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A Matter of Facts: The Evolution of Copyright's Fact-Exclusion and Its Implications for Disinformation and Democracy

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ABSTRACT

The Article begins with a puzzle: the curious absence of an express fact-exclusion from copyright protection in both the Copyright Act and its legislative history despite it being a well-founded legal principle. It traces arguments in the foundational Supreme Court case (*Feist Publications v. Rural Telephone Service*) and in the Copyright Act's legislative history to discern a basis for the fact-exclusion. That research trail produces a legal genealogy of the fact-exclusion based in early copyright common law anchored by canonical cases, *Baker v. Selden*, *Burrow-Giles v. Sarony*, and *Wheaton v. Peters*. Surprisingly, none of them deal with facts *per se* but instead with adjacent and related copyright doctrines. A close look at these cases, as well as at relevant legislative history, uncovers provocative aspects of the fight over facts through the nineteenth and twentieth centuries. This fight is really a debate over the evolving place of human labor and the contours of social progress regarding the production of facts in crucial periods of economic and political development. The nature of "facts" and their increasingly central role in governance and technological progress puts pressure on their control and manipulation, including by and for businesses and democratic institutions, such as legislatures and agencies. Revisiting this history amplifies the need for a broader copyright fact-exclusion and a richer public domain that will lead to doctrinal clarity for our digital age. It also has political implications for how to consider the contestability of facts in the twenty-first century as a matter of access to information and the stabilization of societal institutions – such as law, science, and a free press – that are critical for sustaining U.S. democracy.

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INTRODUCTION

There is a puzzle at the heart of copyright law with far-reaching implications for disinformation and democracy. It starts with the assumption that facts circulate freely and are excluded from copyright protection. But we know this only because a 1991 Supreme Court case, *Feist Publications v. Rural Telephone Service*, says so.[1] The Copyright Act of 1976 does not expressly exclude facts.[2] And the legislative history of the Copyright Act says almost nothing about a fact-exclusion, thus failing to clarify both the reason for *Feist*'s holding and the conspicuous absence of a fact-exclusion from the Act.[3] This puzzle has purchase for our current moment, in which the apprehension of facts is vital.

Apprehending facts is vital because doing so assures transparency and

[1] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).
[2] Copyright Act of 1976, 17 U.S.C. § 102(b).
[3] *See infra* Part II.

objectivity in the regulation of everyday life. Here are just three examples. Imagine insurance companies refusing to insure homes because of their predictions that fires and floods will devastate vast regions of the United States.[4] To question and assess the insurers' denials requires access to the information on which the companies base their decisions. The National Weather Service collects climate data, which is thus a publicly accessible resource. But when private companies collate, analyze, and process the data underlying influential forecasting systems, that information—the facts and expert evaluations on which billions of dollars of investments may rely—may be claimed as copyrightable expression and therefore accessible for reviewing or auditing only with permission and payment (if at all).[5] Insurance companies can refuse insurance, devasting real estate markets and other businesses, without explaining the basis of their decisions. When they do so by claiming their evaluations of data as copyrightable expression, ownable and licensable at their discretion, insurers become one of the many "data cartels" in our world in which "companies . . . control and monopolize . . . information"[6] to the detriment of most ordinary market participants.

Imagine a different but related scenario. Building, fire, and electrical codes are mandatory guidelines when constructing (or reconstructing) property in many states and municipalities. Organizations staffed by experts and other knowledgeable members produce and sell these codes to interested parties as indispensable reference materials for building safety. When a town adopts a code as its law, either expressly or by reference, do those who must follow the law—and thus read and abide by the code—have to pay for access to it? Does following the law require paying a fee for the code book, which the organizations claim as their copyrighted expression? Standard drafting organizations and other expert bodies say yes and are litigating their claims in court.[7]

Finally, imagine a third scenario. A playwright produces an award-

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[4] One need not imagine it. Juliana Kim, *State Farm Has Stopped Accepting Homeowners Insurance Applications in California*, NPR (Mar. 28, 2023), https://www.npr.org/2023/05/28/1178648989/state-farm-home-insurance-california-wildfires-inflation/.

[5] Madison Condon, *Climate Services: The Business of Physical Risk*, __ ARIZ. ST. L. __ REV. (forthcoming) (describing the problem of privatizing climate data and proposing a model that enables access, testing, verification, and competition in the assessments).

[6] SARAH LAMDAN, DATA CARTELS: THE COMPANIES THAT CONTROL AND MONOPOLIZE OUR INFORMATION (Stanford University Press, 2022).

[7] See ASTM v. Public.Resource.Org, 896 F.3d 437 (D.C. Cir. 2018)(technical standards incorporated by reference into law remain protected by copyright but whether their copying and distribution are fair uses and thus exempt from copyright enforcement is a question for the jury). *But see* Veeck v. Southern Building Code Congress Int'l, 293 F. 3d 792 (5th Cir. 2002) (holding the code lost copyright when the town adopted it as law).

winning musical based on a true story. The playwright is subsequently sued for infringing the copyright in an autobiography, which was one of the many sources relied upon to retell history. The musical depicts historical events and repeats true statements drawn from an array of truthful accounts. The copyright owner of the autobiography who sues is the heir of the autobiography's ghostwriter; only after years of litigation, an appeal, a trial, and a second appeal is the musical free and clear from the copyright encumbrance.[8] Writing about the true past comes with significant costs.

All three scenarios describe copyright law restricting access to facts and information. These are just a few examples, but as a trend they raise red flags. The insurance and climate data scenario could instead be about financial information;[9] the building code scenario could be about annotated statutes;[10] and the playwright scenario could be about a journalist, filmmaker, or writer.[11] Despite the Court's 1991 *Feist* decision stating clearly that facts are in the public domain and thus unownable, disputes like these are not going away. This Article exposes *Feist*'s lingering ambiguity as grounded in the puzzle with which the Article began: *Feist* says that facts are in the public domain, but without clear statutory text or history, we do not know what "facts" are. Section 102(b) of the Copyright Act excludes "ideas," "concepts," and "discoveries" from copyright protection.[12] However, as described below, courts do not treat "facts" as synonymous with these other words. *Feist* nonetheless puts facts in the public domain as if they are part of, but different from, the statutory list in §102(b).[13] We need a clearer understanding of what *Feist* means by "raw facts may be copied at will."[14]

This issue goes beyond copyright law, of course. Clarification of

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[8] Again, not a fictional account. Corbello v. Frankie Valli et al., 974 F.3d 965 (9th Cir. 2020) (affirming decision below on the grounds that facts cannot form the basis for a copyright claim and each of the alleged similarities between the musical and autobiography were based on historical facts, common phrases, and scene-a-fairs, or elements that were treated as facts in the autobiography and were thus unprotected by copyright even though now challenged as fictional).

[9] Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 742 F.3d 17 (2d Cir. 2014)(copying and distribution of investor call transcript regarding quarterly earnings fair use in part because of the public purpose of disseminating important financial information).

[10] Georgia v. Public.Resource.Org, Inc, 140 S. Ct. 1498 (2020).

[11] Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d. Cir. 1980) (no copyright infringement when similarities based on historical theories and facts); Salinger v. Random House, Inc., 811 F.2d 90 (2nd Cir. 1987) (scholar's work about Salinger accurately quoting from letters held unlawful under copyright law).

[12] Copyright Act of 1976, 17 U.S.C. § 102(b) ("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.")

[13] See *infra* Part I.

[14] *Feist*, 499 U.S. 340, 350 (1991).

misinformation and competition for reliable arbiters of truth are essential to self-governance, democracy, and human flourishing. Today, we witness the contestation of facts disrupting democratic elections and exacerbating violent attempts to impede the constitutional transfer of power.[15] We watch the Supreme Court accept as "fact" deeply debated views of health care and their implications for liberty and equality.[16] We read about stacked legislative hearings manufacturing false claims to justify restricting civil rights.[17] Political candidates, after winning office, admit to falsifying their credentials and experience, explaining their lies as "embellishment" and "stupid" but refusing to admit their mendacity.[18] The nature of facts and their import appears to be in flux. And all the while, laws that regulate truth and falsehood put a premium on the former and assume the ability to distinguish truth from lies.[19]

Yet copyright law and its exclusion of facts from subject matter protection is an underexplored area. *Feist* makes it seem obvious and inevitable that facts are in the public domain—even those produced through hard work and skilled labor—and yet the history of the fact-exclusion as told below is anything but straightforward. In reality, the fact-exclusion in copyright doctrine has a century-long evolution that, when examined closely, illuminates the evolving status of facts in contemporary society as central to sustaining twentieth-century democratic institutions based on the rule of law,

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[15] *See, e.g.*, Melissa Block, *The Clear and Present Danger of Trump's Enduring 'Big Lie,'* NPR (Dec. 23. 2021), https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election/.

[16] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (describing reliance interest on abortion care as both "intangible" and not "very concrete" like those involving "property and contract" and an "empirical question that is hard for anyone … to assess"); Gonzales v. Carhart, 550 U.S. 124 (2007)(describing as "unexceptional" the fact that some women come to "regret their choice to abort the infant life they once created and sustained"). For analysis of federal appellate decisions that question established facts and demand scientific infallibility in order to manufacture factual uncertainty and justify their counter-factual result *see* Ari Ezra Waldman, *Manufactured Uncertainty in Constitutional Law*, 91 FORDHAM L. REV. 2249 (2022).

[17] Allison O. Larson, *Constitutional Litigation in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018).

[18] Michael Gold & Grace Ashford, *George Santos Admits to Lying About College and Work History*, N.Y. TIMES (Dec. 26, 2022), https://www.nytimes.com/2022/12/26/nyregion/george-santos-interview.html/. *See also* Hahl, O., Kim, M., & Zuckerman Sivan, E. W., *The Authentic Appeal of the Lying Demagogue: Proclaiming the Deeper Truth about Political Illegitimacy*, 83 AM. SOCIO. REV. 1 (2018).

[19] Courtney M. Cox, *Legitimizing Lies*, 90 GEO. WASH. L. REV. 297 (2022); Suzanna Blumenthal, *Humbug: Toward a Legal History*, 64 BUFFALO L. REV. 161 (2016); AUSTIN SARAT, LAWS AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM (2015); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161 (2012).

the pursuit of scientific truth, and a free press. [20] "Facts" are much broader than the "raw facts" (i.e., telephone numbers) at issue in *Feist*. The early twentieth-century history of "facts" parallels the development of legal, scientific, and journalistic institutions on which our democracy has come to rely, making this history crucial for the contemporary moment. The status of facts as such—and their place in the public domain—is determined by their production as credible and authoritative in the context of disciplinary knowledge and through these institutions, which are themselves fundamental to U.S. democracy. As it turns out, these institutional outputs—law, science, and news—were discussed and debated within the early copyright law canon of the twentieth century in the context of "public property"—what is unownable and belongs to the public. Although *Feist* relies only implicitly on this history, making it explicit is one goal of this Article.

Copyright law's fact-exclusion is underexplored in part because we have taken it for granted for so long. *Feist* makes the question and answer seem easy, but when we scratch the decision's surface in order to decide contemporary copyright disputes, its clear statements reveal contested doctrine regarding both what "facts" are and also whether "sweat-of-the-brow" (i.e., labor and hard work) is sufficient to justify taking facts from the public domain and protecting them under copyright law.[21] This Article explores the fact-exclusion by following three interrelated paths: the first two resemble traditional legal arguments discussing case law and legislative history, and both end with incomplete answers to the puzzle; the third path follows an institutional approach. Only after exploring this third path does a full explanation of the origins and applications of the copyright fact-exclusion emerge. Each path is a section of the Article. As the Article concludes, we

[20] *See infra* Part III.

[21] The debate over sweat-of-the-brow before *Feist* was extensive and complex. See, e.g., Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1584 (1963); Robert A. Gorman, *Fact or Fancy: The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y U.S.A. 560 (1982); Ray Patterson & Craig Joyce, Monopolizing the Law: the Scope of Copyright Protection for Law Reports and Statutory Compilations, 36 UCLA L. REV. 719, 763 (1989)[hereinafter *Patterson & Joyce, Monopolizing the Law*]; William Patry, *Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable)*, 12 COM. & LAW 37, 64 (Dec.1990); Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990) [hereinafter *Ginsburg, Commercial Value*]; Robert Denicola, *Copyright in Collection of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. (1981). *See* also Robert Brauneis, *The Transformation of Originality in the Progressive Era Debate over Copyright in News*, 27 CARDOZO ARTS & ENT. L. J. 321, 364 (2009) [hereinafter *Brauneis*] (explaining that in 1884 "[c]ourts and treatise writers uniformly supported the view that a work which presented facts that had been gathered by observation of the world should be protected under copyright law.").

end where we started, only with sharper vision: all roads lead to *Feist*, and also, inescapably, *Feist* needs further explanation.

