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Copyright Law: Copyright Protection for Factual Compilations: The White Pages of the Phone Book are Not Original Enough to Be Copyrighted—But Why?

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CASENOTES

COPYRIGHT LAW: COPYRIGHT PROTECTION FOR FACTUAL COMPILATIONS: THE WHITE PAGES OF THE PHONE BOOK ARE NOT ORIGINAL ENOUGH TO BE COPYRIGHTED - BUT WHY?—*Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282 (interim ed. 1991).

I. INTRODUCTION

Ma Bell, as the telephone industry used to be affectionately known, will not be happy with the United States Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*[1] The Court decided that the white pages of a phone book cannot be copyrighted.[2] This decision affects not only the telephone industry but all other compilers who hold copyrights for factual compilations.[3] "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[4]

Prior to the *Feist* decision, the circuit courts were split regarding the proper standard concerning copyright protection for compilations.[5] The Seventh and Eighth Circuits applied an industrious collection standard which granted copyright protection based on the effort or labor

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1. 111 S. Ct. 1282 (interim ed. 1991) (the prior history of *Feist*, 663 F. Supp. 214 (D. Kan. 1987), *aff'd without opinion*, 916 F.2d 718 (10th Cir. 1990), *cert. granted*, 58 U.S.L.W. 2633 (U.S. May 29, 1990) (No. 89-1909)).

2. *Feist*, 111 S. Ct at 1297. The question presented was: "Does the copyright of a telephone directory by the telephone company prevent access to that directory as source of names and numbers to compile competing directory, or does copyright protection extend only to selection, coordination, or arrangement of those names and numbers?" 59 U.S.L.W. 3517 (U.S. Feb. 15, 1991) (No. 89-1909) (case argued Jan. 9, 1991).

3. 17 U.S.C. § 101 (1988).

4. *Id.*

5. *Compare* Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984) (granting copyright protection on the basis of compiler's judgment in selection, coordination, or arrangement) *with* Schroeder v. William Morrow & Co., 566 F.2d 3 (7th Cir. 1977) (granting copyright protection on the basis of compiler's efforts).

involved in compiling the work.[6] The Second, Ninth, and Eleventh Circuits applied an originality standard which required a certain level of judgment or choice in compiling the work before copyright protection would be granted.[7] Not only were the circuits split, but scholars were also split concerning the proper standard for granting copyright protection.[8]

The Supreme Court resolved this split in favor of the originality standard but failed to supply any guidance for the lower courts when trying to determine if a compilation is original enough to gain copyright protection. Using the *Feist* case as a focus, this note analyzes the Court's decision to choose originality as the standard for copyright protection. From this examination, this note concludes that the Court was correct in choosing the originality standard. Second, this note examines what issues the *Feist* decision resolves regarding the copyright of factual compilation. Third, this note argues that the *Feist* decision raises three problems in the area of copyright of compilations: (1) the decision eviscerates the public policy underlying copyright by raising the level of originality required for copyright thereby dissuading authors from undertaking compilations which in turn harms the public by reducing the free exchange and access to information; (2) the decision requires a higher level of originality than is congressionally mandated; and (3) the higher level of originality required by the Court stems from the Constitution, thereby eliminating congressional power to lower the standard if desired. Finally, this note examines the Court's failure to

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6. *See, e.g.*, West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986); Schroeder v. William Morrow & Co., 566 F.2d 3, 5 (7th Cir. 1977) (holding that "only 'industrious collection,' not originality in the sense of novelty, is required."). In *West* the court purported to rely on originality or judgment in granting copyright protection. *West*, 719 F.2d at 1223. In reality the court upheld West's copyright because West had "spent so much labor and industry in compiling . . . ." *Id.* at 1227.

7. *See, e.g.*, Worth v. Selchow & Righter Co., 827 F.2d 569, 573-74 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (holding that labor alone is not protected); Financial Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204, 208 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987) (denying copyright protection for daily bond cards because "little 'independent creation' was involved"); Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801, 810 (11th Cir. 1985) (protecting the selection and arrangement of the "Atlanta Yellow Pages" but not the pre-existing information).

8. *See, e.g.*, MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 3.04[B] (1990). "One who explores obscure archives and who finds and brings to the light of public knowledge little-known facts or other public domain materials has undoubtedly performed a socially useful service; but such service in itself does not render the finder an 'author.' " *Id. But see* Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981). Denicola stated that "[T]he very vocabulary of copyright is ill suited to analyzing property rights in works of nonfiction." *Id.* at 516. Denicola, therefore, finds that copyright law should protect the labor involved in the compilation. *See id.*

define originality in light of the confusion the *Feist* decision creates for subsequent lower court decisions.

II. BACKGROUND

A. *Copyright Law*

The Constitution grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries."[9] The inherent ambiguity of this clause gives Congress a broad range of avenues to effectuate its underlying purpose.[10] That purpose is to promote knowledge through the granting of economic incentives which will supply motivation to create the work, which in turn benefits the public.[11]

To achieve its goals, Congress has passed a number of copyright acts dating back to 1790.[12] The most recent omnibus revision of copyright law is the Copyright Act of 1976.[13] This act protects "original works of authorship"[14] and makes a distinction between original and preexisting material.[15] The act specifically protects a compilation[16] which is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[17] This language allows protection of the arrangement, coordination, or selection of preexisting material, but not protection of the preexisting material itself.[18]

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9. U.S. CONST. art. I, § 8, cl. 8.

10. *See* William F. Patry, *Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable)*, 12 COMM. & L. 37, 45 (1990). It is arguable that the *Feist* decision severely limits Congress' range of avenues to effectuate this clause. See *infra* text accompanying notes 299-312 for a discussion of this limitation.

11. Mazer v. Stein, 347 U.S. 201, 219 (1954).

12. After Congress passed the first copyright law in 1790, major revisions took place in 1831, 1870, 1909 and 1976. *See* Patry, *supra* note 10, at 45-46.

13. 17 U.S.C. §§ 101-914 (1988).

14. *Id.* § 102.

15. *Id.* § 103(b). The section states that "[t]he copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work . . . ." *Id.* This distinction is carried over from the 1909 Copyright Act. 17 U.S.C. § 5(a) (repealed 1978). It extended protection to the compilation itself but not to the underlying factual material which properly belongs in the public domain. *See id.*

16. 17 U.S.C. § 103(a) (1988).

17. *Id.* § 101.

18. *Id.*

Much of the preexisting material in a compilation will be facts and ideas which are not copyrightable.[19] They are the truth or foundation for knowledge and no one can own the truth.[20] An arrangement of those facts or ideas, however, can be copyrighted.[21] Therefore, courts must draw a fine line when distinguishing between protection of facts and the arrangement of those facts.[22] As one court stated, "[c]opyright law and compilations are uneasy bedfellows."[23] Thus, a court must decide not only whether a compilation is protectable but what elements of it merit protection.

B. The Originality Standard

The Second, Ninth, and Eleventh Circuits apply the originality standard to compilation cases.[24] Prior to the Copyright Act of 1976, "[o]riginality mean[t] only that work owes its origin to the author, i.e., [was] independently created, and not copied from other works."[25] The work had to contain a level of originality which "exceed[ed] that required for a fragmentary work or a short phrase."[26] Therefore, the originality standard required something more than labor for a work to gain copyright protection.[27]

Justice Holmes attempted to define originality in *Bleinstein v. Donaldson Lithographing Co.*[28] He described it as a minimum level of expression unique to the author.[29] "It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."[30] Holmes was trying to identify some irreducible quantum that most people can identify if they see "it" but cannot define what "it" is.[31]

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19. *Id.* § 102(b). The Court, in *Feist*, made this mandate very clear no less than eight times in its decision. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1295 (interim ed. 1991).

20. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

21. 17 U.S.C. § 103 (1988).

