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 (1988).

²⁵ 17 U.S.C. § 408(a) (1988).

²⁶ *See id.* § 409.

²⁷ *See id.* § 708.

²⁸ *See id.* § 407. The function of deposit is to provide the Library of Congress via the Copyright Office with copies and phonorecords of all works published within the United States.

²⁹ *See id.* § 408(a).

³⁰ *See supra* notes 12–13 and accompanying text.

³¹ In addition to prohibiting the institution of an infringement suit until after registration, the Act provides several incentives for copyright owners to register their works. For example, the Act limits statutory damages and attorney’s fees to works that are registered at the time of the infringement unless the work was registered within three months after the first publication. *See* 17 U.S.C. § 504 and § 412. Moreover, section 410(c) of the Act provides that registration, before or within five years after the first publication of the work, is prima facie evidence of the copyright and of the facts stated in the registration certificate, including the requirements of originality and susceptibility to copyright under

requirement and prerequisite to an infringement suit. Under section 411(a), “[N]o action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made.”³² As Congress explained this provision:

[R]egistration must be made before a suit for copyright infringement is instituted. Under the bill, as under the law now in effect, a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his right in the courts until he has made registration.³³

III. COPYRIGHT LAW’S TREATMENT OF FACTUAL COMPILATIONS PRIOR TO *CABLE NEWS NETWORK*

A. *Split of Authority: The Proper Rationale for Applying Copyright Protection to Factual Compilations*

Although the Copyright Act of 1976 clearly establishes the copyrightability of compilations, “copyright law and compilations are uneasy bedfellows.”³⁴ This is because of the undeniable tension between the two well-established propositions that: facts are not copyrightable but compilations of facts may be. Recognizing this tension, courts have disagreed as to the appropriate rationale

section 102(a). *See, e.g.*, *Donald Frederick Evans & Assoc. v. Continental Homes, Inc.*, 785 F.2d 897, 903 (11th Cir. 1986).

³² 17 U.S.C. § 411(a) (1988). Section 411(a) specifies two exceptions: (1) For Berne Convention works, whose country of origin is not the United States; and (2) when application, deposit, and fee were delivered to the Copyright Office in proper form and registration was refused.

Section 411(b) provides a third exception to the requirement of registration prior to the institution of an infringement action:

In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement . . . if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner (1) serves notice upon the infringer, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and (2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

Id. § 411(b).

³³ 1976 House Report, *supra* note 9, at 57.

³⁴ *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2d Cir. 1984).

for extending copyright protection to factual compilations and the scope of protection available to such works.

The disagreement originated to a large extent in the ambiguous language of the 1909 Copyright Act. The Act, like the Constitution, does not expressly require that a work be "original" in order to invoke copyright protection.³⁵ As a result of this omission, a conflict developed among the circuits as to whether a work must be "original" in order to invoke copyright protection. Several circuits held originality to be a statutory prerequisite for copyright protection and, consequently, that copyright protection could extend only to original works of authorship embodied in a compilation.³⁶ Other circuits, however, held "originality" to be satisfied by the collection of information and data and subsequently developed their own theory known as the "industrious collection" or "sweat of the brow" doctrine.³⁷

Recognizing that the language of the 1909 Act had "led to misconception about what is copyrightable matter,"³⁸ Congress made explicit the originality requirement in the Copyright Act of 1976, which specifically provides that copyright protection subsists in "original works of authorship."³⁹ The 1976 Act, however, does not include a definition of an "original work of

³⁵ The 1909 Act merely stated that "the works for which copyright may be secured under this act are all the writings of an author." 17 U.S.C. § 4 (1909). The 1976 Copyright Act is the first Copyright Act to expressly require that a work be "original" in order to invoke copyright protection.

³⁶ Based upon two decisions from the late 19th century in which the Supreme Court defined "authors" and "writings," the same words used in article I, section 8, clause 8 of the Constitution, lower courts concluded that the originality requirement was implicitly incorporated into the 1909 Act. In the first of these decisions, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the Supreme Court defined "author" in a constitutional sense, to mean "he to whom anything owes its origin; originator; maker." *Id.* at 58 (quoting *WORCHESTER'S DICTIONARY OF THE ENGLISH LANGUAGE* 99 (1897)). The Court emphasized the creative component of originality and described copyright as being limited to "original intellectual conceptions of the author." *Id.*

In the second case, *The Trade-Mark Cases*, 100 U.S. 82 (1897), the Supreme Court held that for a particular work to be classified "under the head of writings of authors," that originality is required and that originality requires independent creation plus a modicum of creativity. *Id.* at 94.

Based on these decisions, as one commentator noted, the courts therefore "inferred the requirement [of originality] 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." 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 2.01 (1990 ed.).

³⁷ See *infra* notes 41-49 and accompanying text.

³⁸ REPORT OF THE REGISTER OF COPYRIGHT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, *supra* note 22, at 9.

³⁹ *Id.*

authorship." As stated in the House Report accompanying the Act, "[T]he phrase is purposefully left undefined and is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute."⁴⁰ Therefore, the "industrious collection" doctrine developed by the courts under the 1909 Act continued to be applied in some jurisdictions under the 1976 Act.

1. The "Industrious Collection" Doctrine

The "industrious collection" doctrine, alternatively known as "sweat of the brow," bases copyright protection for compilations of factual materials on the labor expended by the compiler in gathering the facts presented. A compilation is copyrightable in its entirety, regardless of whether it is devoid of creativity or contains purely factual information, if it is the product of meaningful effort. In other words, the labor of the compiler, rather than any particular quality of the factual compilation, makes a work an "original work of authorship."

The classic formulation of the "industrious collection" doctrine appeared in *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*,⁴¹ in which the Second Circuit upheld the copyright to a book containing a compilation of addresses and trademarks of jewelers. Affirming a decision of Judge Learned Hand,⁴² the Second Circuit concluded:

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 copyright⁴³

Although the court used the term "author," it is clear that the directory contained wholly factual information and was void of original thought or original written expression. The only creativity was in the author's industry or labor in collecting the material.

⁴⁰ 1976 House Report, *supra* note 9, at 51.

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

⁴² *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922).

⁴³ *Jeweler's Circular*, 281 F. at 88.