Put simply, *Feist* oversimplifies the matter. The story of copyright's fact-exclusion is as much about how writings can "promote the Progress of Science" (copyright's constitutional object) as about the interrelationship of law, political institutions, and technological development.[22] Copyright law was an early intervenor in political history, scoping the First Amendment's speech and press freedoms early in the twentieth century, when journalism was first professionalized and the First Amendment as we know it today was nascent.[23] Copyright law in the early 1900s left important scientific and economic innovations in the public domain, generating competition and collaboration within scientific and social-scientific fields, even when that application left certain authors or inventors without intellectual property.[24] Indeed, the story of copyright law's fact-exclusion reveals deep-seated commitments both to the free circulation of facts as essential to developing knowledge (i.e., the progress of science), wherein facts are not discoveries but learned truths, and also to the vitality of knowledge-producing institutions and organizations.[25] Yet because *Feist* predates the internet revolution, it

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[22] U.S. Const. Art. 1, Sec. 8, cl. 8 ("Congress shall have the power to … Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.") For a history of this clause and the meaning of "progress of science," *see, e.g.*, JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE (2022), 4-6 and especially note 20 (citing among others, Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993), Jeanne Fromer, *The Intellectual Property Clause's External Limitations*, 61 DUKE L. J. 1329 (2012); Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BRIGHAM YOUNG U. L. REV. 259 (2013)) [hereinafter SILBEY, AGAINST PROGRESS]. *See also* Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017) [hereinafter Beebe, *Aesthetic Progress*].

[23] See *infra* Part III.A. (discussing journalism); Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918) [hereinafter *INS*]. *See also* John Witt, *Weaponized from the Beginning*, 22-13 KNIGHT FIRST AMEND. INST. (November 18, 2022), https://perma.cc/A5H6-EFE3/ (describing early decade of First Amendment jurisprudence when "Freedom of speech in 1919 had barely been invented" and "absent a First Amendment to rely on, critics and advocates turned not to free speech doctrine … but to mediating institutions that offered bulwarks against distortion in the domain of public opinion.").

[24] See *infra* discussing Baker v. Selden, 101 U.S. 99 (1879). For further discussion of the value and scope of public domain in the context of interpreting § 102(b), *see*, Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 989-91, 996-99, and 1016-18 (1990); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L. J. 783 (2006); Tyler Ochoa, *Origins and Meanings of the Public Domain*, 28 UNIV. DAYTON L. R. 215 (2003).

[25] Indeed, as explained *infra* note 32, an interpretation of "discoveries" as synonymous with "facts" (instead of with "inventions") is inconsistent with the constitutional grant of

leaves unanswered some of the digital age's most pressing questions about the nature of facts vis-à-vis our new institutions, political situations, and cutting-edge technologies, which challenge us to differentiate between objectivity and subjectivity and truth and lies.[26]

What are some of these pressing questions? We live in an age of AI-generated expression, the proliferation of information resources, political polarization, and both moral and epistemological relativism.[27] Together, these characteristics of contemporary culture complicate the meaning and role of "facts" as foundations of public discourse.[28] This Article's account of copyright's fact-exclusion clarifies its history by shedding new light on the major Supreme Court case construing the doctrine (*Feist*), thereby guiding both contemporary and future debates concerning copyright's application to information goods. It aims for copyright law to help (and not hinder) public debates and public institutions that rely on access to quality information for democratic self-governance.[29] These debates include the effects of digital age technology on industries, like law, science, and journalism, that produce predominantly fact-based works central to the socio-political institutions at

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power to Congress.

[26] Woodrow Hartzog and Jessica Silbey, *The Upside of Deep Fakes*, 78 MD L. REV. 960 (2019); Danielle Citron & Robert Chesney, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753 (2019). *See also, e.g.*, Tiffany Hsu and Stuart A. Thompson, *Disinformation Researchers Raise Alarms About A.I. Chatbots*, N.Y. TIMES (Feb. 8, 2023), https://www.nytimes.com/2023/02/08/technology/ai-chatbots-disinformation.html/; Barry Forbes, *ChatGPT: Five Alarming Ways in Which AI Will Lie For You*, FORBES.COM (Dec. 20, 2022), https://www.forbes.com/sites/barrycollins/2022/12/30/chatgpt-five-alarming-ways-in-which-ai-will-lie-for-you/?sh=63475d575cb9/.

[27] *See, e.g.*, Mathias Osmundsen et al, *How Partisan Polarization Drives the Spread of Fake News*, BROOKINGS INST. COMMENT (May 13, 2021), https://www.brookings.edu/articles/how-partisan-polarization-drives-the-spread-of-fake-news/; Tiffany Hsu and Steven Lee Myers, *A.I.'s Use in Elections Sets off a Scramble for Guardrails*, N.Y. TIMES (June 25, 2023), https://www.nytimes.com/2023/06/25/technology/ai-elections-disinformation-guardrails.html/.

[28] See JONATHAN RAUCH, THE CONSTITUTION OF KNOWLEDGE: A DEFENSE OF TRUTH 40-41, 85-94, 131-138 (2021) (describing political polarization rooted in conversion of facts to markers of identity and affiliation); Robert Post, Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State 6-10 (2012) (grounding marketplace of ideas approach in First Amendment jurisprudence to belief in expertise and its role in democratic governance) [hereinafter, RAUCH, THE CONSTITUTION].

[29] These debates include: how to sustain quality journalism; facilitating access to information for good governance and scientific progress; the contested role of professional publishers and user-generate platforms in the internet ecosystem; and whether labor justice and wage equity is something copyright law should assure even at the expense of follow-on creativity and knowledge.

the heart of U.S. democracy.[30]

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This Article consists of three parts. Part I starts with *Feist* in 1991 and works backwards to describe the cases on which *Feist* relies. This inquiry offers a revised legal genealogy of *Feist*,[31] highlighting in that genealogy a curious absence of a coherent fact-exclusion doctrine despite *Feist*'s conclusion that such a doctrine is deeply rooted. Part I reorients and reinterprets these cases, which are purportedly about facts, as actually about disciplinary knowledge and knowledge-producing institutions. As reinterpreted, these cases describe not just "facts" but the acceptability of facts as a foundation for knowledge, produced through processes and within institutions with increasingly accepted social and political authority. For the past century, facts have been (and still are) an evolving concept, not just data points on a graph or singular statements about the world. Understanding how facts evolved from disciplinary knowledge into shared public understandings of verifiable truth claims is key to understanding *Feist*'s future application. In other words, *Feist* is not wrong, it just does not say enough.[32]

Part II excavates the legislative history of the Copyright Act of 1976. It connects the case history in Part I with the rise of the authorial labor theory of copyright, a flash point in the legislative debate preceding the 1976 Act.[33] *Feist* categorically rejected the labor theory of copyright fifteen years after the Act's passage, extinguishing a debate that waged for over a century.[34] The

[30] *See, e.g.*, MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS (1981) (showing "that the very idea of impartial, objective 'news' was the social product of the democratization of political, economic, and social life in the nineteenth century").

[31] Part I owes a great debt to several previous articles about *Feist*, especially: Craig Joyce & Tyler T. Ochoa, *Reach Out and Touch Someone: Reflections on the 25th Anniversary of Feist Publications Inc. v. Rural Telephone Service Co.*, 54 HOUS. L. REV. 257 (2016) [hereinafter *Joyce & Ochoa, Reach Out*]; Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007)[hereinafter *Hughes, Ontology*]; Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of its Protection*, 85 TEX. L. REV. 1921 (2007); Wendy Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93 (1992) [hereinafter *Gordon, Artifact*]; Ginsburg, *Commercial Value*, *supra* note 21.

[32] For earlier related critiques of *Feist* focusing on the ambiguity of "facts," see Gordon, *Artifact*, at 94-95 (making the point that even created facts (like census data) are facts, but that *Feist* oversimplifies facts as "discoveries"); Hughes, *Ontology*, at 83 (criticizing *Feist* in the context that "facts are not pebbles waiting to be picked up; the size and shape of the pieces of reality we see are just the result of how we hammer and chisel the world").

[33] *See infra* Part II.

[34] *Id.*

labor theory (or sweat-of-the-brow) argues that hard work and skill justify copyright protection to incentivize "intellectual labor."[35] The theory favors a particular brand of individualism and freedom-to-labor rhetoric often at the expense of institutional and community well-being, despite having roots in organized labor and the Progressive movement, as Part II discusses.[36] The co-optation of the labor theory by businesses, some of them authors and many that become copyright owners (e.g., publishers, distributors, and media conglomerates), is an old story about copyright rhetoric subverting copyright's benefactors.[37] In the case of fact-based works, the rhetoric of protecting the fruits of one's labor (and thus protecting its output with property rights) has two effects: subverting expertise and undermining the public benefit of institutions producing news, science, informational databases, and forecasts essential to the regulation on which our increasingly complex technologies, socio-legal organizations, and democratic politics rely.

Part II's main focus is the small part of the voluminous legislative history that discusses the fact-exclusion in any depth. It features a debate between a then-prominent copyright lawyer, Irwin Karp, representing the Author's Guild and its interests in return on investment in creative labor, and a coalition of librarians advocating for more open access to books via interlibrary loans and intralibrary photocopying. This debate rehashes a familiar tension in copyright law regarding the proper balance between copyright's public interest and private rights, reorienting that debate around the production and role of facts as a core copyright concern and with renewed interest in our information age.[38]

Part III situates the cases and copyright's authorial labor theory within the turn-of-the-twentieth-century philosophical and political debates about the production of knowledge. Facts as we understand them in the twenty-first century are really a modern concept.[39] Facts—as distinguished from truth and

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[35] *Id.*

[36] *Id. See also* CB MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (HOBBES TO LOCKE) (1962) (describing possessive individualism's roots and its central idea that a person's normative essence consists in self-ownership, a theory that today pervades the basis and continued purchase of global capitalism).

[37] MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (Harvard University Press (1995). *See also* SILBEY, AGAINST PROGRESS, *supra* note 22, at 44 (discussing this rhetoric in the context of digital photographers and digital photography platforms and publishers).

[38] Those who did not know that librarians often play the part of subterranean revolutionaries in copyright law—on the side of labor *and* access to information—will learn this history in Part II as well. Kyle Courtney and Juliya Ziskina, T*he Publisher Playbook: A Brief History of the Publishing Industry's Obstruction of the Library Mission* (2023), https://archive.org/details/the-publisher-playbook/.

[39] *See infra* Part III.

value—developed at the turn of nineteenth century with the evolution of the modern university and the emergence of the social and varied physical sciences.[40] From the Enlightenment epistemological fields of religion, moral philosophy, and so-called "natural" philosophy (e.g., anatomy, botany, geology, and zoology) came the new sciences of sociology, psychology, economics, anthropology, and urban studies, along with the diversification of the natural sciences of biology, chemistry, and physics.[41] These evolving disciplines produced new "truths," also called "facts," from empirically grounded methods with consensually established standardized practices characterized by experimentation, verification, and falsification.[42] It was the beginning of "objectivity" as a new measure of "truth" with a variety of "facts" at its core.[43]

Jonathan Rauch explains this development in his book *The Constitution of Knowledge* as the decentralized and impersonal social adjudication process of objective understandings about the world.[44] This progression includes the evolution of the modern university and its disciplinary fields, with the so-called "liberal sciences" as an "epistemic

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[40] RAUCH, THE CONSTITUTION, *supra* note 28, 68. A Google n-gram of "fact," "truth," "knowledge," and "value" between 1800 and 2010 shows "fact" and "value" peaking 1920 and "truth" at its nadir. "Knowledge" remains fairly constant. The n-gram is hardly empirical proof, but as a rough estimate of word usage it shows the word "fact" on the rise in the early twentieth century and "truth" used frequently until the turn of the twentieth century and then not again as frequently until the turn of the twenty-first century.

[41] *Id*. at 68-69. See also Jonathan R. Cole, The Great American University 22 (2009) (describing revolution in American universities and the creation of "new knowledge").

[42] RAUCH, THE CONSTITUTION, *supra* note 28, at 68-69.

[43] *Id*. at 99. Of course, historic events, geographic details, and scientific truths were age-old subjects of knowledge and debate. *See infra* Part III & note 272 (citing M.T. Clanchy and Hayden White). The emergence of "facts" as such is as much about the measure of knowledge – its smallest common incontestable denominator – as much as it is about the process of its production. The very idea of the "fact-exclusion" could not arise in copyright without understanding how facts came to be understood. These new fields of expertise, scholarly disciplines, and research methods provided some answers to the increasingly fraught truth/value distinction and the contested claim to universal truths that plagued 19th century politics and science because of bias and error. See also LORRAINE DASTON & PETER GALISON, OBJECTIVITY 27-28 (2007).