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

23. *Id.*

24. *See, e.g.*, Worth v. Selchow & Righter Co., 827 F.2d 569, 573-74 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); Financial Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204, 208 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801, 810 (11th Cir. 1985).

25. NIMMER & NIMMER, *supra* note 8, § 2.01[A].

26. *Id.* § 2.01[B].

27. *See id.* § 3.04.

28. 188 U.S. 239 (1903).

29. *Id.* at 250.

30. *Id.*

31. *See id.* This definitional problem is very similar to the problem faced by the Court when trying to define pornography. The answer supplied by Justice Stewart regarding pornography is

The Supreme Court offered further insight into what constituted originality in *Baker v. Selden*.[32] The Court stated that copyright was " 'for the encouragement of learning,' and was not intended for the encouragement of mere industry, unconnected with learning and the sciences."[33] The Court, however, also stated that the "novelty of the act or thing described or explained has nothing to do with the validity of the copyright."[34] The Court did not require that the author create something never done before, but did require that the copyrightable expression not be the product of mere labor.[35] As a result, originality must be somewhere between these two standards.

Originality becomes even harder to define in a factual compilation. Facts and ideas are not copyrightable.[36] Pure facts and ideas belong to the public.[37] Thus, the factual compilation cannot be copyrighted for its content but can gain protection to the extent that the manner of compilation is original.[38]

The Copyright Act of 1976 offers standards to determine whether a compilation is original.[39] Section 101 defines what needs to be present for a compilation to qualify as an "original work of authorship."[40] These qualifications are that the compilation be "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[41] While this definition is somewhat circular, originality for compilations under the Act of 1976 must equal a requisite amount of judgment which is identified as selection, coordination, or arrangement.[42] Courts have attempted to work out the required level of judgment involved in the originality standard.

In *Eckes v. Card Prices Update*,[43] the plaintiff compiled a list of 18,000 baseball cards.[44] Of these, 5,000 were ranked as premium cards due to their scarcity or the player pictured on the card.[45] The defend-

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also applicable to originality. Without being able to offer a definition, he stated: "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 187 (1964) (Stewart, J., concurring).

32. 101 U.S. 99 (1879) (involving the copyright of a book of accounting forms which was denied protection).

33. *Id.* at 105.

34. *Id.* at 102.

35. *See id.* at 105.

36. 17 U.S.C. § 102(b) (1988).

37. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

38. 17 U.S.C. § 103(b) (1988).

39. *See id.* §§ 101-103.

40. *Id.* § 101.

41. *Id.*

42. *See id.*

43. 736 F.2d 859 (2d Cir. 1984).

44. *Id.* at 860.

45. *Id.*

ant issued a card price update list which contained substantially the same 5000 premium cards listed by the plaintiff.[46] Many of the same mistakes and misspellings in the plaintiff's list showed up in the card price update.[47] The plaintiff sued for infringement and the defendant claimed that the plaintiff's list lacked the requisite originality to gain protection.[48] The Second Circuit held that the plaintiff's list of baseball cards deserved protection.[49] The court held that the selection, creativity, and judgment in choosing and ranking the cards rose to the level of originality required to gain copyright protection.[50]

In *Worth v. Selchow & Righter Co.*,[51] the plaintiff published an encyclopedia of trivia.[52] When creating its board game, the defendant copied much of the factual material contained in the encyclopedia but did not copy the format or arrangement of the facts.[53] The Ninth Circuit rejected the claim that the defendant's "Trivial Pursuit" game infringed upon the plaintiff's encyclopedia of trivia.[54] The court found the defendant had taken only the factual content and nothing more.[55] Since facts are not the proper subject of copyright, there could be no infringement.[56]

The Second Circuit, in *Financial Information, Inc. v. Moody's Investors Service, Inc.*,[57] denied protection for daily bond cards.[58] In this case, the plaintiff published a financial reporting service which contained daily bond cards.[59] The daily bond cards report when a municipality calls in bonds for redemption.[60] To fill out the card, a person with minimal training only needs to copy five facts from newspaper notices.[61] The defendant also published bond information and copied false information contained in plaintiff's publication.[62] The plaintiff sued for infringement, and the court held that the copying of five facts required little or no selection or judgment and thus it lacked the selec-

46. *Id.* at 861.
47. *Id.*
48. *Id.*
49. *Id.* at 863.
50. *Id.*
51. 827 F.2d 569 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).
52. *Id.* at 570.
53. *Id.* at 573.
54. *Id.* at 573.
55. *Id.*
56. *Id.*
57. 808 F.2d 204 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987).
58. *Id.* at 208.
59. *Id.* at 205.
60. *Id.*
61. *Id.* at 206.
62. *Id.*

tion, coordination, or arrangement which makes a compilation an original work of authorship.[63] The court, on this basis, found there was no infringement.[64]

In *Kregos v. The Associated Press*,[65] the Southern District Court of New York denied protection for a compilation consisting of baseball pitching statistics.[66] The plaintiff published a form containing the statistics for pitchers against the team they would be playing plus a number of other statistics relevant to the game of baseball.[67] The defendant subsequently began publishing a form almost identical to the plaintiff's form.[68] The court found that, due to the limited number of ways the form could be made and the space restrictions of the newspaper, the plaintiff's form failed to meet the originality standard.[69]

There are two important distinctions brought out by these cases. First, under the originality standard a certain level of judgment in selection and arrangement must be present to gain protection for a compilation.[70] As seen in *Moody's* and *Kregos*, if the process or selection is limited or overly simplistic, the compilation will not gain copyright protection.[71] Second, infringement will not be based on mere use of the first compiler's information.[72] As seen in *Eckes* and *Worth*, for copying to qualify as an infringement, the second compiler must also copy the arrangement and format in which the facts are presented.[73]

C. *The Industrious Collection Standard*

The industrious collection standard was first announced by the Second Circuit in *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*[74] This case involved the copyright of a directory of addresses of jewelers.[75] The directory included addresses and trademarks

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63. *Id.* at 208.

64. *Id.*

65. 731 F. Supp. 113 (S.D.N.Y. 1990), *aff'd in part and rev'd in part*, 937 F.2d 700 (2d Cir. 1991).

66. *Id.* at 122.

67. *Id.* at 114.

68. *Id.* at 115.

69. *Id.* at 118.

70. *See, e.g.*, Worth v. Selchow & Righter Co., 827 F.2d 569, 573-74 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); Financial Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204, 208 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801, 810 (11th Cir. 1985).

71. *See Moody's*, 808 F.2d at 208; *Kregos*, 731 F. Supp. at 118.

72. *See, e.g., Worth*, 827 F.2d at 573.

73. *See, e.g., id.*; *Southern Bell*, 756 F.2d at 810; Eckes v. Card Prices Update, 736 F.2d 859, 863 (2d Cir. 1984).

74. 274 F. 932 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922), *cert. denied*, 259 U.S. 581 (1922).

75. *Jewelers*, 281 F. at 84.

of jewelers in alphabetical order.[76] The Second Circuit Court of Appeals stated:

> 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 . . . . 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.[77]

This statement of the standard rejects any notion of originality.[78] It requires only a requisite amount of labor be expended in compiling the work.[79]

Prior to *Feist*, the Seventh and Eighth Circuits applied the industrious collection standard.[80] The standard allows copyright for an identical work as long as each compiler does his/her own independent labor.[81] A second compiler can publish an identical work as long as that compiler went from door to door retracing the first compiler's footsteps.[82] This standard essentially requires each subsequent compiler to "remake the wheel."[83] Requiring subsequent compilers to start afresh each time does not preclude them from using the first compiler's work.[84] Under the doctrine of fair use,[85] a subsequent compiler may copy limited portions of the original compiler's work.[86]

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76. *Id.*

77. *Id.* at 88. The Second Circuit Court of Appeals has renounced this standard and now applies the originality standard to copyright cases. *See, e.g., Eckes*, 736 F.2d 859.