Several circuits subsequently adopted the “industrious collection” standard of *Jeweler’s Circular*.⁴⁴ The Seventh Circuit, for example, has taken a strong position in support of the doctrine,⁴⁵ as illustrated by perhaps its most notable case on point, *Schroeder v. William Morrow & Co.*⁴⁶ In *Schroeder*, the plaintiffs sued for an infringement of a copyrighted garden directory that listed alphabetically the names and addresses of suppliers of items useful to gardeners which the defendant had incorporated into his own gardening book. Relying on *Jeweler’s Circular*, the Seventh Circuit found the copying to be impermissible, stating that “only ‘industrious collection,’ not originality in the sense of novelty, is required to find a work copyrightable.”⁴⁷ The court additionally concluded that because of the labor expended in compiling the facts any individual who wished to use the factual material contained in the compilation had to conduct his or her own independent research.⁴⁸ This rationale illustrates an underlying premise of the “industrious collection” doctrine, which is that one should not freely reap the benefit of the industry of another in reporting and researching facts.⁴⁹ This, according to the “industrious collection” doctrine, was one of the purposes for the Copyright Acts.

⁴⁴ This approach was largely adopted by the Seventh, Eighth, and Tenth Circuits. *See, e.g.,* *Illinois Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081 (7th Cir. 1990); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 916 F.2d 718 (10th Cir. 1990), (finding telephone white pages copyrightable), *rev’d*, 111 S. Ct. 1282 (1991); *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986) (finding creative selection in West’s ordering of cases and pagination in case reporters), *cert. denied*, 479 U.S. 1070 (1987); *Hutchinson Tel. Co. v. Frontier Directory Co.*, 770 F.2d 128, 132 (8th Cir. 1985) (sufficient authorship of white pages telephone directory established because plaintiff “solicited, gathered, filed, sorted, and maintained the information”).

⁴⁵ *See, e.g.,* *Illinois Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081 (7th Cir. 1990) (holding copyrightable telephone directory listings where defendant rearranged entries according to address and phone number); *see also* *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145 (7th Cir. 1985) (creation of map using boundary information from earlier map was copyright infringement). For a discussion of the Seventh Circuit’s application of the “industrious collection” doctrine, see Elizabeth M. Saunders, Note, *Copyright Protection for Compilations of Fact: Does the Originality Standard Allow Protection on the Basis of Industrious Collection?*, 62 NOTRE DAME L. REV. 763, 770–74 (1987).

⁴⁶ 566 F.2d 3 (7th Cir. 1977).

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* at 5–6.

⁴⁹ As one commentator has argued:

The effort of authorship can be effectively encouraged and rewarded only by linking the existence and extent of protection to the total labor of production. To focus on the superficial form of the final product to the exclusion of the effort expended in collecting the data presented in the work is to ignore the central contribution of the compiler.

2. *The Rejection of the "Industrious Collection" Doctrine*

Although some circuits adopted the "industrious collection" doctrine, other circuits rejected and criticized the doctrine for holding labor per se to be copyrightable. For example, in *Miller v. Universal City Studios, Inc.*,⁵⁰ the Fifth Circuit explicitly rejected the doctrine, finding research to be a form of factual compiling, and therefore not copyrightable. The trial court in *Miller* held that copyright law protected not only the ingenuity involved in giving expression to facts, but also the effort involved in discovering and exposing facts—the researcher's labor.⁵¹ Reversing and remanding the trial court's decision, the Fifth Circuit concluded that copyrightability rests "on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information."⁵² The court reasoned that protecting the industry involved in gathering facts or other noncopyrightable material essentially provided copyright protection to that material itself in violation of a fundamental principle of copyright law.⁵³

The Ninth Circuit, adopting the same reasoning as set forth by the Fifth Circuit in *Miller*, reached a similar conclusion in *Worth v. Selchow & Righter Co.*⁵⁴ After citing with approval decisions holding that research or labor per se is not protected,⁵⁵ the court concluded that the "Trivial Pursuit" board game did not infringe upon an encyclopedia of trivia because the defendant game manufacturer copied only the factual content and not the arrangement or selection of entries in the encyclopedia.⁵⁶ The *Worth* decision illustrates the rejection of the premise advocated by the "industrious collection" that every compiler must begin with an independent canvas. As summarized in a Second Circuit opinion:

[The courts] cannot subscribe to the view that any author is absolutely precluded from saving time and effort by referring to and relying upon prior

Robert Denicola, *Copyright in Collection of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981). *But see* Patry, *supra* note 19 (reply to Denicola).

⁵⁰ 650 F.2d 1365 (5th Cir. 1981).

⁵¹ *Id.* at 1369.

⁵² *Id.*

⁵³ *Id.* at 1372.

⁵⁴ 827 F.2d 569 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

⁵⁵ 827 F.2d at 573-74.

⁵⁶ *Id.* at 576.

published material. . . . It is just such wasted effort that the proscription against the copyright of ideas and facts . . . [is] designed to prevent.⁵⁷

So long as the original compiler's selection and arrangement is not used, a subsequent compiler is free to make use of the information in the original copyrighted compilation.⁵⁸ The only materials in the compilation that are not subject to the use by another are the original elements contributed by the first compiler. Alternatively stated, a copyright protects the original form, but not the factual contents of a compilation.

Notwithstanding the existence of this contrary line of authority, represented by such decisions as *Worth* and *Miller*, the "industrious collection" doctrine remained viable, and the debate continued as to the scope of copyright protection available to factual compilations.⁵⁹ As the Supreme Court noted in 1985, "[T]he law is unsettled regarding the ways in which noncopyrightable elements combine with an author's original contributions to form protected expression."⁶⁰ In 1991, however, in *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁶¹ a unanimous Supreme Court resolved the conflict by clarifying the extent of copyright protection available to factual compilations.

B. *Feist Publications Inc. v. Rural Telephone Service Co.*

Feist, perhaps the most important Supreme Court copyright case since the seminal case of *Wheaton v. Peters*,⁶² involved the copyrightability of a telephone directory's white pages. Feist Publications, a publishing company that distributes area-wide telephone directories, extracted telephone listings from Rural's local white pages without Rural's consent.⁶³ Although Feist hired

⁵⁷ *Rosemount Enter. v. Random House Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

⁵⁸ *See Triangle Publications, Inc. v. Sports Eye, Inc.*, 415 F. Supp. 682 (E.D. Pa. 1976).

⁵⁹ The "industrious collection" doctrine has always been the subject of much scholarly debate. *See, e.g.*, Denicola, *supra* note 49; Patry, *supra* note 19; Saunders, *supra* note 45.

⁶⁰ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985).

⁶¹ 111 S. Ct. 1282 (1991).

⁶² 33 U.S. (8 Pet.) 591 (1834). *Wheaton* established the bedrock theory of American Copyright Law: Copyright is the grant of a limited statutory monopoly to benefit the public interest.