[44] RAUCH, THE CONSTITUTION, supra note 28, at 5. *See also* Max Weber, "Science as Vocation," *in* THE VOCATION LECTURES (ed. David Owen and Tracey Strong) (tr. Rodney Livingston) 1-31 (2004) (explaining how science provides methods of explanation and means of justifying an outcome, but not moral questions which is the domain of philosophy and religion). This eventually becomes well known through Robert Merton's canonical work, SOCIOLOGY OF SCIENCE (1973), describing an ethos of science ("Mertonian norms"), including disinterestedness and organized skepticism. *See also* STEVEN SHAPIN, SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND (1994) (historical account of scientific knowledge production rooted in trust and social civility norms around dispute resolution).

regime—that is, a public system for adjudicating differences of belief and perception and for developing shared and warranted conclusions about truth."[45] These debates about new disciplinary knowledge circulated between the 1880s and 1910s as a result of new information industries, including the telegraph and the rise of national journalism (with its share of "fake" news).[46] They also tracked the revolution in legal education and law courts from legal formalism to legal realism, with the attendant rise of legislative facts and courts' deference to them.[47] The debates in law, news, and science eventually resolved into what became the New Deal politics and its modern government structure—administrative agencies, expert bodies, and deferential judicial review, as well as professional journalism strengthened by constitutional guarantees.[48] This metamorphosis came only after industry consolidation and professional institutions could rely on law (including copyright law) to support their missions and refrain from interference.[49] The new understanding and role of "facts"—a revised way to understand both the inputs and outcomes of knowledge and disciplinary learning—was at the center of these institutional changes.

What Wendy Gordon has called the "odd epistemology" of *Feist* can be explained in part by the popularization of "facts" as a synonym (and sometimes replacement) for "truth" in the early twentieth century.[50] *Feist* does not talk about "truth" because the case was about the legality of unauthorized copying of phone book information (i.e., numbers and addresses organized alphabetically). These were "facts" (or "data," as the Court says repeatedly), but what *Feist* means when it says "no one may claim originality as to facts" is broader than simply that address information is public domain material. It means that facts form truths about the world, be they social, scientific, legal, or historical truths, and that copyright ownership

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[45] RAUCH, THE CONSTITUTION, *supra* note 28, at 76. The goals of such a regime include producing knowledge (distinguishing reality from non-reality), freedom (encouraging human autonomy), and peace (fostering institutional resolution of disagreement and nonviolence). Id.

[46] WILL SLAUTER, WHO OWNS THE NEWS? A HISTORY OF COPYRIGHT 109-112 (2019) [hereinafter SLAUTER, NEWS] (describing evolution of news industry, its relation to copyright, and early fake news scandals).

[47] Jessica Silbey & Jeanne *Fromer, Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J. L. & ARTS 341, 346-47 (2021).

[48] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[49] This would come with the overturning of *Lochner v. NY*, see *infra* Part III. *See also* SLAUTER, NEWS, AT 109-112.

[50] Gordon, *Artifact*, supra note 31, at 93, n.18. *See also* Hughes, *Ontology*, supra note 31, at 49-52 (continuing Gordon's critique and describing a "very short history of facts" citing MARY POOVEY, THE HISTORY OF THE MODERN FACT (1998) and scholarship of Lorraine Daston that was a precursor to her co-authored book OBJECTIVITY, cited *supra* note 43).

of even compilations of facts cannot keep truths from circulating freely.[51]

As Part III explains, *Feist*'s reasoning is both slippery and seems inevitable because the word "fact"—absent from the 1976 Copyright Act and its legislative history—only fully emerged as a category of "truth" forming the bedrock of "knowledge" in the early twentieth century, along with the institutions that produce both knowledge and facts (e.g., journalism, natural and social sciences, agencies and research centers, and legislatures).[52] As the authority and influence of these knowledge-producing institutions develop and change, as does their ability to shape public policy and law, the facts produced by them become less contestable and more self-evidently "facts."[53] That was true in 1991 about phone book data when *Feist* was decided, but the earlier decades debated "truths" or "facts" from journalism, human biology, and labor economics, which were more contestable than phone numbers. Absent from *Feist* is the specter of the early twentieth-century debate between "truths" or "facts" and "values," a kind of "ontological politics"[54] that preoccupied the new sciences and law. But that specter was present when the canonical copyright cases leading to *Feist* were decided. Part III fills in that history to clarify why *Feist* is correct and explains how to apply *Feist* today given our democracy deficit and the predominance of our new information industries. (Who uses phone books anymore?)

Feist came about because producing "facts" is hard work, and the telecommunications industry sought to protect its fact-producing labor—the telephone book—with copyright. It was rational to do so given that copyright's first subject matter categories of "maps, charts, and books" were fact-intensive works; the grant of a fourteen-year copyright (by the Copyright Act of 1790) was intended to incentivize their laborious and skilled production.[55] When *Feist* excised the sweat-of-the-brow principle from copyright law but preserved copyright protection for informational goods that demonstrated originality in "selection, coordination, and arrangement" of the information (although not for the phone book, which lacked such originality),

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[51] Feist, 499 U.S. at 347.

[52] This is the same time when certain government agencies, such as the GSA, and independent nongovernmental organizations with similar missions such as RAND (efficient and evidence-based governance), originated and quickly became influential. To be sure, the word "fact" existed and was used before this time, but their institutionalized, diversified production while remaining authoritative and discernable as truths is the twentieth-century innovation this Article describes. *See supra* note 40 (describing n-gram results,) and Part III.

[53] The "facts" produced by these organizations were called "data" and "information," not necessarily "facts." Today we may consider these terms synonyms, or we might say that facts are derived from analysis of data and information.

[54] John Law & John Urry, *Enacting the Social*, 33:3 ECONOMY AND SOCIETY 390, 390 (2005) [hereinafter *Enacting the Social*].

[55] Copyright Act of 1790, 1 Stat. 124.

it avoided answering the question at the heart of the labor theory of copyright: Who is the primary benefactor of copyright law, the author or the public?

Therein lies the reason that the third path to *Feist* is both the most helpful and the most complicated. Whether to protect an author's labor to the detriment of the public interest is ultimately a policy question that becomes a legal question when human labor produces what are called "facts." Standing in the way of the *Feist* Court's definitive statement on the issue—declaring that some works are in the public domain because they lack originality, no matter how much skill they take to produce—is the Court's other most famous copyright decision, *Bleistein v. Donaldson Lithographing* (1903).[56] *Bleistein* was written nearly a century before *Feist* by Justice Oliver Wendell Holmes during his first year on the Court; it has since become a celebration of the inevitability of human originality, standing for the principle that all expressive works have "something irreducible, which is one man's alone."[57] *Feist* cites *Bleistein* exactly once.[58] Reevaluating *Feist*'s fact-exclusion in the context of its history and its future application, as this Article does, also requires a reassessment of *Bleistein*'s holding and its hold on U.S. copyright law.[59] Part III does just that in order to clarify *Feist*'s holding and extend its future reach. This reassessment is an important step to help resolve current disputes over access to information necessary for human flourishing in Anthropocene.

The Article concludes with examples of *Feist*'s broader application to a range of scenarios actively in litigation. It shows that *Feist*, properly understood, actually means that facts *and other forms of objective knowledge produced within knowledge-producing institutions* are uncopyrightable and in the public domain, even if they require substantial labor and investment to produce. The upshot is threefold. First, reading *Feist* this way helps define the public domain of facts not as physical-world discoveries but instead as building blocks of knowledge and expression. Second, it emphasizes the need to reinforce the institutions and organizations—scientific, professional, and

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[56] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[57] *Id.* See also *Ginsburg, Commercial Value*, supra note 21, at 1882 ("Justice Holmes set forth the most celebrated American judicial espousal of the 'copyright as personality' approach in Bleistein…"). See *infra* Part III for further explanation of the celebration and critique of Bleistein, especially Beebe, *Aesthetic Progress, supra* note 22, at 250 (describing Bleistein's "damaging influence" and "culturally regressive trends").

[58] *Feist*, 499 U.S. at 359 (citing *Bleistein* for the proposition that there are "a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent"); but see *Bleistein*, 188 U.S. at 250 (saying even directories may be copyrighted), which *Feist* does not overrule. See *infra* Part III.

[59] Other copyright scholars have been working to tame Bleistein as well, see Barton Beebe, *Aesthetic Progress, supra* note 22, at 250. *See also* Joyce & Ochoa, *Reach Out*, *supra* note 21, at 268-274, 308.

expert—that are vital to the production and dissemination of knowledge and are under pressure in the internet age.[60] And finally, it prepares the *Feist* doctrine for the twenty-first century (in which facts are again being contested) in order to prevent copyright law, in the guise of "originality" or "natural rights" to fruits of one's labor, from interfering with the dissemination of expertise essential to self-governance and promoting the public good. In concrete terms, facts should not be narrowly defined but instead broadly construed so that copyright does not interfere with the circulation and amplification of knowledge and expertise. Copyright law has been and should continue to be a regime serving the public interest of promoting the progress of science—and of knowledge more broadly—by granting limited rights to authors over their expression, *but not over the knowledge it contains*. Where copyright law fails to remunerate labor or sustain an industry because the works are largely fact-based or principally objective, we must not compromise these other values of copyright law, but instead look to the many other ways to enable working people and valuable industries to thrive.[61]

I. *FEIST* AND ITS GENEALOGY

This Part describes *Feist* and then traces the cases on which it relies, along with their histories, to make three points. First, the earliest incarnations of the copyright fact-exclusion doctrine in nineteenth- and early twentieth-century cases did not discuss facts per se. The word "facts" was rarely uttered in these canonical cases. Instead, early cases concerned legal opinions, photographs, news headlines, graphical forms, and financial information. In each situation, courts had to justify the scope of copyright protection in light of copyright's corollary: the public domain. A close look at these cases and the case families they produced reveals that the fight over facts through the nineteenth and twentieth centuries was a fight over how copyright serves the public interest by enabling unfettered dissemination of various forms of knowledge. The matter of "facts" in these early, pre-*Feist* cases was tied to a contingent and contextual public domain of various subject matter that the Court claimed critical to preserve as free even, as it turns out, at the expense of underprotecting the outputs of human labor. With each case, the copyright public domain grew in scope and importance, as did the plausible categories of "facts" to which *Feist* would eventually refer. The result was an expanding landscape comprised of various forms of common property for the purpose

[60] *See, e.g.*, Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L. J. F. 185 (2018).

[61] For a similar critique in another context, *see, e.g.*, Jessica Silbey, *New Copyright Stories: Clearing the Way for Fair Wages and Equitable Working Conditions in American Theater and Other Creative Industries*, 83 OHIO ST. L. J. ONLINE 29 (2022).

of "promot[ing] the Progress of Science and the useful Arts."[62]

Second, these early cases are about evolving *industries* (e.g., law, news, finance) with rising socio-economic power, epistemic authority, and developing professionalism. In addition to diversifying what eventually came to count as "facts" for the purposes of placing them in the public domain, these cases connect the production of facts to their institutional contexts (e.g., of law, journalism, and finance). These cases concern the copyright status of law reports, journalism, and photography, along with the social progress produced through and because of these evolving institutions in crucial periods of political, economic, and technological development. Thus, when the Court analyzes the copyrightability or non-copyrightability of a work or its parts, it also considers the ways in which the work is produced (i.e., the institutional and professional structures that produce and disseminate it) and the consequences for excluding the public from it unless payment is made.

Third, we learn from these cases that even though a "fact" may be contingent and contestable, facts are also discernible and reliable. Facts are knowable according to socio-political processes grounded in professional expertise and institutional authority. And thus, one explanation for the absence of clear, consistent case law guidance on the fact-exclusion from copyright before the 1991 *Feist* decision is that, for a century prior, facts and the institutions producing them (such as university disciplines, professional organizations, legislatures, and even courts) were subject to debates over their power and influence. As Lorraine Daston and Peter Galison write in *Objectivity*, the modern notion of "objectivity" as a scientific ideal that emerged only in the mid-nineteenth century is grounded in "epistemic virtue," which they describe as a moral attribute of those producing knowledge. [63] As courts debate whether a "fact" is in or out of copyright protection—be it a from photograph, a financial report, the law, property evaluations, weather forecasts, or a news headline—the institution or the professional community that produces the "fact" requires authority, a kind of power or influence.[64] And so the absence of clear precedent on the

[62] U.S. Const., Art. 1, sec. 8, cl. 8.

[63] LORRAINE DASTON & PETER GALISON, OBJECTIVITY 27-29 (2007) (introducing the term). Daston and Galison write a social and institutional history of the concept of objectivity based on a case-study of atlases, putting into practice what Emile Durkheim calls "coercion" in his canonical essay "What is a social fact?" about the development of field expertise and community standards and norms. Émile Durkheim, *What Is a Social Fact?, in* THE RULES OF SOCIOLOGICAL METHOD (1895).

[64] When Durkheim theorizes about the force or "coercion" of facts, he does not mean physical force, but the force of norms in culture, e.g., "collective aspects of the beliefs, tendencies, and practices of a group that characterizes social phenomena." Émile Durkheim, *What Is a Social Fact?, in* THE RULES OF SOCIOLOGICAL METHOD (1895) at 7. "Currents of opinion, with an intensity varying according to time and place, impel certain

copyrightability of "facts" is part of a century-long evolution of the institutional authority of organizations producing facts on which we have come to depend.

This Part builds on these three points and demonstrates that *Feist* is not wrong, but its reasoning is insufficiently clear to answer complicated questions about the copyright fact-exclusion for today's purposes. By situating the cases *Feist* relies on with their socio-institutional histories, the defeat of sweat-of-the-brow doctrine in *Feist* becomes more justifiable, and our ability to discern new categories of public domain "facts" and knowledge in the future becomes easier.