78. *Jewelers'*, 281 F. at 88.

79. *See id.*

80. *See, e.g.*, West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986); Schroeder v. William Morrow & Co., 566 F.2d 3, 5 (7th Cir. 1977).

81. Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986). In *Rockford*, the court stated that "[e]veryone must do the same basic work, the same 'industrious collection.' " *Id.* at 148.

82. *Id.*

83. *See, e.g., id.*

84. *Id.* at 145.

85. 17 U.S.C. § 107 (1988). Fair use allows limited copying of copyrighted material and applies to both fictional works and factual compilations. *Id.*

86. *Id.* To determine if the fair use defense is available in a copyright infringement case, the court looks to four factors:

(1) "The purpose and character of the use;"

(2) "the nature of the copyrighted work;"

(3) "the amount used . . . in relation to the . . . whole;" and

(4) "the effect of the use upon the potential market for or value of the copyrighted work."

Under the industrious collection standard, the fair use doctrine has received a very narrow reading. In *Illinois Bell Telephone Co. v. Haines & Co.*,[87] the court found the defendant had infringed on the plaintiff's yellow pages.[88] The defendant published a directory which listed names and addresses in numerical order by phone number.[89] The plaintiff had published its directory with names and addresses in the usual alphabetical order.[90] The court held that the fair use defense was unavailable to the defendant, stating, "the Seventh Circuit firmly holds that a compiler commits copyright infringement if he copies the original compiler's information without conducting an independent canvass."[91] The Eighth Circuit in *United Telephone Co. of Missouri v. Johnson Publishing Co.*[92] also held that subsequent compilers must start with original work.[93] The defendant had made an independent canvass but used the plaintiff's directory to update annual copies of its directory.[94] The court ruled that updating did not constitute an independent canvass and concluded that the defendant had infringed.[95]

While fair use may be unavailable as a defense if the compiler has not done his own work, it is available if the first work is used only as a verification tool.[96] In *Rockford Map Publishers, Inc. v. Directory Service Co. of Colorado*,[97] the court stated it would allow use of the first compiler's work to verify the subsequent compiler's information.[98] "The second compiler must assemble the material as if there had never been a first compilation; only then may the second compiler use the first as a check on error."[99] Under the industrious collection standard, therefore, as long as the second compiler toils as much as the first compiler, there will be no infringement.[100]

D. Current Trends

Both the industrious collection standard and the originality standard have changed since their inception. They were moving in opposite

87. 683 F. Supp. 1204 (N.D. Ill. 1988).
88. *Id.* at 1209.
89. *Id.* at 1206.
90. *Id.*
91. *Id.* at 1210.
92. 671 F. Supp. 1514 (W.D. Mo. 1987), *aff'd*, 855 F.2d 604 (8th Cir. 1988).
93. *Id.* at 1522.
94. *Id.*
95. *Id.*
96. *See, e.g.*, Rockford Map Publishers, Inc. v. Directory Service Co. of Colo., 768 F.2d 145, 149 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986).
97. 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986).
98. *Id.* at 149.
99. *Id.*

directions prior to *Feist*.[101] That is, courts using the industrious collection standard had been granting copyright protection for almost any compilation or portion thereof.[102] On the other hand, those courts applying the originality standard had been denying protection for compilations that arguably should have gained protection.[103]

1. Trends in Originality

Courts applying an originality standard had been giving less and less protection for factual compilations.[104] In so doing, courts applied three different doctrines: (1) lack of sufficient originality;[105] (2) the idea/expression merger;[106] and (3) the blank form doctrine.[107] These will each be discussed in turn.

First, the lack of sufficient originality doctrine requires that a work contain a certain level of originality before it is entitled to be copyrighted.[108] While this doctrine is fairly self-explanatory, until recently "[m]ost federal courts have held that almost any collection of facts is copyrightable as a compilation."[109] The standard now requires "selection, creativity and judgment in choosing" and arranging the compilation.[110] The standard is still very arbitrary in terms of being amorphous[111] but, at the very least, some minimal degree of choice or judgment must be present in the arrangement of the data.[112] Under the lack of sufficient originality doctrine, if the compilation fails the above requirement it will not be protected.[113]

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101. *Compare* West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986) (granting copyright protection to page numbers of case reporters) *with* Kregos v. The Associated Press, 731 F. Supp. 113 (S.D.N.Y. 1990), *aff'd in part and rev'd in part*, 937 F.2d 700 (2d Cir. 1991) (finding that form conveying pitching statistics uncopyrightable).

102. *See, e.g., West*, 799 F.2d at 1227.

103. *See, e.g., Kregos*, 731 F. Supp. at 118.

104. *See, e.g.*, Financial Info., Inc. v. Moody's Investor Serv., Inc., 808 F.2d 204 (2d Cir. 1986); *Kregos*, 731 F. Supp. 113.

105. *See Moody's*, 808 F.2d 204; *Kregos*, 731 F. Supp. 113.

106. *See, e.g.*, Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967); *Kregos*, 731 F. Supp. 113.

107. *See, e.g.*, Baker v. Selden, 101 U.S. 99 (1879); *Kregos*, 731 F. Supp. 113.

108. *See, e.g.*, Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1294 (interim ed. 1991); *Moody's*, 808 F.2d 204; *Kregos*, 731 F. Supp. 113.

109. Kenneth A. Plevan & Michael B. Landau, *Growing Trend Toward Limiting Capacity to Protect Compilations*, NAT'L L.J., Aug. 20, 1990 at 24.

110. Eckes v. Card Prices Update, 736 F.2d 859, 863 (2d Cir. 1984).

111. See *supra* text accompanying notes 25-35 for a discussion concerning the difficulty in defining the level of originality required for copyright protection.

112. NIMMER & NIMMER, *supra* note 8, § 2.01[A].

113. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1294 (interim ed. 1991).

Second, the idea/expression merger disallows copyright when the idea can be expressed in a limited number of ways.[114] If a copyright were given to an expression of facts or ideas which could not be expressed in any other way, the copyright would protect the facts themselves.[115] That is, due to the limited methods of expressing the facts, granting copyright protection would prevent subsequent compilers from using those facts. Therefore, when the expression of the idea is so limited, it merges with the idea itself.[116] For example, a list of names and corresponding social security numbers could not be copyrighted. There are only two functional ways to express the idea: either numerically or alphabetically. Since ideas are not copyrightable,[117] the limited expression of those ideas is also not copyrightable.[118]

Third, the blank form doctrine disallows copyright protection for a blank form that is used only to record information.[119] For example, recording information on a standard sales form such as the price, invoice number, item sold, and other relevant information does not qualify the form for copyright protection. Therefore, if a form is designed for the consumer to fill in information, it cannot be copyrighted.[120] Analogously, if a compilation is nothing more than a blank form once the facts are removed, it also cannot qualify for copyright protection.[121]

One case, *Kregos v. The Associated Press*,[122] used all three doctrines to disallow copyright of a pitching form.[123] The plaintiff created a form to sell to newspapers.[124] The form contained information about pitchers and their win/loss statistics against the teams they would be playing.[125] It conveyed a number of other statistics all relevant to the

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114. Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967) (denying copyright for sweepstakes rules because they could be expressed in only a limited number of ways).

115. *Feist*, 111 S. Ct. at 1287.

116. Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971).

117. 17 U.S.C. § 102(b) (1988); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

118. *Feist*, 111 S. Ct. at 1290.

119. Baker v. Selden, 101 U.S. 99 (1879). The Court denied copyright for a book containing accounting forms. *Id.* at 105.

120. *Id.* at 103.