⁶³ Rural Telephone Service Company is a certified public utility company providing telephone service to several communities in Kansas. Pursuant to state regulation, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. Rural obtains data for the directory from subscribers, who must provide their names and addresses to obtain telephone service. Feist Publications, Inc. is a publishing company that specializes in area-wide telephone directories covering a much larger geographic range than directories such as Rural's. When Rural refused to license its white page listing to Feist for a directory

personnel to verify listings out of Rural's white pages and altered many listings, its final product replicated 1,309 out of approximately 47,000 entries in Rural's directory, including four "trap entries" inserted by Rural to detect copying.⁶⁴ The issue presented to the Court was whether the copyright in Rural's directory protected the names, towns, and telephone numbers copied by Feist.

The Court began its opinion by discussing the tension between the propositions that facts are not copyrightable, whereas a compilation of facts may be.⁶⁵ The solution to resolving this tension, the Court held, was first to recognize why copyright protection does not extend to facts. Facts are not copyrightable because "the *sine qua non* of copyright is originality," and "[t]o qualify for copyright protection, a work must be original to the author."⁶⁶ The term "original," as used in copyright, the Court defined as "independently created by the author and possesses a minimal degree of creativity."⁶⁷ Although acknowledging that the threshold for originality is low,⁶⁸ the Court held "originality" to be the very premise of copyright, a statutory and constitutional requirement, and "the bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations."⁶⁹ Because facts, "whether they be 'scientific, historical, biographical, or news of the day,' do not owe their origin to an act of authorship, they are not original in the constitutional sense and, accordingly, not copyrightable."⁷⁰

Because facts, by themselves, are never copyrightable, the Court reasoned that the component of originality that renders a factual compilation subject to

covering eleven different telephone service areas, Feist extracted the listing it needed from Rural's directory without Rural's consent. Although Feist altered many of the listings, several were identical to listings in Rural's white pages. The district court granted summary judgment to Rural in its copyright infringement suit, holding that telephone directories are copyrightable. The court of appeals affirmed. *See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 916 F.2d 718 (10th Cir. 1990).

⁶⁴ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1286 (1991). Rural had inserted into its directory fictitious listings for the sole purpose of allowing it to detect copying of listings.

⁶⁵ *Id.* at 1287.

⁶⁶ *Id.* at 1287 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547-49 (1985)).

⁶⁷ *Id.* at 1287.

⁶⁸ *Id.* ("[T]he vast majority of works make the grade, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.") (quoting *NIMMER & NIMMER*, *supra* note 36, at § 1.08 [C] [1] (1990)). "Originality" does not require that facts be presented in an innovative or surprising way, however, the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. *Id.*

⁶⁹ *Feist*, 111 S. Ct. at 1288.

⁷⁰ *Id.* at 1289.

copyright lies in the arrangement, coordination, and selection of the facts.⁷¹ Therefore, “a factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement.”⁷² It is the original selection and contribution of the compiler that makes a factual compilation subject to copyright and “in no event may copyright extend to the facts themselves.”⁷³ The consequence of applying this rationale, as the Court recognized, “inevitably means that copyright in a factual compilation is thin,”⁷⁴ because “copyright protection may extend only to those components of a work that are original to the author.”⁷⁵

After establishing the standard that governs the extent to which copyright protection can be extended to factual compilations, the Court then proceeded to explain why the “industrious collection” doctrine was inconsistent with this standard. The “industrious collection” doctrine was held to have numerous flaws, “the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement—the compiler’s original contributions—to the facts themselves.”⁷⁶ Although acknowledging the possible

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1288–89 (citing Carl Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990); L. Ray Patterson and Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports & Statutory Compilations*, 36 UCLA L. REV. 719, 800–02 (1989)).

⁷⁴ *Id.* at 1289. As the Court stated:

Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.

Id.

⁷⁵ *Id.* at 1289.

⁷⁶ *Id.* at 1291. The Court emphasized the point that copyright protection could only be extended to the original components of a work by examining the copyright statute’s legislative history which defines the phrase “original works of authorship” by referring to the originality standard. In addition, the Court cited earlier Supreme Court decisions which it said made clear that the language of the 1909 Act did not permit the “industrious collection” approach. Specifically, the Court cited *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), as being the best example of a decision which recognized that the 1909 Act made clear that the statute did not permit the “sweat of the brow” approach. In *International News Service*, Associated Press had conceded taking news reported by International News Service and publishing it in its own newspapers. Recognizing that section 5 of the 1909 Act specifically mentioned “periodicals, including newspapers,” the Court acknowledged that news articles were copyrightable. *Id.* at 234. It flatly rejected, however, the notion that the copyright in an article extended to the factual information it contained: “The news element—the information respecting current events contained in the

unfairness of failure to protect the compiler's labor, the Court viewed the consequences as neither unfair nor unfortunate, but instead as being "the essence of copyright' and a constitutional requirement."⁷⁷ "The primary objective of copyright is not to reward the labor of authors, but 'to promote the progress of Science and useful Arts.'"⁷⁸ Therefore, fairness to compilers was simply not an issue and the circuits which had adopted the "industrious collection" doctrine had simply misunderstood the copyright statute.⁷⁹

The Court continued its discussion by examining some of the 1976 revisions in the Copyright Act,⁸⁰ which it determined to be a direct response to the Copyright Office's concern over some courts' adoption of the "industrious collection" standard. The Court noted:

The revisions 'explain with painstaking clarity' that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101.⁸¹

Thus, the 1976 Act left no doubt that originality, not "industrious collection," is the touchstone of copyright protection in fact-based works and, consequently, not every collection of facts receives copyright protection.⁸² Furthermore, because not all copying is copyright infringement,⁸³ the Court established that in an infringement action the copyright owner must establish two elements: (1)

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." *Id.*

⁷⁷ *Feist*, 111 S. Ct. at 1290.

⁷⁸ *Id.* (citing U.S. CONST., art. I, § 8, cl. 8); *accord* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). The Court further stated that rather than requiring each newcomer to start from scratch, copyright law intends to make available to all the fruits of previous research. *Feist*, 111 S. Ct. at 1290.

⁷⁹ *Feist*, 111 S. Ct. at 1299.

⁸⁰ For example, section 3 of the 1909 Act stated that copyright protected only the "copyrightable component parts" of a work. The 1976 Act deleted this section and replaced it with § 102(b) which identifies specifically those elements of a work for which copyright is not available.

⁸¹ *Feist*, 111 S. Ct. at 1295 (stating that the 1976 revisions had proven successful in "steering courts" in the right direction and citing approvingly *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981)). *See supra* notes 50-53 and accompanying text.