A. *Feist Publications v. Rural Telephone Service Co.* (1991)

Feist was a dispute between rival phone directory publishers.[65] Rural Telephone was a local Kansas public utility with a state mandate to publish a directory in exchange for its utility monopoly. Newcomer Feist Publications was a publication company whose directory covered wider geographic territory and thus was arguably more useful.[66] Both companies provided directories free of charge and, according to the Court, "compete[d] vigorously for yellow page advertising."[67] Rural was a lone holdout among other local utilities refusing to license its listings to Feist. Because Feist was not a utility, it "lacked independent access to subscriber information."[68] Feist wanted to

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groups [to behave in certain ways]. … These currents are plainly social facts. At first sight they seem inseparable from the forms they take in individual cases. But statistics furnish us with the means of isolating them. … It is a group condition repeated in the individual because imposed on him." *Id.* at 8-9.

[65] *Feist*, 499 U.S. at 343.

[66] The Feist directory covered 11 different telephone service areas in 15 counties and contains 46,878 white pages listings – compared to Rural's approximately 7,700 listings. *Feist*, 499 U.S. at 343. For a fuller exploration of Feist and its backstory, *see* Joyce & Ochoa, *Reach Out.*

[67] *Feist*, 499 U.S. at 343. There is evidence in the papers Justice Steven, who wrote the memo encouraging the Court to grant cert in *Feist*, that he and others were motivated to take the case to promote competition in the phonebook industry specifically and telecommunication companies more generally. *See* Justice Stevens' Papers (copies on file with author and available in Manuscript Room, Library of Congress, Box 590). The original vote on the certiorari petition indicated that Justices Stevens, White, Marshall, and Scalia voted to grant cert, whereas Chief Justice Rehnquist, Justices Blackmun and O'Connor voted to deny cert, and Justice Kennedy voted to defer and relist. Justice Souter had not yet been appointed, but he was on the Court in time for the oral argument in January. This is a notable line-up given Justice O'Connor, who voted to deny cert, authored the unanimous opinion reversing the lower court's ruling in favor of Rural and "sweat of the brow." (Blackmun indicated his concurrence in a single line.)

[68] *Feist*, 499 U.S. at 343.

produce a directory that included the geography covered by Rural's listings, and thus used the listings in Rural's directory without Rural's consent. Feist verified the accuracy of Rural's listings with independent research, discarding those listings outside Feist's geographic area and adding information not contained in Rural's directory (including street addresses). Feist eventually copied 1,309 of Rural's 7,700 listings. Feist's total directory contained 46,878 listings. When Rural sued Feist for copyright infringement, Feist defended by saying it took no copyrightable material from Rural because the listings were facts and not authorial expression.[69]

Both lower courts ruled in Rural's favor based on a "string of . . . court decisions" holding directories and factual compilations copyrightable.[70] The Court did not disturb this line of cases; instead, it sought to resolve an "undeniable tension" between the principles that "facts are not copyrightable" because they lack originality but that "compilation of facts generally are."[71] In reversing the lower rulings and holding for *Feist*, the Court confirmed both principles and explained their harmonious coexistence.[72] In the context of a directory containing only phone numbers and addresses, that content did not "originate" with Rural.[73]

> Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not "ow[e] its origin" to Rural. . . . Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them, and would have continued to exist if Rural had never published a telephone directory.[74]

According to the Court, compilations of facts may be protectible if the particular selection, coordination, and arrangements of facts contain some originality. If, however, the facts' selection, coordination, and arrangement

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[69] Rural proved copying-in-fact (and thus an absence of independent creation, which is a total defense to a claim for copyright infringement) because Feist's listings included four fake listings that Rural used in its directories to detect copying of this sort. *Id*. at 344.

[70] *Id. See also* Robert Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1584-89 (1963) (collecting and discussing cases about copyrightability of directories).

[71] *Feist*, 499 U.S. at 345.

[72] *Id.*

[73] Well, of course it did. Rural created and assigned the phone numbers. This is part of the "odd epistemology" of *Feist*, which Wendy Gordon describes in her article, *Reality as Artifacts: From Feist to Fair Use* explaining that even "created" facts are uncopyrightable. This comports with the word's etymology. Gordon, *Artifact*, supra note 31, at 96 n. 16. The word "fact" comes from the Latin "factum" which means "a thing done or performed" and derives from the Latin root "fac" meaning "to make or do" (e.g., "factor," "manufacture").

[74] *Feist*, 499 U.S. at 361 (citations omitted).

are "entirely typical," "obvious," "mechanical or routine," or "devoid of even the slightest trace of creativity," the compilation, like any other work, lacks copyright protection.[75] Rural's white pages had all these non-original qualities: it was alphabetical and comprehensive by law (thus lacking selectivity), making it a "garden-variety white pages directory" lacking any creativity.[76] The Court concluded that "Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original."[77]

The prelude to this determination includes two key paragraphs about the matter of facts and their exclusion from copyright protection:

> It is [a] bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts" [Nimmer sec. 2.11[A]]. This is because facts do not owe their origin to 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. To borrow from *Burrow-Giles*, one who discovers a fact is not its "maker" or "originator." "The discoverer merely finds and records" [Nimmer sec. 2.03[E]]. Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Wor*ks, 81 Colum. L. Rev. 516, 525 (1981). Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense.
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> The same is true of all facts—scientific, historical, biographical, and news of the day. "[T]hey may not be

[75] Compilation copyright must meet requirements of 102(a). Copyright Act of 1976, 17 U.S.C. §§ 102(b), 103. Compilation copyright was first expressly added to the Copyright Act of 1976. See §§ 101 (defining compilations), 103 (defining what is protectible subject matter of compilations).

[76] *Feist*, 499 U.S. at 362. "There is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. *See* Brief for Information Industry Association *et al.* as *Amici Curiae* 10 (alphabetical arrangement "is universally observed in directories published by local exchange telephone companies"). It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution." *Id.*

[77] *Id*. at 363.

> copyrighted and are part of the public domain available to every person."[78]

In response to the "unfairness" of declaring public property all these "facts" produced with significant labor, investment, and effort, the Court said:

> It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. . . . As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." *Harper & Row* (dissenting opinion). . . It is, rather, "the essence of copyright," . . .*ibid.*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. . . . This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, . . . only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.[79]

The Court relies on several cases dating from the mid-1800s to the mid-1990s for this "bedrock" principle.[80] *Feist* reads like a statement of how

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[78] *Feist*, 499 U.S. at 347. Note the equal (if not greater) weight on treatise and scholarly writings as on caselaw. Other than Nimmer and Denicola, the Court relies on Ginsburg, Patry, Patterson and Joyce to fill in the gaps left by past case law. *Id*. at 347-348 (citing William Patry, *Copyright in Compilation of Facts*, 12 COMM'NS. & L. 37, 64 (Dec. 1990); Ginsburg, *Commercial Value*, *supra* note 21; Joyce & Patterson, *Monopolizing the Law*, *supra* note 21). *See also* Joyce & Ochoa, *Reach Out*, *supra* note 21, at 292-93 (making similar point about reliance on scholarly citations).

[79] *Feist*, 499 U.S. at 349.

[80] For the "constitutional requirement," *Feist* relies on a law review article and Nimmer's treatise. *Feist*, 499 U.S. at 347. The article is Patterson & Joyce, *Monopolizing the Law*, supra note 21, at 759-60, 763 n. 155, which supports its assertion with *Bleistein v. Donaldson Lithographing* (1903) and *Durham Indus. Inc v. Tomy Corp*., 630 F.2d 905, 911 (2nd Cir. 1980), which itself cites to *Chamberlin v. Uris Sales Corp*., 150 F.2d. 512 (2nd Cir. 1945). Nimmer's 1990 treatise describes original authorship to be a "statutory as well as a constitutional requirement," Nimmer §1.06[A] and also that "a modicum of intellectual labor . . . clearly constitutes an essential constitutional element." *Id*. at §1.08[C][1]. As one commentator at the time wrote, "The *Feist* opinion … blurs the concept of originality in

past cases about copyright's public domain definitively and inevitably sum to the present moment about a phone book. But the common law of copyright is less clear.[81]

B. Pre-*Feist* Cases

The cases on which *Feist* relies fall into three categories that have developed into different (but related) doctrinal paths. The first, *Burrow-Giles v. Sarony*, undergirds *Feist*'s proposition that the sine qua non of copyright is originality. *Burrow-Giles* (and later *Bleistein v. Donaldson* (1903) and *Harper & Row v. Nation* (1984)) identifies the scope of originality and distinguishes between uncopyrightable facts in the world and copyrightable factual compilations. But, as this part explains more fully, *Burrow-Giles* also pertains to the new technology of photography: Do photographers use cameras to make portraits like the painters of the past, producing creative expression with new and different tools, or are they merely mechanical recorders of contemporaneous life? Implicit in this analysis are assertions that new technologies advance knowledge (i.e., we learn about the world through photography), and that photography also shapes what we know by

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relation to authorship with two quotations from Nimmer." Leo Raskin, *Assessing the Impact of Feist*, 17 U. DAYTON L. REV 331, 335 (1992). As best as I can determine, the pre-*Feist* Nimmer treatise grounds the constitutional requirement of originality in authorship via his interpretation of the constitutional text alone. *See* NIMMER, §1.06[B] (1987) (as quoted and analyzed in Ralph Oman, *The Copyright Clause: "A Charter for a Living People,"* 17 U. BALTIMORE L. REV. 99. 107 (1987) (citing NIMMER, §1.06[A] (1987) for the proposition that "originality is different from intellectual labor: the former stems from the copyright clause's use of the term 'authors' and refers to independent creation, while the latter suggests an absolute, although minimal, standard of creativity.")).

None of these citations adequately clarify "originality," "authorship," or their relationship to sweat-of-the-brow, except with a circular reference to the Constitution. What "authorship" means remains subject to substantial debate. Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 *VA L. REV.* 1229, 1230-31 (2016). And none of these citations explain why the Constitution would leave objective knowledge created with substantial investment of time and intellectual labor in the public domain a s a constitutional matter, unless the First Amendment (or some other constitutional interest) cuts through the grant of copyright.

[81] For scholarship highlighting the lack of clarity on this issue, *see supra* note 21 (describing sweat-of-the-brow debates). Also, a circuit split existed relating to directories, which appeared to be one motivating factor to grant certiorari. Compare *Illinois Bell Telephone Co.*, v. *Haines and Co., Inc*., et al., 905 F.2d 1081 (7th Cir. 1990) with *Cooling Systems & Flexibles Inc v. Stuart Radiator, Inc.* 777 F.2d 485 (9th Cir. 1985); *Southern Bell Tel. & Tel. Co. v. Assoc. Tel. Dir. Publ*. 756 F.2d 801 (11th Cir. 1985), and *Eckes v. Card Prices Update*, 736 F.2d 859 (2nd Cir. 1984). *See also* Justice Stevens' papers, Memo dated Sept. 11, 1990, describing the circuit split related to "sweat of the brow" and fact-based works, *see supra* note 67.

influencing *how* we know. Is photography different from other forms of expression or "writings," like maps, charts, books, engravings, and illustrations, that were already within the scope of copyrightable subject matter and whose limited copyright protection is understood to promote "the progress of science"? That was the question -presented in *Burrow-Giles*.

Feist also relies on *Baker v. Selden* (1880), which has become canonical for distinguishing methods and systems as patentable subject matter from creative expression as copyrightable subject matter. *Baker* further designates certain ideas, discoveries, and principles as in the public domain. This holding was eventually codified in the 1976 Copyright Act as part of §102(b), which notably does *not* include "facts" within its long list of exclusions. Although *Feist* depends on *Baker* to ground the fact/expression distinction in a century's worth of copyright case law, it confounds this distinction with the *idea*/expression dichotomy, which is what *Baker* really says. *Baker* concerns innovations in accounting and financial records—specifically, the imperative of learning and teaching the new "science" of double-column bookkeeping without copyright law impeding its practice. One way to understand the evolution of facts as constitutional constructs anchoring a broad copyright public domain and promoting knowledge production is to recognize *Baker* as limiting copyright scope for the purposes of disseminating knowledge and promoting practice of the "useful arts." In this reading, *Feist* is correct but does not go far enough or explain its reasoning fully.

The third set of cases that *Feist* relies on begins with *International News Service v. Associated Press* [*INS v. AP*] (1918), whose central holding is anchored in the first Supreme Court copyright case, *Wheaton v. Peters* (1834). Both *INS* and *Wheaton* justify unremunerated labor under copyright law. *INS v. AP* allows copying and distribution of news headlines among competing national telegraph companies.[82] *Wheaton* decides that the production and editing of judicial case reports and the work of Henry Wheaton (the first paid Supreme Court reporter), when left unregistered despite the requirements of copyright law, rendered the valuable edited volumes in the public domain. *Wheaton* is often cited for the by-then blackletter proposition that judicial decisions specifically, and law more generally, are not copyrightable and thus free for all to copy and disseminate.