121. Kregos v. The Associated Press, 731 F. Supp. 113, 120 (S.D.N.Y. 1990), *aff'd in part and rev'd in part*, 937 F.2d 700 (2d Cir. 1991).

122. 731 F. Supp. 113 (S.D.N.Y. 1990), *aff'd in part and rev'd in part*, 937 F.2d 700 (2d Cir. 1991).

123. *Id.* at 122.

124. *Id.* at 114.

game of baseball.[126] The Associated Press subsequently began publishing its own pitching form that was almost identical to the plaintiff's.[127]

The court found that the plaintiff's form varied only slightly from previously compiled forms.[128] On this basis, the court found the form lacked the requisite originality to be copyrightable because the plaintiff did not exercise the requisite creativity in selecting, coordinating, or arranging the statistics.[129] The court also found that, because the form was to be published in a newspaper, there were a limited number of ways the statistics could be expressed due to limited space.[130] Therefore, the court ruled that the idea of publishing pitching statistics in a newspaper and the expression of that idea merged.[131] Further, the court found that the plaintiff's form, while "not a true 'blank form' for recording information[,] . . . [was] sufficiently analogous in that it fail[ed] to convey information."[132] Thus, the court denied copyright protection for the plaintiff's form on the basis of all three doctrines.[133]

As can be seen from the above cases, denying copyright is becoming more common under the originality standard. This was not the situation under the alternative standard of industrious collection. Courts using this standard granted greater protection on a more frequent basis.[134]

2. Trends in Industrious Collection

The leading case in the current trend to grant copyright protection under the industrious collection standard is *West Publishing Company v. Mead Data Central, Inc.*[135] West Publishing Company collects and compiles judicial opinions, which it publishes in the National Reporter System.[136] Mead Data Central operates a computerized database known as LEXIS.[137] The legal community uses this database as a research tool.[138] Mead announced plans to incorporate West's page num-

126. *Id.* These statistics include wins, losses, and earned run average for the season for the pitcher's career against this opponent, and for this opponent at a particular ballpark. *Id.*

127. *Id.* at 115.

128. *Id.* at 118.

129. *Id.* The court relied on *Financial Information, Inc. v. Moody's Investor Service, Inc.*, 808 F.2d 1219 (8th Cir. 1986), to deny protection. *Kregos*, 731 F. Supp. at 118.

130. *Id.* at 119.

131. *Id.*

132. *Id.* at 120.

133. *See id.* at 122.

134. *See, e.g.*, West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986); Schroeder v. William Morrow & Co., 566 F.2d 3, 5 (7th Cir. 1977).

135. 799 F.2d 1219 (8th Cir. 1986).

136. *Id.* at 1221.

137. *Id.* at 1222.

138. *Id.*

bers from the National Reporter System into its cases available on LEXIS.[139] West sued and was granted a preliminary injunction.[140]

The Eighth Circuit upheld the injunction.[141] The court purported to rely on the originality standard[142] but found that West's arrangement had been the result of "so much labor and industry in compiling" that it should be protected.[143] The court clearly rested its decision on the basis of West's efforts.[144]

The fact that this case is about page numbers in a book[145] should not be confused with protecting the information on the those pages. The opinions are not copyrightable because they are public documents.[146] The dissent pointed out that there was no evidence showing whether a word processor automatically created the page numbers.[147] The dissent also pointed out that this may "be no more than the sequential publication of court opinions in the chronological order in which the cases are handed down."[148]

This case points out the extreme end of what the industrious collection standard allows to be copyrighted. By granting West protection of its page numbers, the court effectively granted West a copyright to the opinions contained on those pages.[149] This is due to the fact that a page number must appear to properly cite a case which forces researchers to use West's printed version of the case.[150]

As noted previously, the current trends under the industrious collection standard and the originality standard were moving in opposite directions. This led to widely divergent results with courts granting copyright protection in cases it should have been denied and denying it

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139. *Id.*

140. West Publishing Co. v. Mead Data Central, Inc., 616 F. Supp. 1571 (D. Minn. 1985), *aff'd*, 799 F.2d 1219 (8th Cir. 1986).

141. West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219, 1227 (8th Cir. 1986).

142. The court stated that it found West's case arrangement "original works of authorship entitled to copyright protection." *Id.*

143. *Id.*

144. *See id.*

145. *See id.* at 1222.

146. 17 U.S.C. § 105 (1988). Section 105 disallows copyright for any work of the United States Government which is defined as a "work prepared by an . . . employee of the United States Government as part of that person's official duties." *Id.* § 101.

147. *West*, 799 F.2d at 1237 (Oliver J., dissenting).

148. *Id.* at 1248 (Oliver J., dissenting).

149. Cary E. Donham, Note, *Copyright, Compilations, and Public Policy: Lingering Issues After the West Publishing-Mead Data Central Settlement*, 64 CHI-KENT L. REV. 375, 405 (1988). The author argues that the facts in a database are not ever arranged until a user requests them. *Id.* at 395. Thus, can a database ever be copyrighted?

150. *Id.* at 405.

in cases in which it should have been granted.[151] Because copyright law is federal, it should be uniform in its protection.

E. *The Facts of* Feist

The Supreme Court of the United States resolved the lack of uniformity in *Feist Publications, Inc. v. Rural Telephone Service Co.*[152] This case involved Rural Telephone Service Company (RTSC), a Kansas telephone company, and Feist Publications (Feist), a publisher of telephone directories.[153] RTSC compiles directories each year for its customers as required by state regulation.[154] Feist also publishes area wide telephone directories which cover a larger area than RTSC's service area.[155] Feist entered into licensing agreements with all of the companies servicing the same areas its directory covered, except RTSC.[156] RTSC declined to sell a list of its white pages listings to Feist.[157] Feist, unable to complete its directory, used RTSC's directory as an original source and then verified all the names, addresses, and telephone numbers it could by hiring personnel to investigate the listings.[158] RTSC, suspicious of Feist's activity, entered a number of false listings in its directory.[159] Feist, when updating its directory, printed four of the false listings.[160] RTSC sued for copyright infringement and both parties moved for summary judgment.[161]

In deciding whether and to whom to grant summary judgment, the district court, without any discussion of copyright law, found that RTSC was entitled to a valid copyright for its directory.[162] The district court stated: "The issue of whether telephone directories are copyright-

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151. *Compare West*, 799 F.2d 1219 (court granted copyright protection to page numbers of case reporters) *with* Kregos v. The Associated Press, 731 F. Supp. 113 (S.D.N.Y. 1990), *aff'd in part and rev'd in part*, 937 F.2d 700 (2d Cir. 1991) (finding that form conveying pitching statistics uncopyrightable).

152. 111 S. Ct. 1282 (interim ed. 1991).

153. *Id.* at 1286.

154. *Id.*

155. *Id.* Feist's white pages contained 46,878 listings while RTSC's only contained 7,700. *Id.* Of RTSC's 7,700 listings, Feist used 4,935, and 1,309 of these listings were exactly identical in both books. *Id.* at 1286-87.

156. *Id.* at 1286.

157. *Id.* RTSC declined to sell Feist the listings in hopes of gaining a monopoly on the Yellow Pages listings. *Id.*

158. *Id.*

159. *Id.* at 1287.

160. *Id.*; *see* Rural Tel. Serv. Co. v. Feist Publications Inc., 663 F. Supp. 214, 217 (D. Kan. 1987); *aff'd without opinion*, 916 F.2d 718 (10th Cir. 1990), *rev'd*, 111 S. Ct. 1282 (interim ed. 1991).

161. *Feist*, 111 S. Ct. at 1287. Feist countered with an antitrust claim based on RTSC's attempt to exclude Feist from competition by refusing to sell its listings to Feist. *Feist*, 663 F. Supp. at 216.