⁸² *Id.* at 1294.

⁸³ A person accused of copying may or may not be guilty of violating a copyright. Although a person who copies the original components of a work may be guilty of infringement, he or she may not be guilty of infringement if: (1) only unoriginal components are copied; or (2) if the copying is fair use in conformity with 17 U.S.C. § 107 (1988).

ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.⁸⁴

Having completed its attack on the “industrious collection” doctrine, the Court concluded by addressing the particular facts of the case presented. Beginning with the proposition that Rural owned a copyright in its telephone directory as a whole, which included introductory text and graphically laid-out yellow pages, it was uncontested that Feist had copied a substantial amount of factual information from Rural’s white pages.⁸⁵ Therefore, the issue was simply whether Rural had proven the second element necessary to establish infringement—the copying of constituent elements of the work that are original. Stated another way, the question before the Court was whether the names, towns, and telephone numbers listed in Rural’s telephone white pages were entitled to copyright protection. Recognizing that nothing Feist had copied reflected original authorship or “owed its origin” to Rural, the Court concluded that they were not.⁸⁶ The raw data making up the telephone directory did not satisfy the originality requirement and, given that Rural’s alphabetical listing amounted to a “garden-variety white pages directory, devoid of even the slightest creativity,”⁸⁷ the Court held that the selection, coordination, and arrangement of Rural’s white pages did not satisfy the minimum constitutional standards for copyright protection since “copyright rewards originality, not effort.”⁸⁸ Accordingly, because Feist had copied only the uncopyrightable data in Rural’s white pages, Feist’s use of the listings could not constitute infringement.⁸⁹

⁸⁴ *Feist*, 111 S. Ct. at 1296. This is contrary to many courts’ contention that to succeed in a copyright infringement action, a plaintiff must prove ownership of the copyright and copying by the defendant. *See, e.g.*, *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 711 (S.D.N.Y. 1987).

⁸⁵ It is interesting to note that the issue as to whether such copying included the selection and arrangement of the material was not addressed. Presumably, because Feist copied the entirety of the material, Feist would have been held to have copied the arrangement.

⁸⁶ *Feist*, 111 S. Ct. at 1296.

⁸⁷ *Id.* at 1296 (noting that although Rural’s arrangement may, technically speaking, owe its origin to Rural and that no one disputes that Rural undertook the task of alphabetizing the names itself, there is nothing remotely creative about arranging names alphabetically in a white pages directory).

⁸⁸ *Id.* at 1297.

⁸⁹ *Id.*

IV. CABLE NEWS NETWORK V. VIDEO MONITORING SERVICES

A. The Procedural History

Cable News Network v. Video Monitoring Services was initiated on November 23, 1988 when Cable News Network (CNN)⁹⁰ claimed ownership of a copyright in a certain thirty-minute television broadcast, "Crossfire," that Video Monitoring Services (VMS)⁹¹ had copied and sold.⁹² CNN brought a copyright infringement suit against VMS stating that it was "entitled, pursuant to section 502 [of the Copyright Act] to injunctive relief to prevent VMS from selling or otherwise distributing videotapes, transcripts, or other copies, in any form, of any of CNN's programming, or any part or portion thereof, and from otherwise infringing any copyright interest of CNN."⁹³ The district court granted CNN a preliminary injunction enjoining VMS from "copying or selling copies of any of CNN's programming."⁹⁴

On February 21, 1990, VMS filed a motion to clarify and amend the judgment stating that "the injunction language proposed by CNN was improper and overbroad because it prohibits far more activity that [sic] allegedly infringes CNN's copyrights."⁹⁵ Following the district court's denial of VMS's motion to clarify and amend the judgment, VMS filed an interlocutory appeal

⁹⁰ Cable News Network (CNN) is in the business of producing news reports which are broadcast and distributed via satellite to viewers throughout the United States and approximately sixty-five foreign countries. The programming at the domestic level is composed of two distinct presentations. The first, known as "Cable News Network," provides comprehensive up-to-the-minute coverage of domestic and international news, sports, business, and weather. The second programming service offered by CNN is known as "Headline News," which provides a more concise version of the basic coverage on a periodic cycle. Additionally, CNN programming consists of supplemental broadcasts embracing a variety of special programming covering various topics. Included in this category is the program "Crossfire."

⁹¹ Video Monitoring Services (VMS) is a national video monitoring service that monitors television programming nationwide, including CNN's, and provides copies of program segments and other information requested by its clients. During 1988, VMS's New York office recorded approximately \$300,000 in sales.

⁹² *Cable News Network v. Video Monitoring Servs.*, 940 F.2d 1471, 1474 (11th Cir.), *vacated and reh'g granted*, 949 F.2d 378 (11th Cir. 1991) (en banc), *appeal dismissed*, 959 F.2d 188 (11th Cir. 1992) (en banc). CNN had filed with the Copyright Office and received a certificate of registration for the thirty-minute segment, "Crossfire." The court presumed that employees of CNN recorded the sounds and images which constituted the broadcast of the segment, thereby conferring "authorship" status of CNN by operation of law. *Id.* at 1475 n.5.

⁹³ *Id.* at 1475.

⁹⁴ *Id.* at 1476 (emphasis added).

⁹⁵ *Id.*

to the Eleventh Circuit Court of Appeals. On September 4, 1991, the Eleventh Circuit panel entered its decision in *Cable News Network*, reversing and remanding the preliminary injunction and the subsequent denial of VMS's motion to clarify and amend.⁹⁶

B. *The Issues Presented*

The question presented on appeal to the Eleventh Circuit panel was whether the preliminary injunction granted by the district court was inconsistent with the law of copyright. Specifically, the injunction raised two issues. First, was the scope of the injunction overbroad in that it prevented VMS from copying (a) unregistered copyrighted claims in existing works and (b) future transmission programming yet to be created? Second, was the scope of the injunction contrary to the teachings of *Feist* in that it indiscriminately prohibited the copying of "any part" of CNN's news broadcast in the absence of proof that each and every element of the newscast constituted original, creative authorship?