[82] To be sure, while defeating a copyright claim because AP failed to register any copyrights, an impracticality for most news organizations, *INS* contrives the "hot news" misappropriation doctrine, which the court describes as a quasi-property right and has rarely been extended beyond the facts of the case. See Shyamkrishna Balganesh, *The Uncertain Future of "Hot News" Misappropriation After Barclays Capital v. TheFlyOnThewall.com*, 112 COLUM. L. REV. SIDEBAR 134 (2012) [hereinafter *Balganesh, Hot News*].

But its reach and extension in modern times remains contested given the many private-public partnerships that produce essential legal materials, such as annotated statutes and regulatory standards.[83]

Feist relies on this case family to refute the sweat-of-the-brow theory of copyright protection denying copyright revenue to news organizations in their headlines and law reporters in their edited court decisions. *Feist* renders defunct the labor theory of copyright, even while appreciating that the industries producing the materials (here news organizations and law reporters) are indispensable to democratic governance, and that the lack of copyright may weaken their economic vitality. It does so by explaining, albeit implicitly, that sometimes the most valuable information and knowledge (i.e., journalism and the law) are not private property but "public property," or *publici juris*.[84] This recognition requires first accepting that these industries produce valuable public goods that should be accessible to all. Journalism in 1918 and the Court in 1834 were still establishing themselves as institutions with public authority. *Feist*'s reliance on *INS* and *Wheaton* to protect a public domain in "facts" (qua headlines and law) despite the expensive labor required to produce them is therefore intertwined with these institutions earning reputations as serving the public interest in the production of and access to knowledge. In all these cases and case families, the unprotected "facts" are tied to the developing industry, its reputation for epistemic authority, and copyright's role preserving public domain knowledge produced by and through those industries.

1. *Burrow-Giles Lithographic Co. v. Sarony* (1884)

Feist relies on *Burrow-Giles* for the proposition that the Constitution limits copyright protection to original authorial expression.[85] *Burrow-Giles* defines *author* as "he to whom anything owes its origin; originator; maker."[86] Importantly, novelty is not the touchstone for originality, but that which springs from the "intellectual conception" of a person.[87] *Feist*'s reliance on *Burrow-Giles* makes the most sense in the context of the fact-exclusion when we understand that *Burrow-Giles* debates authorship in photography, because its technology and artistry in 1884 was still contestable.

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[83] Georgia v. Public.Resource.Org, Inc, 140 S. Ct. 1498 (2020) (holding annotated statutes are not "authored" works under copyright law); see also *supra* note XX (listing model code cases).

[84] *Feist*, 499 U.S. at 354 (citing *INS*). *See also* Tyler Ochoa, *Origins and Meanings of the Public Domain*, 28 UNIV. DAYTON L. R. 215 (2003) (on the evolution and meaning of *publici juris* and related terms) [hereinafter *Ochoa, Public Domain*].

[85] U.S. CONST. art I., § 8, cl. 8 (protecting "writings" of "authors").

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

[87] *Id*. at 59.

The case centers on photographer and portraitist Napoleon Sarony, who made the photo of Oscar Wilde pictured below. When the Burrow-Giles Lithographic Company made unauthorized copies of the photograph and sold them, Sarony sued. To win, Sarony had to prove that he added something recognizably his own in the photograph, something that did not come from Wilde himself or from other preexisting things in the world; he had to explain what he "authored" of the reality reproduced in the photograph. At the time, many people understood photography as a mechanistic and unartistic practice.[88] Cameras were new technologies that could reproduce the world as it exists rather than reconstruct or create original images of it.[89] "It is insisted, in argument," the Court said, "that a photograph being a reproduction, on paper, of the exact features of some natural object, or of some person, is not a writing of which the producer is the author."[90] Competing with this view of photography was an alternative conception: that of photography as "a misleading form of proof"[91] and the product "of human agency."[92] At stake in Sarony's argument was an understanding of photography as both creative and factual.

The Court drew on several analogies to rule in Sarony's favor. The first was to compare copyright in photographs to copyright in "maps and charts," the first subject matter of U.S. copyright law in 1790.[93] The second analogy was to engravings and etchings—reproductions of historical prints—which were the subject of the 1802 amendment to the Copyright Act:

> Unless, therefore, photographs can be distinguished . . . from

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[88] There was a competing view of photography at the time, too, however, which was that it created ghostly apparitions and fictions. *See, e.g.*, Jessica Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 Mich. J. L. Reform 493 (2004); Jennifer Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J. L. & HUMAN. 1 (1998) [hereinafter *Mnookin*]. See also Christine Haight Farley, *The Lingering Effects of Copyright Law's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004).

[89] FRANCOIS BRUNET, THE BIRTH OF THE IDEA OF PHOTOGRAPHY xiii-xiv (2019) [hereinafter *Brunet*] (describing the origins of photography as "an art without art" and "essentially a natural, or 'atechnical' image" but also, importantly, as an invention and a cultural practice "of making pictures"). Oliver Wendell Holmes famously called photographs "mirrors with a memory." Oliver Wendell Holmes, *The Stereoscope and the Stereograph*, 3 ATLANTIC MONTHLY 738 (1861), *reprinted in* CLASSIC ESSAYS ON PHOTOGRAPHY (Alan Trachtenberg ed. 1980), at 71, 74.

[90] *Burrow-Giles*, 111 U.S. at 56.

[91] *Mnookin*, supra note 88, at 4 (describing the early history of photography as courtroom evidence based on the evolving understanding and acceptance of photographic technology as a product of professional practice and expertise).

[92] *Id*. at 20-21 (describing early use of photographs as disputed forms of "the most dangerous perjurer").

[93] *Burrow-Giles*, 111 U.S. at 56-5.

> . . . maps, charts, designs, engravings, etchings, cuts, and other prints, it is difficult to see why Congress cannot make them the subject of copyright. . . . The only reason why photographs were not included in. . . . the act of 1802 is probably that they did not exist, as photography, as an art, was then unknown.[94]

By explaining that photographs are tools of knowledge production—akin to "science," in the language of the Constitution, like other "writings"—the *Burrow-Giles* Court blessed photography as both factual (containing knowledge about the world) and plausibly authored (originating from a person), and thus protectible under copyright law.[95] This was no small feat. As mentioned, photography was not uniformly considered to perform like a telescope or looking glass—transparently and without distortion, bringing into focus things in the world the human eye cannot see. Some thought photography to be a phantasmic practice, creating apparitions and ghosts, a fictional exercise not always to be trusted.[96] By blessing photography as both art and science, *Burrow-Giles* implicitly recognizes that photography follows a predictable, physical process directed and influenced by its maker.[97] This view reflects the emerging modern conception of scientific constructivism, foreshadowing the imminent evolution of sciences and university disciplines in the coming years.[98]

From these propositions, *Burrow-Giles* held that Sarony could own of the portrait that which was a product of his own "intellectual conception," namely

> [the] useful, new, harmonious, characteristic, and graceful picture [which was] . . . entirely from his own original mental conception, to which he gave visible form by posing . . . Wilde in front of the camera, selecting and arranging the costume,

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[94] *Id.* at 58. "Art" used in this context does not mean "fine arts" but the more general "art" as a skilled or learned practice, usually technical or practical. For a discussion of the Progress Clause's "useful Arts" as opposed to "Science" (and its exclusion of "fine arts"), see Beebe, *Aesthetic Progress*, at 338.

[95] *Burrow-Giles* relied on contemporary English precedent, *Nottage v. Jackson*, to conclude that photography is authored, extending illustrations and painting to photographs, citing Lord Justice Cotton for the proposition that "'author' involves originating, making, producing, as the inventive or mastermind, the thing which is to be protected, whether it be a drawing or a painting, or a photograph." *Nottage* also says that "photography is to be treated for the purposes of [the Copyright Act] as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination." Nottage v. Jackson, 11 Q.B.D. 627 1883.

[96] *See supra* note 88.

[97] *Mnookin*, *supra* note 88, at 4 (confirming authentication of photographs).

[98] *See infra* Part III (defining scientific constructivism).

> draperies, and other various accessories in said photograph, arranging this subject so as to present graceful outlines, [and] arranging and disposing the light and shade, suggesting and evoking the desired expression.[99]

In other words, photographs can be copyrighted as long as they contained some aspects of the author's "intellectual conception."[100] Like maps, charts, engravings, and etchings, photos contain both authorial expression and promote "progress of science" by disseminating knowledge about the world.[101] This shift did not happen overnight, of course. The history of photographs becoming reliable evidence, as well as both high art and "the most democratic art," took more than a century.[102]

Feist's reliance on *Burrow-Giles* omits this socio-technical history, but it is central to *Feist*'s application of precedent. Copyright's public domain—unauthored parts of photographs or other works—is hidden in *Burrow-Giles* but made explicit in *Feist*. In the passage quoted earlier,[103] *Feist* cites the famous Melville Nimmer copyright law treatise to connect *Burrow-Giles*' positive ruling (Sarony has copyright in his photograph of Oscar Wilde) with *Feist*'s negative ruling (Rural has no copyright in its alphabetized phone directory).

Several aspects of this *Feist* passage deserve attention. First, Nimmer originates equating "discoveries" with "facts"—a problem because "discovery" in the Constitution means "invention."[104] Nimmer conflates "facts" with "discoveries" despite their differences as a matter of semantics and statutory and constitutional text. The Court relies on Nimmer's interpretation as a "bedrock" interpretation of statutory law.[105]

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[99] *Burrow-Giles*, 111 U.S. at 54-55.

[100] *Id.* at 55.

[101] Copyright law permits copying only factual parts of factual works – names and places, or visual information. This practice was rare until the mid-20th century as previously only the whole work was usually copied (the entire photograph or map or chart), not just parts of it. And when whole works were copied, whatever authorial expression the work contained was also copied. Not until early-20th century did copying parts become more common, developing the doctrine of literal fragmented similarity and the substantial similarity test. This development highlights the importance of the "de minimis" defense, about which there is some doctrinal confusion. *See* Oren Bracha, *Not DeMinimis*, 68 AM. U. L. REV. 139 (2018); *see also* Jessica Silbey, The Renewed Relevance of the De Minimis Defense in the Digital Age (June 2023) (unpublished draft, on file with author).

[102] *Mnookin*, *supra* note 88; *Brunet*, at xiii (describing photography as "the cultural face of the political idea of equality, it heralded a democratic art").

[103] *Feist*, 499 U.S. at 349.

[104] U.S. Const. Art. 1, Sec. 8, cl. 8.

[105] *Feist*, 499 U.S. at 347 (citing MELVILLE NIMMER & DAVID NIMMER, COPYRIGHT § 2.11[A] 2-157 (1990)). Earlier *Feist* cites *Harper & Row* (a decision authored by Justice

Second, *Feist*'s reliance on *Burrow-Giles* inverts the latter's focus, suggesting that *Burrow-Giles* concerns both what is within and outside copyright law. One must scour *Burrow-Giles* to find the "facts" of the photograph that are unprotected by copyright law. Their mention is buried in the middle of the opinion. There, the Court hypothesizes a situation wherein the photograph

> is simply the [result of] manual operation, by the use of these instruments and preparations . . . transferring to the plate the visible representations of some existing object [for which] the accuracy of this representation [is] its highest merit.
>
> This may be true in regard to the *ordinary* production of a photograph, and . . . in such case, a copyright is no protection.[106]

Like census takers and directory publishers, photographers in 1884 or today can reproduce "scientific, historical, biographical" facts or "news of the day," with the production of "accuracy" being the "highest merit."[107] *Burrow-Giles*' breakthrough is understanding that photography in 1884 was doing just that *and* that Sarony was the exception to that rule. His photograph contained creative choices that originated from his mind and was not an "ordinary" or "mechanical" photograph. Or, as *Feist* says about Rural's directory, it was not "mechanical or routine," "entirely typical," or "garden-variety."[108] This originality needed proving in *Burrow-Giles* because photography was still a contested communicative medium: Was it informational or artistic or both?

Third, when *Feist* considered the same question for phone directories, both photography and phone directories were understood to contain "facts" available for copying and use. Yet *Feist* leaves implicit the evolution of that institutional history of knowledge production within a disciplinary practice developing its expertise. *Feist* relies on *Burrow-Giles* for its blackletter

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O'Connor) for the proposition that facts are not protected by copyright, id. at 345; *Harper & Row* in turn cites *INS v. AP*. See *infra* at XX discussing both cases.

[106] *Burrow-Giles*, 111 U.S. 53 at 282 (emphasis added). The court said on this question, "we decide nothing." But the comparison between the "ordinary photography and the Sarony photograph is the justification for protecting the latter. And thus, identifying the difference between an ordinary photography and an original photograph becomes critical for defining the boundaries of copyright. *See also* Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J. L. & TECH. 339, 342 (2012); Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405 (2019).

[107] *Feist*, 499 U.S. at 349.