162. *Feist*, 663 F. Supp. at 217-18.

able is well-settled."[163] Although the court did not identify the standard used, it applied the industrious collection standard in its discussion of infringement.[164] The court stated that "if there is substantial copying from the plaintiff's work without an independent canvass initially, the resulting work will be an infringement even when the defendant later verifies the material by checking the plaintiff's original sources."[165] This statement articulates the industrious collection standard used by other courts.[166] The district court granted RTSC's motion for summary judgment, basing its decision on Feist's admission of using plaintiff's directory and on the four false listings that were copied, without regard to any lack of substantial similarity between the works.[167] The court of appeals, without opinion, affirmed the district court's ruling.[168] The Supreme Court granted certiorari.[169] The Supreme Court ruled that RTSC's white pages lacked the requisite originality to qualify for copyright protection.[170]

III. ANALYSIS

In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[171] the parties called upon the Supreme Court to answer two major questions. The first question concerned what the proper standard is to determine if a compilation deserves copyright protection.[172] The second question, depending upon the first, was whether the white pages of a phone book gain copyright protection.[173] In answer to the first question, the Court ruled that the originality standard is the correct standard for determin-

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163. *Id.* The court cited a number of cases from both originality and industrious collection jurisdictions. *Id.*

164. *See id.*

165. *Id.* at 219 (quoting Jewelers' Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922)). See *supra* text accompanying notes 74-79 for a discussion of *Jewelers'*.

166. *See, e.g.*, Schroeder v. William Morrow & Co., 566 F.2d 3, 5 (7th Cir. 1977) (holding that "only 'industrious collection,' not originality in the sense of novelty, is required").

167. *Feist*, 663 F. Supp. at 218. The court ruled that the substantial similarity test is only used when there is no direct evidence of copying. Because Feist had four false listings the court ruled there was direct evidence of copying and summarily ruled against Feist.

168. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1287 (interim ed. 1991).

169. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 40 (interim ed. 1990).

170. *Feist*, 111 S. Ct. at 1297.

171. 111 S. Ct. 1282 (interim ed. 1991). See *supra* note 2 for the question presented to the Court.

172. This question had to be answered in order to answer the question presented to the Court and resolve the split in the circuit courts. See *supra* note 2 and text accompanying notes 24-100 for the question presented and a discussion of the split in the circuit courts.

173. The answer to this question depended upon the standard chosen but, in either case, still required an answer as a threshold issue before the question of infringement could be taken up.

ing if a compilation deserves copyright protection.[174] In answer to the second question, the Court ruled that the white pages lack the requisite originality to qualify for protection.[175] By answering these questions in such a manner, the Court resolved a number of issues regarding copyright law. At the same time, however, the *Feist* decision raised a new set of problems and left one major question unanswered—What is originality?

A. Originality as a Basis for Protecting Compilations

The Court was correct in deciding that the originality standard was the proper standard for determining copyright protection. The statutory language of the Copyright Act of 1976, the congressional intent supporting the statute, and even the Constitution all mandate originality as the correct standard.

1. The Copyright Act of 1976

The Copyright Act of 1976 explicitly requires copyright protection be given only to "original works of authorship."[176] To gain protection, these works must be "formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[177] Congress included this section "to ensure that courts would not repeat the mistake of the [industrious collection] courts by concluding that fact-based works are treated differently and measured by some other standard."[178] Additionally, the Act extends protection only "to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work."[179] Further, protection does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . ."[180] Since a copyright does not protect the underlying facts or ideas used in the compilation,[181] the Court concluded that "[e]ven if a work qualifies as a copyrightable compilation, it receives only limited protection."[182]

Applying the above directives to the originality standard and the industrious collection standard, the industrious collection standard fails.

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174. *Feist*, 111 S. Ct. at 1290-91.
175. *Id.* at 1297.
176. 17 U.S.C. § 102(a) (1988).
177. *Id.* § 101.
178. *Feist*, 111 S. Ct. at 1294.
179. 17 U.S.C § 103(b) (1988).
180. *Id.* § 102(b).
181. *Id.* § 103.
182. *Feist*, 111 S. Ct. at 1294.

The industrious collection standard is not based on the phrase "selected, coordinated, or arranged in such a way . . . ."[183] These terms suggest some effort must be involved, but they also imply that a certain amount of judgment must be used in creating a new work.[184] The work must display some minimal degree of creativity.[185] Selection, coordination, and arrangement constitute the process by which one produces an "original work of authorship."[186] Courts applying the industrious collection standard read section 101 of the Copyright Act of 1976 disjunctively.[187] That is, the court will grant copyright protection based on the compiler's "collection and assembling" of a work, ignoring the requirement of selection, coordination, or arrangement.[188]

On the other hand, courts applying the originality standard have specifically looked to the judgment[189] (selection, coordination, or arrangement) involved in creating the work.[190] The problem is that the courts have required different levels of judgment to qualify a compilation as an original work of authorship.[191]

Traditionally, the originality requirement was an easy standard to meet because "almost any collection of facts [was] copyrightable as a compilation."[192] Only a minimum level of originality was required[193]

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183. 17 U.S.C. § 101 (1988).

184. *See id.* Some level of judgment is required by the definition of the terms themselves. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (1986). Webster's defines them as follows:

"select: 1: chosen from a number or group by fitness or preference . . . 3: judicious or restrictive in choice."

Id. at 2058

"coordinate: 1a: equal in rank, quality , or significance."

Id. at 501.

"arrange: 1: to put in correct, convenient, or desired order."

Id. at 120.

185. *Feist*, 111 S. Ct. at 1294.

186. 17 U.S.C. § 101 (1988). The section states: "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." *Id.*

187. Patry, *supra* note 10, at 51.

188. *Id.*

189. The Supreme Court chose to use the term creative rather than, as this note does, judgment.

190. *See, e.g.*, Worth v. Selchow & Righter Co., 827 F.2d 569, 573-74 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); Financial Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204, 208 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801, 810 (11th Cir. 1985).

191. *Compare Southern Bell*, 756 F.2d at 810 *with* Kregos v. The Associated Press, 731 F. Supp. 113, 118 (S.D.N.Y. 1990), *aff'd in part and rev'd in part*, 937 F.2d 700 (2d Cir. 1991).

192. Plevan & Landau, *supra* note 109, at 24.

193. Elizabeth 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. 765, 776 (1987).

prior to the recent trends courts have taken under the standard.[194] By denying copyright protection for the white pages, the Supreme Court has followed the recent trends under the originality standard.[195] The question now is whether the requirement of selection, coordination, or arrangement have heightened the level of originality demanded.

2. Congressional Intent

The congressional intent underlying the Copyright Act of 1976 makes it clear that not only was the originality standard intended but also the level of originality required was not to be heightened.[196]

> The two fundamental criteria of copyright protection—originality and fixation in tangible form—are restated in the first sentence of this cornerstone provision. The phrase "original works of authorship," . . . is intended to incorporate without change the standard of originality established by the courts under the present copyright statute.[197]

The congressional reports accompanying the Act also point out that originality, not industrious collection, should be rewarded.[198]

> 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.[199]

Congress, therefore, intended that compilers have free access to the underlying information.[200] It did not intend that a second compiler retrace the steps of the first to create an identical work but rather, it intended that the second compiler use the first's work to advance that work to create something new.[201] The Supreme Court made this clear in *Feist* when it stated that "raw facts may be copied at will."[202]

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194. See *supra* text accompanying notes 104-134 for recent trends in originality.

195. See *infra* text accompanying notes 280-312 for a discussion of the issue of whether the Court raised the level of originality required.

196. H.R. REP. No. 1476, 94th Cong., 2d Sess. 57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5670-71 [hereinafter H.R. REP. No. 1476]; S. REP No. 473, 94th Cong., 1st Sess. 55 (1975).