C. *Analysis of the Case*

1. *Scope of the Injunction: Was it Overbroad and Inconsistent with the Law of Copyright?*

The power for any court to grant injunctive relief springs from section 502 (a) which provides: "Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."⁹⁷ The operative words are "having jurisdiction" and "copyright,"⁹⁸ and, as the panel recognized, before a court can have jurisdiction to entertain an infringement action, the prior registration requirements of section 411 must be met.⁹⁹ Furthermore, the scope of the remedy for copyright infringement is constrained and dictated by the scope of the copyright claim actually registered. In this case, CNN did not undertake to register its claim of copyright in the broadcast day on which the copyrighted segment of "Crossfire" appeared, or for that week, month, or year.¹⁰⁰ Moreover, by CNN's own admission, the

⁹⁶ *Cable News Network v. Video Monitoring Servs.*, 940 F.2d 1471 (11th Cir.), *vacated and reh'g granted*, 949 F.2d 378 (11th Cir. 1991) (en banc), *appeal dismissed*, 959 F.2d 188 (11th Cir. 1992) (en banc).

⁹⁷ 17 U.S.C. § 502(a) (1988).

⁹⁸ *Cable News Network*, 940 F.2d at 1480.

⁹⁹ See *supra* notes 24–33 and accompanying text.

¹⁰⁰ *Cable News Network*, 940 F.2d at 1480.

program is not the usual news, sports, or weather broadcast reporting that constitutes the bulk of CNN's 24-hour-a-day transmission programming.¹⁰¹ Nevertheless, the district court entered the injunction enjoining VMS from "copying or selling copies of *any* of CNN's programming."¹⁰² As the panel concluded, such relief assumes that one can enforce a remedy for infringement of: (1) unregistered claims of copyright in unpublished works; and (2) putative copyrights in works that are not yet in existence. Although the panel determined both to be manifestly contrary to the basic concepts of copyright law, it addressed the validity of each separately, beginning with the future works theory.

a. *Propriety of Affording Injunctive Relief for the Infringement of Future Works*

Even though recognizing that a court may enjoin the future infringement of copyrighted works in certain instances,¹⁰³ the panel concluded that copying of future works that are yet to be created could not be enjoined.¹⁰⁴ Part of the panel's reasoning was grounded in the theory that because a "future work," by definition, has not yet been created, it cannot be "fixed in a tangible medium of expression."¹⁰⁵ Without fixation, there can be no copyright protection because "[c]opyright protection subsists . . . in original works of authorship fixed in a

¹⁰¹ *Id.*

¹⁰² *Id.* at 1476 (emphasis added).

¹⁰³ *Id.* at 1481. *See, e.g.,* Encyclopedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1187-88 (W.D.N.Y. 1982) (enjoining "infringement of future registered works"); Orth-O-Vision v. Home Box Office, 474 F. Supp. 672, 685 (S.D.N.Y. 1979) (same); *cf.* Walt Disney Co. v. Powell, 897 F.2d 565 (D.C. Cir. 1990) (relying on *Britannica* and *Orth-O-Vision* to impose injunction on use of plaintiff's existing cartoon characters similar to the registered ones at issue).

¹⁰⁴ *Cable News Network*, 940 F.2d at 1481. This is because Congress in the 1976 Copyright Act requires the registration of a work in order to obtain a remedy for copyright infringement. 17 U.S.C. § 411 (1988). *See supra* notes 24-33 and accompanying text. This limitation, of course, is ignored by a permanent injunction protecting future works.

The only time an injunction against future unregistered works has been granted was in *National Football League v. McBee & Bruno's Inc.*, 792 F.2d 726 (8th Cir. 1986). This case concerned the unique circumstance of repeated interception of satellite broadcasts of professional football games which, unlike newscasts, consists entirely of special unscripted live events. Because these events were "spontaneous," section 411(b) was created to make available an infringement remedy to a "live" broadcast yet to be "fixed." 1976 House Report, *supra* note 9, at 57. Even under this limited and narrow procedure, however, registration has to be accomplished within three months of the work's transmission. CNN provided no such notice.

¹⁰⁵ *Cable News Network*, 940 F.2d at 1481. *See supra* notes 12-13 and accompanying text.

tangible medium of expression.”¹⁰⁶ The panel found further support for its conclusion—that relief can be granted only for extant copyright—in section 501(a), which provides: “Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright.”¹⁰⁷ Accordingly, until there is a copyright, there cannot be a copyright owner, and section 501(b) limits an action for infringement to acts that occur while one is the owner.¹⁰⁸ A copyright injunction thus can only be granted to protect the statutory rights of a copyright owner, in contrast to would-be authors who are not entitled to copyright protection. Therefore, the *Cable News Network* district court did not have jurisdiction enabling it to extend to CNN a copyright injunction.

In addition to challenging the district court’s jurisdiction to issue the injunction, the Eleventh Circuit panel also held that any injunction restraining the copying of a class of future works would be antithetical to the holding in *Feist*.¹⁰⁹ The injunction clearly afforded generic protection to all of CNN’s television news broadcasts, regardless of their satisfaction of the constitutional and statutory requirement of originality as interpreted in *Feist*.¹¹⁰ In prior

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* See 17 U.S.C. § 501(a) (1988).

¹⁰⁸ *Cable News Network*, 940 F.2d at 1481. Section 501(b) provides in pertinent part: “The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b) (1988).

¹⁰⁹ *Cable News Network*, 940 F.2d at 1481.

¹¹⁰ A permanent injunction relieves CNN of the burden of either complying with or proving the originality requirement. The result is that CNN would receive copyright protection to which it may not be entitled, i.e., not because all the components of the works are original, but because the works themselves are created by hard work. The panel also noted that an injunction that restrains the copying of a class of future works not yet created enables copyright claimants to avoid registration which the panel determined serves to maintain the copyright monopoly within the context of the promotion of learning, by assuring access to even unpublished works because the deposit is open to the public. *Cable News Network*, 940 F.2d at 1481.

It is apparent that the Constitution does not permit, and the Copyright Act does not provide for generic copyright protection for future works. Thus, Congress can provide copyright only for the writings an author has produced, not for writings that the author intends to produce.