[108] *Feist*, 499 U.S. at 362.

definition of authorship. Left unmentioned is the nineteenth-century debate over photography as both an emerging expressive genre with creative components and a new technology producing reliable information about the world. Thus, *Feist* lacks an explanation of what facts are. By 1991, facts were assumed to be self-evident—a weakness in the case to be sure.[109] But the production and identification of facts in earlier and novel forms of expression was exactly the focus of these earlier debates, which were structured around the technological production of new expressive forms and their sources of epistemic authority. *Feist* assumes away these historical and institutional foundations by universalizing the identification and production of facts.

An astute reader of *Feist* might say that it cites *Burrow-Giles* less frequently than the latter's twentieth-century corollary, *Harper & Row v. Nation* (1985).[110] *Harper & Row* protected President Gerald Ford's autobiography from unauthorized quotation by *The Nation* in a scooped story about the soon-to-be-released book and its description of Richard Nixon's pardon. Like *Burrow-Giles*, *Harper & Row* was a case about a fact-based work.[111] And like *Burrow-Giles*, the copyright owner in *Harper & Row* won its case against the unauthorized copier despite the "thin" copyright in fact-based works. For reasons explained below, *Feist*'s reliance on *Harper & Row* is more directly related to the next case family with roots in *Baker v. Selden*, which establishes the importance of keeping useful inventions either under patent protection (and thus disseminated as part of the dispersal of knowledge) or in the public domain, even if made with significant investment of time and labor.[112]

2. *Baker v. Selden* (1880)

Feist cites to *Burrow-Giles* more often than *Baker v. Selden*, but this earlier case best supports *Feist*'s holding that facts are in the public domain despite the expense of the labor required to collect, produce, and organize them. *Baker* anchors *Feist*'s animating copyright, which is that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote

[109] See Gordon, *Artifact*, *supra* note 31, and Hughes, *Ontology*, *supra* note 31, pointing out these weaknesses.

[110] Feist cites to *Burrow-Giles* seven times and to *Harper & Row* eight times.

[111] *Harper & Row* was about pre-existing facts reported by President Ford in his own voice, and *Burrow-Giles* was about Wilde's appearance as posed and captured by the photographer. There is a fine line between pre-existing facts and created facts, but neither case sufficiently interrogates it for the purposes of copyrightability or otherwise. But see Justin Hughes, *Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J. OF L. & TECH, 327 (2012).

[112] Baker v. Selden, 101 U.S. 99 (1879).

the Progress of Science and the useful Arts.'"[113] As quoted in full above, *Feist* says:

> [C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, . . . only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.[114]

The slippage in this canonical paragraph between "ideas" and "information" and also between "idea/expression" and "fact/expression" goes unnoticed, perhaps because they are assumed to be synonyms.[115] Yet they are not. Furthermore, §102(b) of the Copyright Act contains the word "idea" but not "fact" (or "information"). As Section III describes in more detail, the debate in the 1880s over copyright protection for factual works, especially regarding the development of professional journalism, begs the question whether facts (as opposed to ideas, principles, and discoveries as discussed in *Baker*) are or should be protected by copyright. *Feist* conflates "ideas" with "facts" however, rendering them indistinct for the purposes of the copyright public domain. *Feist* appears to say that *Baker* originates a century-long doctrine that takes facts as self-evident and uncopyrightable. But a closer look at *Baker* makes *Feist*'s reliance on it more complex, revealing that *Feist* erroneously paints *Baker* as the origin of the conflation of "ideas" with "facts":

> This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works. More than a century ago, the Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world that useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." *Baker v. Selden*, 101 U.S. 99, 103

[113] *Feist*, 499 U.S. at 349.

[114] *Id*.

[115] The Court made this slippage in *Harper & Row* as well, so it is making it again in *Feist*. (Thanks to Tyler Ochoa for pointing this out to me.)

(1880).[116]

Feist then cites *Harper & Row v. Nation* to "reiterate[] this point":

> [N]o author may copyright facts or ideas. . . . [C]opyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original—for example . . . facts, or materials in the public domain. . . . This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts . . . are not original, and therefore may not be copyrighted. 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. In no event may copyright extend to the facts themselves.[117]

But *Baker* is not about the non-protectability of facts. It is about the non-copyrightability of methods of operation, processes, or systems—in particular, an accounting (or "bookkeeping") system described and made popular by Charles Selden. Those words—"processes," "systems," and "methods of operation"—are listed in §102(b) (along with "idea," "principle," "concept," and "discovery"). Understanding the eventual inclusion of "facts" as public domain material arising from *Baker v. Selden* and its progeny requires a closer look at *Baker* and the principles underlying it.

Baker is much discussed in legal scholarship for its canonical holding that copyright in Selden's book about bookkeeping did not protect the system it describes or the forms necessary for its use.[118] *Baker* also contains three subsidiary and often-cited holdings. First, it instantiates copyright law's "idea/expression" distinction, declaring that "ideas" are in the public domain but "expression about ideas" may be copyrighted.[119] It also exemplifies the

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[116] *Feist*, 499 U.S. at 350.

[117] *Id*. *See also id.* at 357 ("Section 102(b) is universally understood to prohibit any copyright in facts. Harper & Row, *supra* …; Accord Nimmer (equating facts with 'discoveries'). . . . Congress emphasized that § 102(b) did not change the law, but merely clarified it: 'Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate that the basic dichotomy between expression and ideas remains unchanged.' HR Rep at 57.").

[118] *See, e.g.*, Pam Samuelson, *The Story of Baker v. Selden: Sharpening the Distinction between Authorship and Invention*, *in* INTELLECTUAL PROPERTY STORIES (Jane C. Ginsburg & Rochelle C. Dreyfuss eds., 2005) [hereinafter Samuelson, *The Story of Baker*].

[119] Samuelson, *The Story of Baker v. Selden*, *supra* note 118, at 13-14.

principle of "merger": when there are limited ways to express an idea (e.g., the accounting system in Selden's forms), those expressions are in the public domain to also keep the idea or system in the copyright public domain.[120] Finally, it distinguishes patentable subject matter (i.e., inventions) from copyrightable subject matter (i.e., authorial writings).[121] As Pamela Samuelson writes, the first two holdings are not new but merely a restatement of earlier copyright principles.[122] Yet *Baker*'s third point "is unusual in the attention it gives to the distinction between copyrights and patents and the respective roles of these laws in the protection of the fruits of intellectual labor."[123] Samuelson attributes this "unusual attention" in part to Selden's failed attempt to obtain a patent on his bookkeeping system.[124] It was therefore in the patent public domain, and the question for the Court was whether it was also in the copyright public domain.

Samuelson further details the Court's reasoning that renders Selden's valuable forms and charts free to all: Selden's system of double-entry bookkeeping was an improvement on prior bookkeeping systems, but it was an iteration of existing methods, not a wholesale revolution or novel invention.[125] Selden's system combined ledgers into one book, where previously debits and credits were spread among several books, thereby making the system less error-prone, more efficient, and better for preparing future business plans.[126] By the trial court's account, Baker copied from Selden's book, leaving the lower court to question whether he copied too much, copied some but made his own work with it, or, by some coincidence, independently authored a similar accounting book. As Samuelson puts it, "[w]as Baker a 'pirate,' . . . an improver, . . . or an independent creator"?[127] At the Supreme Court, however, the arguments shifted from these typical copyright infringement questions to whether what was copied (a version of the form used to practice double-entry bookkeeping) was the proper subject for copyright protection in the first place.[128] This question changed the case from one about piracy and impermissible free-riding on authorial expression into one about the dissemination of information about and the essential tools

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[120] *Id*.
[121] *Id*. at 17.
[122] *Id*. at 2-3.
[123] *Id*.
[124] *Id*. at 2-3, 17-18, 23. Business method patents were not considered patentable until State Street Bank Trust Company v. Signature Financial Group, Inc., 149 F.3d 1368 (1998).
[125] Samuelson, *The Story of Baker v. Selden*, *supra* note 118, at 13-14.
[126] *Id.* at 2.
[127] *Id.* at 12–13.
[128] *Id.* at 17.

for performing "useful arts."[129] The new framing threatened the most valuable aspect of Selden's book because "[i]n the absence of a patent, the useful art depicted in a work, along with its ideas, could be used and copied by anyone, even in directly competing works."[130]

A reader of *Baker v. Selden* might think that Baker, the alleged copier, was the story's hero. And that is because, when explaining why Selden's book could and maybe also *should* be copied, the decision celebrates the progress of learning as well as innovation and industry that Baker's unauthorized copying produced. The case never uses the term "facts," nor, as Samuelson points out, does the decision use the term "expression."[131] *Baker* can therefore hardly be the origin of the "fact/expression" distinction that *Feist* claims it is. The case *is* about the preemptory interest in promoting the progress of the useful arts by disseminating ideas and systems, and if copyright law thwarts that dissemination by stretching too far, copyright law must yield. The examples of "useful arts" in *Baker* include medicine, the construction and use of ploughs, and modes of drawing lines to produce the effect of perspective.[132] That is, *Baker* analogizes the "useful art" of bookkeeping to other "useful arts" that were well-established at the time to remind readers that copyright adhering in medical textbooks, industrial manuals, and books about fine art techniques could not be asserted to prevent the *practice* of medicine, farming, and the fine arts. *Baker* explains:

> The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where

[129] *Id.* at 18-19 ("The Baker opinion introduced a new kind of inquiry to the framework for analyzing copyright claims. In essence, it directed courts to consider whether the defendant had copied the author's description, explanation, illustration, or depiction of a useful art (such as a bookkeeping system) or ideas, or had only copied the useful art or ideas themselves. In the absence of a patent, the useful art depicted in a work, along with its ideas, could be used and copied by anyone, even in directly competing works. Any necessary incidents to implementing the art (e.g., blank forms illustrating use of the system) could likewise be used and copied by second comers without fear of copyright liability.")

[130] *Id*. at 19.

[131] *Id*. at 20, n. 111. *See also* Baker v. Selden, 101 U.S. 99 (1879)

[132] Baker v. Selden, 101 U.S. 99 (1879).

> the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public.[133]

Several features of this reasoning deserve highlighting given that *Feist* eventually held that twentieth-century "facts" should be understood as part of the broader conception of "knowledge" and its practical applications. Ostensibly, one reason *Baker* analogizes bookkeeping to medicine, fine art drawing, and plough construction is that bookkeeping was not yet well-understood to be either a "science" (a form of "knowledge") or a "useful art." To be sure, keeping accounts was a practice as old as money. But whether bookkeeping was to be studied like a learned "science" and practiced as a "useful art" would turn on the discipline's social and innovative significance, professional organizations, and reigning expertise (here producing competing treatises). Without being explicit about its historic context, *Baker* (both the decision and the dispute that gave rise to it) is anchored in the aftermath of the Industrial Revolution, during which bookkeeping became central to commercial successes as businesses grew larger and more complex and the post–Civil War United States expanded in wealth, geography, and global significance.[134] In other words, bookkeeping was most certainly "useful" (and became more so) at this time.

Also, by analogizing bookkeeping and accounting to these other learned practices essential to contemporary society and culture, *Baker* indicates that copyright plays a role in the promotion of learned domains. First, it explains that copyright attaches to authorial explanations, but not to the useful art itself. Books cannot be pirated (and should be read and learned from), but a book describing "useful arts" cannot prevent the application of the arts it contains.[135] Second, *Baker* relies on many other cases wherein copyright claims failed or were narrowed because of the importance of

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[133] Baker v. Selden, 101 U.S. 99, 103 (1879).

[134] B.S. Yarney, *Scientific Bookkeeping and the Rise of Capitalism*, 1 ECON. HIST. REV. 99 (1949); JOHN L. CAREY, THE RISE OF THE ACCOUNTING PROFESSION: FROM TECHNICIAN TO PROFESSIONAL, 1896-1936 (1969).

[135] "[A]s a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein.…The copyright of a book on bookkeeping cannot secure the exclusive right to make, sell, and use account books prepared upon the plan set forth in such book. Whether the art might or might not have been patented, is a question which is not before us. It was not patented, and is open and free to the use of the public. And, of course, in using the art, the ruled lines and heading of accounts must necessarily be used as incident to it." Baker v. Selden, 101 U.S. 99, 104 (1879).

preserving access to information and enabling its use. These other cases concern weekly publications about "the state of the market" and "daily price-current[s]";[136] furniture catalogs;[137] cricket-scoring sheets;[138] and dress patterns.[139] In them all, copyright either did not cover the works at issue (prices and scoring sheets) or copying was allowed because of the nature of the use (information to sell consumer goods).[140] These copyright limitations and exclusions foreshadow future legislative debates. The protectability of price-predictions, fashion, manufacturing catalogs, and sport scorecards became part of the early twentieth-century copyright reform discussions and were mentioned specifically in legislative history as unprotectable subject matter under the new §102(b).[141] These cases and examples support the

[136] Clayton v. Stone & Hall, 2 Paine 382 (C.C.S.D.N.Y. 1829), *cited in* Baker v. Selden, 101 U.S. 99, 105 (1879) ("the term 'science' cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public, not a work of science. The title of the act of Congress is 'for the encouragement of learning,' and was not intended for the encouragement of mere industry, unconnected with learning and the sciences.").