197. H.R. REP. No. 1476, *supra* note 196, at 51; S. REP. No. 473, 94th Cong., 1st Sess. 50 (1975).

198. H.R. REP. No. 1476, *supra* note 196, at 57.

199. *Id.*

200. *See id.*

201. *See id.*

202. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1290 (interim ed. 1991).

The originality standard accomplishes this goal by allowing compilers to use other works.[203] The industrious collection standard places a brick wall in the way of accomplishing this goal by slavishly requiring the subsequent compiler to recreate the work each time.[204] Industrious collection courts "flouted basic copyright principles"[205] by handing out "proprietary interests in facts."[206]

Congress purposefully did not offer a definition of originality.[207] Section 102 of the Act includes a list of works that are "works of authorship."[208] The congressional report states that this list "sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular" categories.[209] Therefore, Congress did not intend to limit the courts in their attempt to protect copyrightable works but still mandated that the work be original at some level.[210] The Court ruled that by using the language "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship," Congress was implying that certain works will fail.[211]

This mandate also applies to compilations. The congressional history indicates that section 103 of the Act complements section 102.[212] "A compilation . . . is copyrightable if it represents an 'original work of authorship' and falls within one or more of the categories listed in section 102."[213] One of the categories in section 102 is literary works which are defined by section 101 as "works . . . expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects . . . in which they are embodied."[214]

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203. *See, e.g.*, Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801, 810 (11th Cir. 1985).

204. *See, e.g.*, Rockford Map Publishers, Inc. v. Directory Serv. of Colo., 768 F.2d. 145, 148 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986).

205. *Feist*, 111 S. Ct. at 1292.

206. *Id.*

207. H.R. REP. No. 1476, *supra* note 196, at 51.

208. Section 102(a) of chapter 17 of the United States Code includes:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.

17 U.S.C. § 102(a) (1988).

209. H.R. REP. No. 1476, *supra* note 196, at 53.

210. *Feist*, 111 S. Ct. at 1287.

211. *Id.* at 1293; *see also* H.R. REP. No. 1476, *supra* note 196, at 57.

212. H.R. REP. No. 1476, *supra* note 196, at 57.

213. *Id.*

214. 17 U.S.C. §§ 101, 102 (1988).

With such a broad definition, any compilation is likely to qualify as a literary work under section 102.[215]

Congress intended the courts to apply the originality standard to compilations but did not want to limit the courts' ability to grant copyright protection because times had changed and new forms of works, unforeseen by Congress, had arisen.[216] Congress further intended that courts should apply originality in the same manner in which it had been used under the old copyright laws.[217] This indicates that the courts, in applying the originality standard, have required more, in terms of originality, than was congressionally mandated.[218]

3. Originality as a Constitutional Mandate

The Supreme Court also found that the originality requirement was constitutionally mandated.[219] This is surprising, not because originality has its roots in the Constitution, but because of the extent to which the Court relied on the Constitution and made the constitutional requirement coextensive with the Copyright Act of 1976. The Court not only cited the Constitution as a basis for originality but also derived the level of originality required from the Constitution.[220]

The power of Congress to pass copyright laws comes from the Constitution.[221] The Copyright Clause grants the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[222] While this clause says nothing about originality, the Court, as far back as 1884, interpreted the word "authors" to mean "he to whom anything owes its origin; originator; maker."[223]

In *Feist*, the Court expanded upon this definition. In doing so, it cited *The Trade-Mark Cases*[224] which held that "originality is required"[225] in reference to the writings of authors.[226] Therefore, the

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215. *See id.*

216. H.R. REP. NO. 1476, *supra* note 196, at 51.

217. *Id.*

218. See *infra* text accompanying notes 280-312 for the question of whether present trends under originality have required more of a compiler than was Congressionally mandated.

219. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1290 (interim ed. 1991).

220. *Id.*

221. U.S. CONST. art. I, § 8, cl. 8; *Feist*, 111 S. Ct. at 1288.

222. U.S. CONST. art. I, § 8, cl. 8.

223. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

224. 100 U.S. 82 (1879).

225. *Id.* at 94.

226. *Id.*

Court stated that "originality is a constitutionally mandated prerequisite for copyright protection."[227]

The question then arises: To what extent does the Constitution require originality? That is, what level of originality is required by the Constitution? In answer, the Court implied that the Constitution and the Copyright Act of 1976 are coextensive.[228] In denying copyright to the white pages, the Court stated that "[t]he selection, coordination, and arrangement of [RTSC's] white pages do not satisfy the minimum constitutional standards for copyright protection."[229] Further, the Court stated that the white pages "[do] not possess the minimal creative spark required by the Copyright Act and the Constitution."[230] Finally, 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."[231]

The Court interpreted the Constitution and statutory requirements as coextensive.[232] By stating that white pages do not meet the selection, coordination, and arrangement as required by the Constitution,[233] the Court necessarily read the statutory requirement of section 101 of the Copyright Act of 1976 into Clause 8 of Article I of the Constitution.[234] Therefore, for the same reasons that industrious collection does not satisfy the Copyright Act,[235] it also fails the constitutional mandate. Originality is the required standard for copyright because it satisfies the requirements of the Copyright Act, the congressional intent, and the Constitution.

B. Issues Resolved by the Feist *Decision*

In deciding *Feist*, the Supreme Court resolved three major issues pertaining to the copyrightability of compilations. The first is that a judge should use originality, not industrious collection, as the proper standard to determine if a compilation is copyrightable.[236] The second

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227. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1290 (interim ed. 1991).

228. *Id.* at 1288-90.

229. *Id.* at 1296.

230. *Id.* at 1297.

231. *Id.*

232. *See id.*

233. *Id.*

234. *See id.*

235. See *supra* text accompanying notes 183-188 for the reasons the industrious collection standard does not achieve the requirements of the Copyright Act.

236. *Feist*, 111 S. Ct. at 1291-92. See *supra* text accompanying notes 176-235 for the reasons the industrious collection standard does not achieve the requirements of the Copyright Act of 1976, the congressional intent, or the constitutional mandate.

issue, flowing from the first, is that facts are not copyrightable.[237] Finally, the third issue, flowing from the prior two, is the level of protection to which a compilation is entitled.[238]

1. Originality is the Correct Standard

As stated previously, the Court ruled that originality is the correct standard for copyright.[239] This standard does not just apply to the white pages, or to just compilers, but to all works if they are to be copyrighted.[240] "[T]he *sine qua non* of copyright" is originality,[241] or, in other words, it is an indispensable element.[242]

The Court makes it clear that compilations are not different from other works. "Although section 102 states plainly that the originality requirement applies to all works, the point was emphasized with regard to compilations to ensure that courts would not repeat the mistake of the [industrious collection] courts by concluding that fact-based works are treated differently and measured by some other standard."[243] To determine if a compilation qualifies for copyright, a court must look to the selection, coordination, or arrangement of that work.[244] To this end, "the selection, coordination, or arrangement [must be] sufficiently original to merit protection."[245] Some compilations will not be "sufficiently original to trigger copyright protection."[246] The Court decided the white pages are not sufficiently original.[247]

2. Facts Are Not the Proper Subject of Copyright

By deciding that the originality standard is correct, the Court also made clear that facts cannot be copyrighted.[248] In holding that facts are not the proper subject of copyright, the Court stated that " '[n]o author may copyright his ideas or the facts he narrates.' "[249] In support of this holding, the Court explains that "facts do not owe their origin to

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237. *Feist*, 111 S. Ct. at 1290.
238. *Id.* at 1294-95.
239. *Id.* at 1291-92.
240. *Id.*
241. *Id.* at 1289.
242. BLACK'S LAW DICTIONARY 1385 (6th ed. 1990). "Sine qua non" means "[a]n indispensable requisite or condition." *Id.*
243. *Feist*, 111 S. Ct. at 1294.
244. *Id.*; 17 U.S.C. § 101 (1988).
245. *Feist*, 111 S. Ct. at 1294.
246. *Id.*
247. *Id.* at 1297. The Court states that there is nothing remotely creative about arranging names alphabetically. *Id.*
248. *Id.* at 1287.
249. *Id.* (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985)).

an act of authorship. The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."[250] Therefore, facts are not original and may not be copyrighted.[251]

The concept that facts may not be copyrighted is one of the major flaws with the industrious collection standard.[252] The industrious collection standard "extended copyright protection . . . to the facts themselves."[253] By doing so, "[industrious collection] courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas."[254] Thus, the obvious question is: If facts are not copyrightable, what is copyrightable in a factual compilation?