Although the Copyright Act does not provide for an injunction to enjoin the infringement of future works, the copyright owner of a future original work is by no means remediless if that work is infringed. “The Copyright Act provides the owner of a copyright with a potent arsenal of remedies against an infringer.” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 438 (1984). The availability of statutory damages under 17 U.S.C. § 504(c)(2) (1988), as well as the court’s power to impound and to destroy infringing copies and “articles by means of which [infringing] copies or phonorecords may be reproduced,” *id.* § 503(a) and (b), and to award attorneys’ fees to the prevailing party,

copyright infringement cases similar to *Cable News Network*, courts, including the Eleventh Circuit, held the originality of newscasts to be beyond dispute based on the premise that “editorial judgment used to present effectively the events covered by the broadcast made it an ‘original work of authorship.’”¹¹¹ *Feist*, however, undermines this assumption and mandates that in each instance a determination be made whether the selection, coordination, and arrangement are sufficiently original to merit protection. As the panel decision noted, it cannot be assumed that after *Feist* every newscast will qualify for compilation copyright status.¹¹² Furthermore, affording protection to works, that may or may not be copyrightable, can clearly not be based on some “equitable” concept granting protection to the efforts of an author.¹¹³ As the panel concluded, *Feist* not only rejected the “industrious collection” doctrine, but also the notion that allowing free copying of facts was in any way “unfair” or “unfortunate.”¹¹⁴

b. *Propriety of Affording Injunctive Relief for the Infringement of Unregistered Copyrights in Existing Works*

Although the panel acknowledged CNN’s contention that the Eleventh Circuit had approved of affording injunctive relief for the infringement of

id. § 505, are arguably sufficient deterrents to the infringement of future works. Additionally, “any person who infringes a copyright willfully and for purposes of commercial advantage or private gain” may be prosecuted for a criminal offense. *Id.* § 506.

¹¹¹ See, e.g., *Georgia Television v. TV News Clips of Atlanta*, 718 F. Supp. 939 (N.D. Ga. 1989); *KCNC-TV v. Broadcast Info. Servs., Inc.*, 717 F. Supp. 1449 (D. Colo. 1988); *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1494 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985), *on remand*, 618 F. Supp. 469 (N.D. Ga. 1985), *aff’d*, 792 F.2d 1013 (11th Cir. 1986).

¹¹² *Cable News Network*, 940 F.2d at 1485 n.23. As established by *Feist*,

[N]ot every selection, coordination, or arrangement will pass muster. To merit protection, the facts must be selected, coordinated, or arranged in such a way to render the work as a whole original. This implies that some ‘ways’ will trigger copyright, but that others will not.

Feist, 111 S. Ct. at 1294 (citing Pátry, *supra* note 19, at 57). Accordingly, in light of *Feist*, a court could find a news broadcast not susceptible to copyright protection, regardless of the time expended by the network employees in compiling the materials.

¹¹³ *Cable News Network*, 940 F.2d at 1481 (“*Feist* overrules the ‘industrious collection’ or ‘sweat of the brow’ line of cases precisely because those cases indiscriminately afforded copyright protection against any and all copying of all or any part of a compilation.”)

¹¹⁴ *Id.* (citing *Feist*, 111 S. Ct. at 1290).

unregistered copyrights in existing works in a previous decision,¹¹⁵ it noted that such relief would render meaningless the substantive provisions of section 411(a) and, in any case, was clearly contrary to the teachings of *Feist*.¹¹⁶ The panel reiterated that a copyright owner's compliance with section 411 is a prerequisite to invoking the jurisdiction of the federal district court and pursuing any remedy for infringement.¹¹⁷ The dichotomy between copyright protection and remedy, the panel held, was apparent from the statutory language and legislative history accompanying the 1976 Copyright Act.¹¹⁸ Furthermore, sections of the Congressional Committee Report that focused on the registration requirement before the passage of the Berne Convention Implementation Act of 1988 indicates that registration is still in the public interest and therefore section 411(a)—and registration as a prerequisite to the filing of an infringement suit—should remain.¹¹⁹ Additionally, the Report reflects concern that abolition of the registration requirement would “result in attempts to use the legal system to exert control over materials that Congress

¹¹⁵ In *Pacific & S. Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), the Eleventh Circuit was presented with a copyright infringement case in which the district court had declined to afford injunctive relief to the copyright owner. Although the scope of an injunction was never at issue, in a footnote the court indicated the district court had

the power to issue [an injunction against the use of unregistered works] because the statute provides for injunctions to prevent infringement of a ‘copyright’ not necessarily the registered copyright that gave rise to the infringement action. . . . To refuse injunctive relief under these conditions would render meaningless the fact that registration is ‘not a condition of copyright protection.’ 17 U.S.C. § 408(a) (1977).

Id. at 1499 n.17. To the extent that CNN sought to rely upon the language of this footnote, the panel noted that the language is manifestly *obiter dicta* and that *Cable News Network* was clearly distinguishable from *Pacific & Southern*.

Furthermore, the panel noted that “since the [*Pacific & Southern*] opinion the Supreme Court [in *Feist*] had addressed and clarified the law of copyright and thereby removed any doubt concerning the appropriate scope of injunctive relief that may have been suggested by *Pacific & Southern*.” *Id.* at 1477.

¹¹⁶ *Cable News Network*, 940 F.2d at 1482–83.

¹¹⁷ *Id.* at 1482.

¹¹⁸ *Id.*

¹¹⁹ H.R. REP. NO. 609, 100th Cong., 2d Sess. 41–42 (1988) (concluding that registration promotes efficient litigation practices, narrows the issues that must be litigated and, because it pertains to proof of ownership, assists the courts in resolving the underlying copyright dispute). For an extensive discussion on the legislative debate, see NIMMER ON COPYRIGHT, *supra* note 36, at § 7.16 [B][1][6].

intended to be in the public domain.”¹²⁰ This concern was clearly realized in *Cable News Network*.¹²¹

As the panel recognized, the protection of CNN’s news broadcasts by the injunction was contrary to the scheme of the Copyright Act because it eliminated both the need for originality in the protected works, and the means of assuring a work’s existence—registration. Although an issue of fact, registration is also a constitutional requirement and its presence cannot be determined by inference or conjecture.¹²² Furthermore, without registration there can be no assurance that copyright will be limited to “original intellectual conceptions of the author,” as the Constitution mandates. By enjoining VMS from copying unregistered works, the district court in this case simply failed to recognize that the only way to ensure that a copyright claimant, such as CNN, fulfills the constitutional requirement of original authorship is to grant relief only in accordance with the copyright registration. Recognizing this failure, the panel properly held that CNN, like all copyright holders, must comply with the deposit and registration system before it can enforce copyrights in its news broadcasts.¹²³

¹²⁰ H.R. REP. NO. 609, 100th Cong., 2d Sess. 42 (1988).

¹²¹ *Cable News Network*, 940 F.2d at 1483.

¹²² By trying to protect all of the material in its broadcast day without proper registration, CNN precluded any analysis of originality or fair use with respect to the material it used, thereby preventing the district court from “fashion[ing] an injunctive remedy that balanced the copyright owner’s rights fairly against the rights of the public.” *Cable News Network*, 940 F.2d at 1479. If CNN had registered its copyright claim in a typical broadcast day, its registration application would have had to identify those uncopyrightable elements. *See supra* note 20.