[137] Cobbett v. Woodward, L.R. 14, Eq. 407 (1872) *cited in* Baker, 101 U.S. at 106 (furniture catalog drawings not subject of copyright because when "done … solely for the purpose of advertising particular articles for sale, promoting the private trade of the publisher by the sale of the articles which any other person might sell as well as the first advertiser, and if in fact it contained little more than an illustrated inventory of the contents of a warehouse, I know of no law which … would prevent him from using the same advertisement")

[138] Page v. Wisden, 20 Law Times 435 (1869) *cited in* Baker, 101 U.S. at 106 ("cricket scoring sheets not fit subject for copyright … because to say that a particular mode of ruling a book constituted an object for copyright is absurd").

[139] Drury v. Ewing, 1 Bond 540 (1862) *cited in* Baker, 101 U.S. at 107 (book of dress designs could be copyrighted but that does not prevent their use which generates copies of the exact patterns and designs as "exemplified in cloth on the tailor's board and under his shears; in other words, by the application of a mechanical operation to the cutting of cloth in certain patterns and forms. Surely the exclusive right to this practical use was not reserved to the publisher by his copyright of the chart").

[140] See *infra* notes 136-139.

[141] See Part II (discussing legislative history). See also cases litigated on these subjects: NY Mercantile Exchange v. Intercontinental Exchange, 497 F.3d 109 (2nd Cir. 2007) (daily price currents); CCC v. MacLean (car prices); CDN v. Kapes, 197 F.3d 1256 (9th Cir. 1999) (coin prices); ATC Distribution Group v. Whatever It Takes Transmissions & Parts, 402 F.3d 700 (6th Cir. 2005) (illustration and organization of auto parts in catalog were not sufficiently original); compare Kregos v. AP, 937 F.2d 700 (2nd Cir. 1991) (on forms for predicting outcomes of baseball games based on pitching statistics); Star Athletica v. Varsity Brands, 137 S.Ct. 1002 (2017) (shape, cut, and dimensions of cheerleader uniforms not copyrightable).

growing consensus that copyright cannot extend to mere "industry"[142] or the "practical use"[143] of information and information-containing images, which is one way to understand "facts" and constitution through tables, charts, graphs, and narratives.[144]

One final point about *Baker*: it only implicitly relates truth, as a goal of "Progress of Science and the useful Arts," with a reliably open public domain. But it is hard not to read into the Court's reasoning their necessary interdependence. The Court explains:

> Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way. As an author, Selden explained the system in a particular way. It may be conceded that Baker makes and uses account books arranged on substantially the same system, but the proof fails to show that he has violated the copyright of Selden's book, regarding the latter merely as an explanatory work.[145]

The Court here states copyright's role as encouraging multiple dialogues on "truths of science," which ideally produce diverse perspectives on that subject. Later, the Court says:

> To give to the author of the book an exclusive property in the art described therein when no examination of its novelty has ever been officially made would be a surprise and a fraud upon the public. . . . The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained, and it can only be secured by a patent from the government.[146]

This declaration confirms the right to rely on and assume an open public domain for debating "truths of science" and practices of useful arts. Unless notice exists that a patent has been issued on the art, there are no limits on its use. Copyright law must be interpreted to make sure that patent law—and

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[142] *See* Clayton, *supra* note 136.

[143] *Baker*, 101 U.S. at 107 (discussing Drury v. Ewing).

[144] *Cf.* HAYDEN WHITE, CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 1-25 (1987) (describing how historic events recorded in annals and calendars inevitably become narrativized challenging the distinction between objectivity and subjectivity).

[145] *Baker*, 101 U.S. at 101-2.

[146] *Baker*, 101 U.S. at 102.

only patent law—protects novel and useful inventions. And copyright cannot cover truths of "science" or methods of an "art" that are society's common property absent a patent on the subject matter.

These copyright principles apply despite the hard work of producing and communicating "truths" and developing "methods" of discerning or applying them. *Baker* clarifies that Selden's loss in the case is not fortuitous or an accident of legal formalities. It is, to use *Feist*'s updated formulation, a "result [that] is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."[147] In so stating, *Feist* relies on *Harper & Row v. Nation*, a case about the line between protecting expression and the facts it contains. *Feist* paraphrases that case:

> Others may copy the underlying facts from the publication, but not the precise words used to present them. In *Harper & Row*, . . . we explained that President Ford could not prevent others from copying bare historical facts from his autobiography . . . but that he could prevent others from copying his "subjective descriptions and portraits of public figures."

As we saw above, the Court then affirms that, though "it may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation," such use is actually "the essence of copyright" and constitutionally required: "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and the useful Arts.'"[148]

As such, Baker could copy Selden's accounting charts and other material from Selden's book necessary to explain and practice the "art," but he could not copy the whole book containing Selden's "particular" descriptions and explanations. Similarly, *The Nation* could copy facts and truths of history contained in President Ford's forthcoming autobiography for its news reporting, but not the "subjective descriptions" contained therein. And while Baker might benefit from Selden's labor writing and publishing his book by drawing on it to write and publish a competing treatise containing similar illustrations and charts, so too might *The Nation* reveal facts and truths about the president contained in his autobiography without having done the hard work of collecting them. Likewise, Feist may copy the facts of Rural's directory without expending the time or money collecting the facts. *Feist*'s rejection of protections for "sweat of the brow" or "industrious collection and labor" has roots in both *Baker* and *Harper & Row*.[149]

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[147] *Feist*, 499 U.S. at 349.

[148] *Id*. at 348-9 (quoting Harper & Row).

[149] *See* Brauneis, *supra* note 21, at 321 (discussing industrious labor doctrine). See also

Feist extends its discussion of public domain facts and rejection of sweat-of-the-brow to yet a third case and its resulting genealogy: *Wheaton v. Peters* by way of *INS v. AP*. Like *Burrow-Giles v. Sarony* and *Baker v. Selden*, *Wheaton* and *INS* do not mention "facts" in their conclusions denying copyright to law reports and news headlines, respectively; they reference only law and news. But as with the other cases, they focus on "Progress of Science and the useful Arts" and copyright's role in the pursuit of knowledge within imminently authoritative industries whose relevance to "truth" and "science" was controversial, widely debated, and eventually stabilized, due in part to an open public domain. The origin of twentieth-century "facts" that *Feist* refers to emerges in the eighteenth and nineteenth centuries within institutionally generated and disciplinarily grounded knowledge-producing industries—the subjects of the cases on which *Feist* relies.

3. *Wheaton v. Peters* (1834) and *Publici Juris*

Feist's holding that facts are not copyrightable was uncontroversial in 1991. However, its holding that sweat-of-the-brow can never justify copyright protection was subject to significant controversy that started a century earlier in the 1880s and endured until *Feist*.[150] Robert Brauneis recounts this history of the Progressive Era debate over copyright in news as inaugurating copyright's "originality" doctrine.[151] But it also anchors copyright's fact-exclusion to its public domain in knowledge and truth.[152]

Recall that maps were among the original copyrightable subject matter, and they were full of facts.[153] But in the early days of copyright, the justification for protecting maps from unauthorized copying did not require distinguishing the labor to collect the facts from the facts themselves.[154]

Miriam Bitton, *Trends in Protection for Informational Works under Copyright Law during the 19th and 20th Centuries*, 13 MICH. TELECOMM. & TECH. L. REV. 115 (2006) (discussing the historical treatment of informational goods under copyright as a "complicated spectrum" between industrious labor and creativity).

[150] See note *supra* 21 (citing scholarship on sweat-of-the-brow).

[151] *See Brauneis*, *supra* note 21.

[152] *See* Ochoa, *Public Domain*, *supra* note 84.

[153] Copyright Act of 1790, 1 Stat. 124. "[F]or the first three-quarters of the 19th century, the notion that copyright incorporated an originality requirement which excluded factual matter from protection was unknown to Anglo-American law. Courts routinely found infringement of fact-based works, such as maps, charts, road-books, directories, and calendars, on the basis of the copying of their factual content, and concluded that the industry of plaintiffs in gathering and presenting facts—their 'intellectual labor' should be protected under copyright law." *Brauneis*, at 321. *See also* Joyce & Ochoa, *Reach Out* (describing competing lines of authority for copyright protection, some requiring originality, and some not).

[154] *Brauneis*, *supra* note 21, at 321.

Mapmakers competed because mapmaking was hard and affordably pirating whole maps was nearly just as hard.[155] Once copying and communication technology evolved to threaten the markets in copyrighted works, including maps—as it did with affordable lithography and photography in the mid-1800s—justifying the protection of works with "thin" copyright would follow.[156] According to Brauneis, this is when the originality standard develops, finding its nineteenth-century apex in *Burrow-Giles*.[157]

As technological innovation accelerates knowledge production and dissemination (via new discovery tools, communication technology, and delivery systems), the value of labor diminishes as the value of information increases. *Feist* affirms this result, deriving its anti–sweat-of-the-brow holding from the case of *INS v. AP*, which itself has origins in *Wheaton v. Peters*. These two cases concerned developing professions and industries (i.e., news and the law) that, like the directories in *Feist*, produced informational works and compilations of preexisting materials for sale. By reaffirming these cases' holdings, *Feist* claims to correct an off-course line of twentieth-century cases that wrongly protected "component parts of the work" and "directories, gazetteers, and other compilations"[158] in the absence of originality. *Feist* expressly says that "some courts . . . infer[ed] erroneously that directories and the like were copyrightable per se."[159] *Feist* explains:

> Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," the underlying notion was that copyright was a reward for the hard work that went into compiling facts. . . . The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation . . . to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler "was not entitled to take one word of information previously published," but rather had to

[155] For copyrighted map cases and sweat-of-the brow, see, e.g., *Blunt v. Patten,* 2 Paise 397, 400 (1828); *Emerson v. Davies*, F. Cas. No. 446 (CC Mass.1845); *Farmer v. Calvert Lithographing*, 8 F. Cas. 1022 (CCED Mich. 1872); *Perris v. Hexamer*, 99 U.S. 674 (1878). For a history of map-making as it relates to copyright law, see ISABELLA ALEXANDER, COPYRIGHT AND CARTOGRAPHY: HISTORY, LAW, AND THE CIRCULATION OF GEOGRAPHICAL KNOWLEDGE (2023).

[156] *See Brauneis, supra* note 21, at 321

[157] *Id.* Joyce & Ochoa, *Reach Out, supra* note 21, agree with Brauneis that *Burrow-Giles* is a dividing line and resolved the competing lines of authority in favor of originality.

[158] *Feist*, 499 U.S. at 353 (discussing the 1909 Copyright Act).

[159] *Id*.

> "independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information. . . . "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas.[160]

To support its anti–sweat-of-the-brow principle, *Feist* cites *INS*, a case confirming the denial of copyright protection to news reports and the facts they contain.[161] Without copyright protection (and only the limited "hot news" protection), competition intensified in the production and dissemination of news, inaugurating a new era of journalism industry.[162] Because INS was allowed to republish AP's news headlines and factual reports without copyright liability even if it did not collect the news, the scope of AP's monopoly over (and value in) its news enterprise diminished, especially with the ease of telegraphic copying and dissemination. *Feist* cites *INS* as the "best example" of copyright's scope and purpose concerning the value and status of informational goods.[163] Citing *INS*, *Feist* affirms that "[t]he news element—the information respecting current events contained in 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."[164]

a. *INS v. AP* and the "Science" of Journalism

Feist's citation to *INS* highlights two key features of the evolution of facts as elements of authoritative knowledge in the twentieth-century public domain. First, for "news" to be *publici juris*, an understanding of news as truthful and trustworthy (as "fact") had to be established. This would take time, as newspaper publishing was still local and unprofessionalized.[165] Second, for journalism to be valued and sustainable given rapidly evolving business models and industry standards, paying for news production and keeping it reliable triggered arguments about its copyrightability.[166] As Brauneis explains, the tumult in the news industry between 1875 and 1910 driven by technological change (e.g., telegraphy and printing) forced its reorganization from an industry that did not rely on copyright (because

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[160] *Id.*

[161] It did grant AP a limited misappropriation claim, today called the "hot news" doctrine which has not been expanded beyond its original context. See Balganesh, *Hot News* and *supra* note 82.

[162] *See Brauneis*.

[163] See *supra* note 82 (describing how INS was primarily an unfair competition case).

[164] *Feist*, 499 U.S. at 353.

[165] SLAUTER, WHO OWNS THE NEWS?, *supra* note 46, at 109-112.

[166] *See Brauneis*, *supra* note 21.

copying was hard and local journalism the norm) to one that sought copyright protection.[167] This reorganization included investing in journalists, which raised questions about how and why to pay for them, with copyright being one potential answer. This shift inaugurated the new career of professional journalists, who previously were considered gossip columnists or mere "collectors" of news items and eventually became expert investigators and "writers" commanding respect, deference, and reasonable pay for their high-quality truthful accounts of contemporary events.[168] *Feist*'s reliance on *INS* takes for granted the 1991 quality standards of journalism, even though *INS* does not discuss facts per se (but *news*), and journalism in 1918 was still establishing itself as a dependable, reliable profession.