3. The Scope of Protection

By making it clear that facts are not copyrightable, the Court further defined what is copyrightable in a factual compilation.[255] Overall, "the copyright in a factual compilation is thin."[256] Rather than protecting the whole work, copyright in a factual compilation only extends to the selection, coordination, or arrangement of the work.[257] By only protecting the arrangement of a compilation, subsequent compilers are allowed to take freely the facts contained in the first work.[258] That is, "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."[259]

In further delineating the scope of protection to be given to a compilation, the Court undertook a discussion of the fact/expression dichotomy.[260] This dichotomy restates the basic premise that facts cannot be copyrighted while the arrangement or selection of a work can be copyrighted.[261] By incorporating the fact/expression dichotomy into the originality standard, a complete picture of what the Court resolved is achieved. That is, a compilation must have the requisite level of origi-

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250. *Id.* at 1288; *see also* NIMMER & NIMMER, *supra* note 8, § 3.04.

251. *Feist*, 111 S. Ct. at 1289.

252. *Id.* at 1291.

253. *Id.* This raises an interesting question of whether Mead will stand by its settlement agreement with West. It seems clear that after *Feist*, West cannot have a valid copyright for mere page numbers. See *supra* text accompanying notes 135-151 for a discussion of the *West* case.

254. *Feist*, 111 S. Ct. at 1291.

255. *Id.* at 1294.

256. *Id.* at 1289.

257. *Id.*

258. *Id.*

259. *Id.* at 1289.

260. *Id.* at 1290.

261. *Id.*; *see also* Baker v. Selden, 101 U.S. 99, 103 (1879).

nality required; but only the arrangement or selection gain copyright—not the facts.[262]

C. *Problems the* Feist *Decision Raises*

While the Court resolved a number of issues regarding copyright, the decision also raises a number of problems. First, the Court eviscerates the public policy underlying copyright. Second, the Court raised the level of originality above what Congress required for a compilation to be copyrighted. Finally, by relying so heavily on the Constitution, the Court limited the power of Congress to change the standard and protect certain works.

1. The Evisceration of Public Policy

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' "[263] The public policy, therefore, is to give authors incentives to create works which directly benefit the public.[264] While granting this economic incentive, it must be clear that facts and ideas are not copyrightable[265] because these properly belong to the public and cannot be owned.[266] Courts, therefore, must be very careful in finding infringement when a factual compilation is involved.[267] If too much protection is granted then the facts are taken from the public to private domain.[268] The courts, however, must also be careful not to underprotect works as this may eliminate the incentive to create the work.[269]

In denying the white pages copyright protection, the Court defeats the purpose of copyright law. The purpose is to provide economic incentive to authors to compile new works which in turn benefit the public.[270] Because the white pages are denied copyright protection, authors

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262. *Feist*, 111 S. Ct. at 1290.

263. Mazer v. Stein, 347 U.S. 201, 219 (1954).

264. *See id.*

265. 17 U.S.C. § 102(b) (1988).

266. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

267. *See* NEC Corp. v. Intel Corp., 10 U.S.P.Q.2d (BNA) 1177 (N.D. Cal. 1989). The court in *NEC* ruled that as a work became more and more limited in the way it could be expressed, virtually identical copying would be required before infringement would be found. *Id.* at 1189.

268. Michael J. Haungs, *Copyright of Factual Compilations: Public Policy and the First Amendment*, 23 COLUM. J.L. & SOC. PROBS. 347, 358 (1990).

269. *Id.*

270. Mazer v. Stein, 347 U.S. 201, 219 (1954).

will be chilled from undertaking such projects.[271] This chilling effect results from the fear that anyone could copy the first compiler's work and market it.[272] In turn, the public will be harmed because the access to information will be reduced because of that fear.[273] Thus, by denying protection, the Court is between the Scylla of expanding the originality requirement beyond congressional intent and the Charybdis of failing to carry out the purpose of copyright law.

The Court could have applied the industrious collection standard as an alternative. The fear of dissuading authors from undertaking factual compilations may explain some of the appeal of this standard.[274] Under the industrious collection standard, a hard worker is guaranteed copyright protection.[275] The industrious collection standard appeals viscerally because it seems only equitable that one should be protected from another appropriating an author's hard work.[276] Letting someone appropriate another's work strikes most people as wrong. While the industrious collection standard provides greater protection, it also fails to serve the purpose of copyright.[277] That is, it overprotects by essentially placing facts in the control of one author.[278] It also limits the free flow of information to the public.[279]

In the end, it seems that neither the originality standard, as applied by the Court, nor the industrious collection standard serve the goals of copyright law when compilations are concerned. The former fails because it underprotects and the latter because it overprotects.

2. The Supreme Court Raised the Level Of Originality Required

By deciding that the white pages of the phone book lack the requisite originality to qualify for copyright, the Court raised the level of originality above that required by Congress.[280] Three factors support

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271. National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982). If copyright protection only covers the expression, then "the economic incentives underlying the copyright laws are largely swept away." *Id.* at 92. The Court in *Feist* may have been largely unconcerned with the economic incentives to create the white pages because RTSC was required to publish the phone book by state regulation. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1296-97 (interim ed. 1991). Thus, the phone book will be published regardless of any economic incentive. *Id.*

272. *See Dun & Bradstreet*, 552 F. Supp. at 92.

273. *See id.*

274. *See* Haungs, *supra* note 268, at 358.

275. *See* Denicola, *supra* note 8, at 528.

276. *Id.* at 530.

277. Haungs, *supra* note 268, at 366.

278. *Id.*

279. *Id.*

280. See *infra* text accompanying notes 280-312 for the discussion of how the Court raised the level of originality required.

this argument. First, the Court continually uses the word "creative" when speaking of originality.[281] "There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent."[282] In denying the white pages a copyright, the Court stated: "The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity."[283] Further, the Court ignored the requirement of selection, coordination, or arrangement and held creativity to be the equivalent of originality.[284] The inclusion of the name, town, and telephone number "is [a] 'selection' of a sort, but lacks the modicum of creativity necessary to transform mere selection into copyrightable expression."[285]

In holding that creativity is the necessary element to achieve originality, the Court also ignored the history of the Copyright Act of 1976.[286] In the proposed revision to the copyright laws, the term "creative" was suggested and then dropped after criticisms from Melville Nimmer.[287] Nimmer argued that including the term "creative" would suggest a higher standard than required and requested that if the term "creative" were to be used it should be made clear that nothing new had to be added by a subsequent compiler.[288] Original authorship could be achieved by merely rearranging the previously compiled material.[289]

The term "creative" was eliminated from the proposal because of the fear it would lead courts to believe something new or never done before was required.[290] By reintroducing the term "creative" into copyright law, the Court has introduced a higher level of originality than was proposed or passed by Congress.

The second indicator that the Court raised the level of originality is found in the Copyright Act of 1909. The Act of 1909 included the requirement of originality.[291] The Act of 1909 also listed fourteen cate-

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281. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1287, 1289, 1294, 1296, 1297 (interim ed. 1991).