Furthermore, relieving CNN of the statutory duty of registration as a condition for the protection of future works enables CNN to defeat the constitutional purpose of promoting learning, because the injunction allows CNN to prevent a news monitor from copying off-the-air its future fact-based newscasts that may be destroyed shortly after they are performed over the public airwaves.

¹²³ The panel further noted that even if CNN had undertaken registration of its claim of copyright in a typical broadcast day, the scope of the injunctive relief afforded by the district court would remain overbroad. As the panel recognized, “Copyright protection has never accorded the copyright owner complete control over all possible use of his work.” *Cable News Network*, 940 F.2d at 1484 (citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 433 (1984)). Arguably, VMS’s use of some of the material contained in CNN’s news broadcasts would constitute “fair use” and thus not an infringement of copyright. *See supra* note 23. An injunction, however, precluding VMS from copying CNN’s material in whole or in part, clearly robs VMS of the fair use defense, and accords CNN complete control over the use of its news broadcasts. As the panel concluded: “By approving a grant of injunctive relief for infringement of unregistered, copyrighted transmission programs, [the court] would allow broadcasters to close the door on public access to their work product.” *Cable News Network*, 940 F.2d at 1484. Furthermore, the panel recognized that in an age when the broadcast media represents the source of news for so many citizens,

2. *The Scope of the Injunction: Was it Contrary to the Teachings of Feist?*

Recognizing a television news broadcast to be a compilation consisting of preexisting, collected, and assembled materials that are factual in nature, the panel correctly reasoned that only the arrangement and selection of these materials makes the newscast as “a whole an original work of collective authorship copyrightable only as a compilation.”¹²⁴ Therefore, “the teachings of *Feist*, as to the scope of copyright protection for compilations, governed the case to the extent that the district court sought to afford protection to such newscasts.”¹²⁵

Relying on the language of *Feist*, the panel reiterated the importance of originality as the *sine qua non* of copyright protection, and recognized that preexisting, collected, and assembled factual materials incorporated into any news broadcast are never copyrightable. Therefore, if CNN had registered its news programming, the scope of the copyright could only extend to the newscast itself, as distinguished from the substance of the information contained in the news report. *Feist* leaves no doubt that “facts, whether they be ‘scientific, historical, biographical, or the news of the day’ do not trigger copyright because they are not ‘original’ in the constitutional sense.”¹²⁶ Accordingly, copyright protection can not extend to the news events, facts, or ideas that CNN incorporates into its news broadcasts. This material is not copyrightable, but rather a part of the public domain available to all, including VMS and, as established in *Feist*, the copying of public domain material is not only not copyright infringement, it is the exercise of a constitutional right.¹²⁷

Furthermore, copyright in a compilation does not extend to any preexisting material incorporated into the compilation. As set forth in section 103(b), “The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work and does not imply any exclusive right in the pre-existing material.”¹²⁸ *Feist* reiterates that copyright protects only those constituent elements of a work that are actually shown to be creatively original to the compilation authors: “[T]his is the point of section 103.”¹²⁹

thoughtful consideration must be afforded to the public interest, and courts “must exercise great care when fashioning injunctive relief in the copyright arena.” *Id.*

¹²⁴ *Cable News Network*, 940 F.2d at 1485.

¹²⁵ *Id.*

¹²⁶ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1289 (1991).

¹²⁷ *Id.* at 1290.

¹²⁸ *Cable News Network*, 940 F.2d at 1486 (citing 17 U.S.C. § 103(b) (1988)); see *supra* notes 14–23 and accompanying text.

¹²⁹ *Feist*, 111 S. Ct. at 1294–95.

As a matter of copyright law, much of the material in CNN's news broadcasts is not authored by CNN. The newscasts, as collective works, contain preexisting material, such as video news releases and commercials, that are separate contributions created outside of CNN's studio. Because "copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution,"¹³⁰ CNN is not entitled to copyright protection for the portion of its newscasts of which it is not the author. For example, CNN could not claim copyright in the amateur photographer's videotape of the Los Angeles police beating a motorist even if it broadcasts the video with permission. Similarly, CNN does not own clips of Congressional hearings or Presidential press conferences, or the commercials that interrupt its programming.¹³¹

The *Cable News Network* district court, however, clearly ignored this fact. The injunction it provided to CNN protected all of CNN's newscasts from being copied at any time, for any purpose, without regard to the authorship of the contents. This type of injunction granted CNN a copyright per se, which *Feist* directly forbids¹³² and is inconsistent with the provisions in the 1976 Copyright Act.¹³³

¹³⁰ 17 U.S.C. § 201(c) (1988). Section 201(c) additionally provides:

In the absence of any express transfer of copyright the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, and any later collective work in the same series.

Id.

¹³¹ A substantial portion of VMS's business involves recording television broadcasts so that it can monitor television advertising. Many of the copyright owners of the commercials run by CNN retain VMS to monitor CNN to ensure that the network properly aired their material. In monitoring broadcasts for such commercials, VMS provides its clients with written reports of the timing and placement of the advertisement, something that cannot feasibly be done by viewing broadcasts "live."

¹³² *Feist*, 111 S. Ct. at 1293 (compilations not copyrightable per se). Copyright per se means that a work is given copyright protection merely because it exists, not because it conforms to any constitutional or statutory conditions. The "industrious collection" doctrine, of course, results in copyright per se because its test is not the characteristics of the work, but the effort of the compiler.

¹³³ The permanent injunction relieves CNN of any duty to comply with any provisions of the Copyright Act as to its future newscasts by:

(1) not mandating that CNN create original works, 17 U.S.C. § 102(a) (1988); (2) enabling CNN to destroy the works systematically (and immediately after its use of them) with impunity, although the policy is that copyrighted works go into the

Although not discussed in the panel's decision, the injunction is additionally contrary to a further principle established in *Feist*. *Feist* makes it clear that in order to establish infringement, the copyright owner must prove the copying of constituent elements that are original.¹³⁴ CNN, as the copyright owner, would have the burden of proving that VMS had copied particular material of which CNN was the author. Because CNN could not know the future of its newscasts and, as a result, would be unable to fulfill this requirement, a reasonable inference is that CNN did not have a right to enjoin the copying of future works it had not yet created.