282. *Id.* at 1294.

283. *Id.* at 1296.

284. *See id.*

285. *Id.*

286. *See* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY: COPYRIGHT LAW REVISION PART 2 372 (1976); *id.* at COPYRIGHT LAW REVISION PART 3 42-46; *see also* Patry, *supra* note 10, at 53.

287. 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY: COPYRIGHT LAW REVISION PART 2, at 372 (1976).

288. *Id.*

289. *Id.*

290. *Id.* at COPYRIGHT LAW REVISION PART 3, at 42-46.

291. NIMMER & NIMMER, *supra* note 8, § 2.01. The Act of 1909 did not specifically require originality but it was inferred from word "authors." *Id.*

gories of works which qualified for copyright.[292] This list explicitly included directories.[293] Therefore, under the Act of 1909, the RTSC's white pages would have qualified for copyright.[294]

Congress, when enacting the Copyright Act of 1976, specifically stated that "[t]he phrase 'original works of authorship' . . . is intended to incorporate without change the standard of originality established by the courts under [the Act of 1909]."[295] The courts, under the Act of 1909, allowed the copyright of white pages.[296] Because the originality standard protected directories (the white pages) prior to the Act of 1976, Congress intended that this same level of originality be carried over to the Act of 1976.[297] Thus, by denying copyright to the white pages, the Supreme Court raised the level of originality above that which was congressionally mandated.[298]

The third factor indicating that the Court raised the level of originality required comes from Congress. Under the Act of 1909, Congress was concerned that the Constitution and the copyright statutes had become coextensive.[299] If they were coextensive, then "the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect, or of holding constitutionally incapable of copyright something that Congress might one day want to protect."[300] To avoid this problem, the phrase "original works of authorship" under the Act of 1976,[301] is necessarily narrower than the "writings" of "Authors" under the Constitution.[302]

In holding that the white pages cannot be copyrighted, the Court based its decision on the Copyright Act and the Constitution.[303] By doing so, the Court made the Act of 1976 and the Constitution coextensive.[304] "As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis*

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292. 17 U.S.C. § 5 (repealed 1978).

293. *Id.* § 5(a).

294. *See id.*; *see also* Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); Southwestern Bell Tel. Co. v. Nationwide Indep. Directory Serv., Inc., 371 F. Supp. 900 (W.D. Ark. 1974); Cincinnati and Suburban Bell Tel. Co. v. Brown, 44 F. Supp. 631 (S.D. Ohio 1930).

295. H.R. REP. NO. 1476, *supra* note 196, at 51.

296. *See, e.g., Leon*, 91 F.2d 484; *Southwestern Bell*, 371 F. Supp. 900; *Cincinnati and Suburban Bell*, 44 F. Supp. 631.

297. H.R. REP. NO. 1476, *supra* note 196, at 51.

298. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1296 (interim ed. 1991).

299. *Id.*

300. H.R. REP. NO. 1476, *supra* note 196, at 51.

301. 17 U.S.C. § 101 (1988).

302. H.R. REP. NO. 1476, *supra* note 196, at 51.

303. *Feist*, 111 S. Ct. at 1297.

304. See *supra* text accompanying notes 228-235 for the argument that the Constitution and statute are coextensive.

quantum of creativity."[305] "As a statutory matter, 17 U.S.C. [section] 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality."[306] From this equivalency, Congress will find itself unable to protect the white pages.

The Court has removed this discretion from Congress and found the present level of originality to exist in the Constitution.[307] Despite the absence of the word "original" in the empowering clause of the Constitution,[308] the Court found that not only is originality required but it is a higher level than mandated by Congress under section 101 of the Act of 1976.[309] Congress is therefore powerless to change the level of originality to allow copyright of the white pages and other similar compilations.

While Congress may be unable to allow copyright of the white pages and other similar compilations, it is possible that Congress can still protect these types of works.[310] This protection would be found under the authority of the Commerce Clause.[311] This protection would not be identical to copyright but under the broad powers of the Commerce Clause, it could be almost identical in its function.[312]

D. What Is Originality?

While the Court raised the level of originality required of an author, it failed to define exactly what constitutes originality. By failing to state specifically what constitutes originality, the Court has left the lower courts to flounder in search of the standard. Lower courts will now come in conflict with each other by granting copyright in cases where it has been denied by other courts and denying protection where it has been granted by other courts.[313]

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305. *Feist*, 111 S. Ct. at 1297.

306. *Id.*

307. *See id.*

308. U.S. CONST. art. I, § 8, cl. 8.

309. 17 U.S.C. § 101 (1988).

310. *See* CRAIG JOYCE ET AL., COPYRIGHT LAW: CASES AND MATERIALS § 3.04, at n. 6 (1991).

311. *Id.*

312. *See id.*

313. The Supreme Court has raised this quandary for the lower courts by using numerous different descriptions of originality. The Court mentions creative as equalling originality. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1294 (interim ed. 1991). The Court also speaks of an original selection or arrangement. *Id.* at 1289. Further, the Court also mentions a selection or arrangement which makes a work original as opposed to an original arrangement. *Id.* at 1294. All of these different descriptions are open to divergent views of what constitutes originality.

The Supreme Court did offer some insight into what constitutes originality by denying the white pages copyright.[314] This denial of copyright indicates that the level of "originality" required to compile this type of directory is insufficient to merit protection.[315] This minimal insight, however, does not clear up the confusion surrounding the "originality" issue. Exactly, what does this denial of copyright mean? Are all other directories destined for the same fate? Can maps be protected? What about stock indexes? All of these works are completely based on facts.

It is clear that the Court raised the level of originality required of an author;[316] but how high? What is the "modicum of creativity" required? By using the term creativity, the Court did not clear up matters. Creativity now equals originality,[317] but does this solve anything? These are not rhetorical questions. These questions require answers if copyright law is to be uniform in its application.

Without answers to these questions, the Court has left originality to remain the irreducible quantum that Justice Holmes was trying to define.[318] Most people can identify originality when they see "it," but each person's evaluation of "it" will be different.[319]

IV. CONCLUSION

The Supreme Court of the United States recently decided that the white pages of the phone book do not qualify for copyright. In deciding this issue, the Court ruled that originality is the standard by which to judge if a compilation can be copyrighted. This eliminated any misconception courts and commentators might have had about the industrious collection standard which based copyright on the labor the author expended.

The Court also resolved two other issues regarding factual compilations and copyright. First, the Court made clear that facts are not copyrightable. Subsequent compilers are entitled to freely use the facts found in previously compiled works. Second, the Court resolved the issue of the scope of protection available to compilation. A compilation gains only thin copyright protection. The only portion of a factual compilation entitled to copyright is the selection, coordination, or arrangement of the work.

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314. *See id.* at 1297.

315. *Id.*

316. *Id.* at 1296.

317. *Id.* at 1297.

318. See *supra* text accompanying notes 28-31 for a discussion of Justice Holmes attempt to define originality.

319. See *supra* note 31 for this definitional problem.

While the Court's decision resolved the issues above, its decision also created three problems. First, the Court's denial of copyright for the white pages eviscerates the public policy underlying copyright. It does so by eliminating the economic incentive to create factual compilations which in turn reduces the free flow of information available to the public. Second, the Court raised the level of copyright above the level that was congressionally required. Third, when raising the level of originality required of an author, the Court based this higher level of originality on constitutional grounds. Because the new level of originality is constitutionally mandated, Congress is powerless to lower the standard. Congress, however, might be able to side step this problem and give factual compilations protection under the Commerce Clause.

Finally, the Court failed to define what originality is or how to determine if a work has achieved the required level to be copyrighted. This failure will cause havoc among subsequent lower court decisions resulting in conflicting views regarding what can be copyrighted.

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