V. THE *CABLE NEWS NETWORK* PANEL DECISION, *FEIST*, AND COPYRIGHT COMPILATION

The significance of the *Cable News Network* panel decision to copyright law's treatment of compilations is substantial. Although ultimately vacated, the decision will likely serve as the focal point of debate over the proper scope of copyright protection for factual compilations for years to come. Even though the decision purported, on its face, to address only the scope of copyright protection available for CNN's news broadcasts, the panel's rationale and application of *Feist* can be extended to all copyright compilations. Notwithstanding the fact that *Feist* dealt with telephone directory white pages and *Cable News Network* dealt with television newscasts, both media are compilations. That a television newscast arguably entails more authorship than "the garden variety white pages directory" does not alter its status as a compilation, nor does it remove television news broadcasts from the rulings of *Feist*. The basic point of *Feist*—which is applicable to all works—is that "copyright protection may extend only to those components of a work that are original to the author."¹³⁵ The logical extension of this is the basic point of the panel's decision: an injunction that indiscriminately prohibits the copying of a compilation, without regard to the authorship of the contents, is inconsistent with the law of copyright. The effects of allowing the type of permanent injunction issued against VMS are: (1) that a compilation copyright owner is

public domain at the end of the copyrighted term, *id.* § 302(c); and (3) excusing CNN from making a deposit of the works with the Library of Congress.

Id. § 407.

Yet the injunction enables CNN to enjoy every benefit the Copyright Act confers. Furthermore, this type of injunction would deprive an accused infringer of defenses that would otherwise be available. For example, normally a defendant in a copyright infringement action can defend for lack of original authorship, lack of registration, fair use, or lack of ownership.

¹³⁴ *Feist*, 111 S. Ct. at 1296.

¹³⁵ *Id.* at 1289.

entitled to per se copyright for its fact-based works; (2) that a compilation copyright owner is entitled to a per se remedy for copyright infringement in the form of a permanent injunction; and (3) that a permanent injunction may protect uncopyrightable material contained in future works. As *Feist* makes clear, all three premises are contrary to both the Constitution and the Copyright Act of 1976.

VI. THE *CABLE NEWS NETWORK* PANEL'S APPROACH : A REFLECTION OF COPYRIGHT'S CHANGING LANDSCAPE

The importance of the panel's approach extends beyond the proper treatment of copyright compilations. The panel's reasoning represents a shift in the paradigm governing copyright law. As the panel noted, copyright by nature has two aspects, one proprietary and the other regulatory:

Copyright's basis as a proprietary concept is that it enables one to protect his or her own creations. Its regulatory basis is that when these creations constitute the expression of ideas presented to the public, they become part of the stream of information whose unimpeded flow is critical to a free society.¹³⁶

This dual nature of copyright has produced differing views as to whether copyright is essentially a proprietary or a regulatory concept. If held to be a regulatory concept, copyright is a limited statutory monopoly granted to authors for the public benefit.¹³⁷ In the alternative, if viewed as a proprietary concept, copyright is held to be a natural law property right of the author by reason of his or her creation.¹³⁸ In recent years, courts have tended to approach copyright conflicts from a proprietary premise and interpreted the function of copyright to be the protection of the author's property rights and economic interests, to "protect authors against those who would pilfer their work."¹³⁹

¹³⁶ *Cable News Network v. Video Monitoring Servs.*, 940 F.2d 1471, 1478 (11th Cir.) (quoting L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 5 (1987)), *vacated and reh'g granted*, 949 F.2d 378 (11th Cir. 1991) (en banc), *appeal dismissed*, 959 F.2d 188 (11th Cir. 1992) (en banc).

¹³⁷ See, e.g., Patterson, *supra* note 136.

¹³⁸ See, e.g., Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

¹³⁹ L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT, A LAW OF USERS' RIGHTS* 2 (1991) (quoting a recent article in *NEWSWEEK* that asserted confidently that "the primary purpose of copyright law is to protect the authors against those who would pilfer their work").

Presumably the courts have adopted this approach because they are concerned with equity as between the litigants and the equity is most often in favor of the copyright owner. See Patterson, *supra* note 136, at 5. Additionally, as the *CNN* decision alluded to, new communication technology, for example television, has led to an expansion of the

Feist, however, clearly establishes that this is not the intended purpose of copyright. Rather, the constitutionally-ordained purpose set forth in the copyright clause of the Constitution, “is not to reward the labor of the author, but [t]o promote the Progress of Science and Useful Arts.”¹⁴⁰ Thus, as the language in *Feist* indicates, copyright cannot be viewed as a property right of the author, but rather must be viewed as a statutorily defined right, granted by the Copyright Act—an Act that limits and precisely defines the scope of rights it confers.¹⁴¹

The panel decision clearly reflected a recognition that “*Feist* mandates a shift from the traditional [proprietary] approach to copyright conflicts” and “compels examination of copyright issues . . . also from a regulatory perspective.”¹⁴² The panel’s analysis of the conflict indicates an understanding that the scope of copyright protection that could extend to CNN was dictated not by precedent established in pre-*Feist* cases, but rather by the basic principles of copyright law as defined in the 1976 Copyright Act. This is the type of analysis mandated by *Feist* and, as such, should be the approach that future courts adopt. Therefore, the panel’s analysis of the issues and its interpretation of the principles codified in the 1976 Act ultimately may serve as an analytical foundation for future courts.

VII. CONCLUSION

Caught in the crossfire between CNN and VMS, the Eleventh Circuit panel adopted a holding directly challenging prevailing copyright doctrine. In doing so, the panel articulated a conceptual framework of copyright as a regulatory mechanism rather than one establishing a property right in gross to an author’s work. Although ultimately rendered moot by the Eleventh Circuit’s en banc dismissal of the defendant’s appeal, the panel’s rationale is not only likely to be controversial in the narrow inquiry of the copyrightability of factual

proprietary premise. See *Cable News Network*, 940 F.2d at 1478; see also PATTERSON & LINDBERG, at 11. (“This modern trend [of courts tending toward the proprietary premise] can be accounted for in part historically, since the application of copyright to any technology has generally led to an expansion of the proprietary premise.”).

¹⁴⁰ *Feist*, 111 S. Ct. at 1290 (citing U.S. CONST. art. I, § 8, cl. 2).

¹⁴¹ For example, as previously discussed, section 102(a), provides copyright protection only for original works of authorship; section 102(b) denies copyright protection to ideas; section 103(b) limits copyright protection for derivative works and compilations. See *supra* notes 14–23 and accompanying text.

¹⁴² *Cable News Network*, 940 F.2d at 1478. The panel approached the conflict from both the proprietary and regulatory perspective. By adopting this approach the panel hoped “to arrive at a balance between the Copyright Clause and the First Amendment that harmonized the underlying concerns of the founding fathers embodied in our constitutional legacy.” *Id.*

compilations but also is likely to be a harbinger of debate over the very nature of copyright itself.

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