INS preceded three decades of fighting among expanding news organizations competing for national coverage.[169] Starting in the mid-1800s, the news industry evolved from many small local papers (which, because of geographically constrained markets, happily copied news stories from each other, sharing across distances through subsidized postal services) to consolidated, regional news organizations and national news services like the Associated Press and Western Union.[170] Changing communication technology accelerated these organizations' growth. Journalism transformed with the rise of the telegraph, improvements in printing, ease of railroad transportation in the 1880s, and the shrinking of political subsidies for newspapers.[171] Lead-time advantages for stories shrank as distances and time became traversable with more ease, and more news stories could be copied quickly, across greater distances, and without adhering to professional courtesies that were part of local journalism's norms of reciprocity and

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[167] *Id*. See also WILL SLAUTER, WHO OWNS THE NEWS?, *supra* note 46.

[168] *See* Brauneis, *supra* note 21, at 355 (describing the critique of journalists as not authors and news gathering and journalism not considered the product of "skilled labor" or "intellectual conception of the writer"). As Brauneis describes, news was considered unlike original copyright subject matter -- maps and charts – which required lengthy expeditions, special tools, and expertise. An 1884 article from the Nation described news reporters in the following way, as part of a critique of a new bill that would protect copyright in news.

> "[I]t is absurd to talk of a man who picks up a piece of news or an "item" as an "author" at all. The reason why copyright laws are passed is to secure the fruits of original, intellectual labor. But the proposed copyright in "news" does not do this. Any one may collect news without any original intellectual effort, and with very little effort of any kind. Some people do it by listening at keyholes … [or] in the ordinary course of conversation with the persons whom they meet in the way of business or pleasure."

Id.

[169] *See* SLAUTER, WHO OWNS THE NEWS, *supra* note 46, at 227.

[170] *Id.* at 87-107.

[171] *See* Brauneis, *supra* note 21, at 345-49.

delay.[172] Competition among newspapers increased and newspapers became more dependent on sales and advertising.[173] Companies and larger associations emerged and came to dominate the market; all of them were accused of anti-competitive practices, putting even more pressure on local papers.[174]

From these changes came calls for copyright (or something!) to protect the news from expropriation.[175] Intriguingly, local newspapers were not asking for these changes—they did not want copyright because they depended on copying. The new media conglomerates asked for stronger copyright to prevent competition in national news services. In 1883, AP hired a lobbyist (Henry Watterson) to seek passage of the "News Copyright Bill" that would grant short-term protection to articles published in newspapers.[176] Although the bill never got out of committee, debates about it foreshadowed copyright's implied fact-exclusion that *Feist* makes blackletter law, extinguishing sweat-of-the-brow to protect *publici juris*.[177]

How did the notion of *publici juris*—property so important for general welfare that it must be free—enter copyright canon?[178] *Feist* does not quote Justice Louis Brandeis's famous *INS* dissent but is surely channeling it.[179] Brandeis's opinion reflects the changing nature of journalism and the growing emphasis on the public interest in freedom of information as a mainstay of scientific progress and democracy:

> News is a report of recent occurrences. The business of the news agency is to gather systematically knowledge of such occurrences of interest and to distribute reports thereof. The

[172] Laura J. Murray, S. Tina Piper & Kirsty Robertston, *Exchange Practices among Nineteenth-Century US Newspaper Editors: Cooperation*, *in* COMPETITION IN PUTTING INTELLECTUAL PROPERTY IN ITS PLACE: RIGHTS DISCOURSES, CREATIVE LABOR, AND THE EVERYDAY 86 (Oxford Univ. Press 2014). ("cabbaging").

[173] *See* Brauneis, *supra* note 21, at 341.

[174] *Id*.

[175] *Id*. See also Douglas Baird, *The Story of INS v. AP*, in INTELLECTUAL PROPERTY STORIES, Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds. (Foundation Press, 2006) (referring to INS v. AP as a "concocted controversy").

[176] *See* Brauneis, *supra* note 21, at 355. *Compare* S. 673 "Journalism Competition and Preservation Act of 2022" at https://www.congress.gov/bill/117th-congress/senate-bill/673

[177] Instead of extending copyright to news, the Court decided *INS v. AP*, which as stated above, ended in a limited *sui-generis* "hot news" doctrine that has rarely been extended beyond facts.

[178] *See* Ochoa, *Public Domain*, *supra* note 84 (discussing history and related terminology of *publici juris*). I use *publici juris* because it is what *INS* uses when describing *Wheaton v. Peters*. Other terms include public property and common property.

[179] Brandeis's opinion is considered a dissent (although sometimes indicated in databases as a concurrence) because he would have denied all relief to AP, including unfair competition, placing all news in the public domain.

> [AP] contended that knowledge so acquired is property, because it costs money and labor to produce and because it has value for which those who have it not are ready to pay; that it remains property and is entitled to protection as long as it has commercial value as news, and that to protect it effectively, the defendant must be enjoined from making, or causing to be made, any gainful use of it while it retains such value. An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is that the noblest of human production—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.[180]

Brandeis's language reflects a changing respect for the news industry as a producer of knowledge serving the public interest. It also reflects property law's limits, including copyright, when "property" is "affected with a public interest." At the turn of the twentieth century, the Court was familiar with debates concerning public interest limits on property and contract because it frequently decided such cases regarding state regulation of ordinary economic affairs. The Court's infamous 1905 *Lochner v. New York* decision confounded states' power to regulate such matters by holding both property and contract inviolable as a matter of fundamental rights.[181] *Lochner* prevented state government from, for example, fixing prices of essential household staples and setting minimum wages and maximum hours.[182] Justices Brandeis and Holmes were at the forefront of this fight, dissenting in *Lochner* and eventually planting the doctrinal seeds for its demise.[183] The point here is twofold: In 1918, "news" was not the same as "facts" (despite *Feist* later equating them). And also, *INS* made a breakthrough determination that "news agencies" were sufficiently reliable and expert to produce "truths"

[180] *INS*, 248 U.S. at 250.

[181] Lochner v. US, 198 U.S. 45 (1905).

[182] *Id.* (discussing both kinds of regulations).

[183] Nebbia v. New York, 291 U.S. 502 (1934) (upholding price regulation for milk because it was an industry "affected with the public interest"); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding the hours and wages regulation as a reasonably in the public interest). Justice Brandeis was on the Court for both decisions (stepping down in 1939). Justice Holmes left the Court in 1932.

that people can rely on—and that served the public good—such that exclusivity over the news (via copyright or otherwise) was inappropriate.

Although *Feist* says none of this, it cites *INS*'s holding that "the news element—the information respecting current events contained in the literary production—is not the creation of the writer but a report of matters that ordinarily are *publici juris.*"[184] As such, *Feist* affirms the preeminent value of free, accessible, and accurate information as a function of effective and efficient knowledge production in furtherance of the public interest. After designating "history of the day" *publici juris*, *INS* says that "[i]t is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and the useful arts' . . . , intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."[185] *Feist* itself does not say "knowledge," but after quoting this sentence designating "history of the day" *publici juris*, it says:

> [C]opyright law has "recognize[d] a greater need to disseminate factual works than works of fiction or fantasy." . . . But "sweat of the brow" courts took a contrary view; they handed out propriety interest in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. In truth, "[i]t is just such wasted effort that the proscription against the copyright of ideas and facts . . . [is] designed to prevent. . . . Protection for the fruits of such research . . . may, in certain circumstances, be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials.[186]

By criticizing copyright protection of "fruits of . . . research" and for the "wasted effort" it creates, this passage shows that "facts" in *Feist* means more than "information" or "data." It means knowledge produced through institutions with disciplinary authority (such as journalism). So understood, *Feist* expands the public domain in the information age.[187]

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[184] *Feist*, 499 U.S. at 354.

[185] *INS*, 248 U.S. at 235.

[186] *Feist*, 499 U.S. at 354 (citations omitted).

[187] *Feist* was about telephone directories, after all, knowledge and information we care about today, such as algorithmic functions, biochemical processes, and all the scholarly research that sits behind expensive paywalls. See KALMAN, DATA CARTELS. See also Hachette Book Grp., Inc. v. Internet Archive, 542 F. Supp. 1156 (S.D.N.Y. 2023) (determining that the Internet Archive, engaging in controlled digital lending, committed

b. *Wheaton v. Peters* and Knowledge of Law

Feist cites *INS* as precedent for copyright's *publici juris*, justifying free-riding on labor and investment to collect and publish the news. But from where did INS derive it? To be sure, the notion of "public right" or common property—like claims on rainwater or, as Justice Brandeis says in *INS*, that which is "free as the air to common use"—was an enduring concept in English and U.S. law. It is an ancestor of today's "public domain," or the "commons."[188] In deciding *INS*, the Court was well aware of the battles at the time between privatization and maintaining public goods. Yet in *Wheaton v. Peters*, the argument for news as public property came from the INS's lawyer, who cited to *Wheaton* in his argument to justify limiting copyright as a matter of the public interest.[189] Although neither *INS* nor *Feist* cites *Wheaton*, the latter is discussed in the court briefs as the canonical case for limiting copyright when public interest demands it.[190]

INS argues first that "facts are public not private property," citing *Baker* as controlling precedent (though we know that is not what *Baker* said).[191] Then INS explains that because AP does not copyright its news—as in, AP does not seek copyright registrations for its news reports prior to publishing them—it can have at most a common law right extinguished upon publication.[192] "Yet, by the common law, the publication of such works amounts to a dedication to the public and confers a universal right of reproduction and use whether for purposes of gain or otherwise. *Wheaton v. Peters*."[193] INS's lawyer anchors his argument for *publici juris* in news in *Wheaton*'s 1834 holding that copyright extinguishes when the writings are "published," without converting the common law right into a federal

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copyright infringement unprotected by fair use by scanning and distributing copies of books online as part of the National Emergency Library (NEL) stemming from the COVID-19 pandemic).

[188] *See* Ochoa, *Public Domain*, *supra* note 84.

[189] *INS*, 248 U.S. at 229 (citing Wheaton v. Peters, 8 Pet. 591, 657 (1834)).

[190] *Id*.

[191] *Id*. Petitioner also cited in support lower court decisions, such as Davies v. Bowes, 209 F. 53, 56 (S.D.N.Y. 1913); Tribune Co. v. Illinois Publishing Co., 76 Publishers' Weekly, 643, 947; Thompson Co. v. American Law Book Co., 122 F. 922 (2d Cir. 1903); West Pub. Co. v. Thompson Co., 176 F. 839 (2d Cir. 1910); Clayton v. Stone, 2 Paine 382 (C.C.S.D.N.Y 1829). *Baker* discusses *Clayton*, see *Baker*, 101 U.S. at 105.

[192] *INS*, 248 U.S. at 229.

[193] *INS*, 248 U.S. at 229. The petitioner also cites *Holmes v. Hurst*, a 1899 Supreme Court case upholding the public domain status of parts of Justice Oliver Wendell Holmes's father's book, *The Autocrat at the Breakfast Table* (1858), because those parts were published in the Atlantic Monthly prior to registration and deposit with the appropriate government office (formalities required for copyright protection at the time).

copyright, through notice, deposit, and registration, as copyright formalities required. "As long ago as 1774, the House of Lords in *Donaldson v. Beckett* . . . laid down principles which indicate that there can be no ownership in news at common law *after publication*. To the same effect are [other federal cases and two copyright treatises Drone and Bowker]."[194] INS's lawyer analogizes this public dedication to the common law of trade secrets. "Upon publication, the news becomes the common possession of all to whom it is accessible; private property therein dies with its publication, as in the case of a trade secret."[195] Citation to *Wheaton* is not out of the blue. It is the Court's first copyright case and its holding, like *INS*, and like *Feist* eventually, extinguishes copyright in factual works produced with skill and effort.

The works in *Wheaton* were twelve volumes of Supreme Court law reports (arguments and opinions), edited by Court reporter Henry Wheaton from 1816 to 1827.[196] Richard Peters, the Defendant, was alleged to have published a volume called *Condensed Reports of Cases in the Supreme Court of the United States* containing all the Court's decisions from its beginning through to the commencement of Peter's reports (in 1827), and including, "without any material abbreviation or alteration, all the reports of cases in the first volume of Wheaton's reports."[197] Like *Baker v. Selden*, *INS v. AP*, and *Burrow-Giles v. Sarony*, *Wheaton* concerned competing copies in the marketplace and the scope of copyright's public domain in works of "science." *Wheaton* reads like a long, complicated opinion (with a dissent of approximately thirty pages), but the short story is that there was a factual dispute as to whether Wheaton and his publisher failed to adhere to statutory formalities to secure federal copyright in his reports.[198] As such, Wheaton

[194] *INS*, 248 U.S. at 229 (emphasis added). Neither Bowker nor Drone directly address the issue. In relevant part, Bowker writes: "There is, therefore, no copyright protection for news as such, but the general copyright of the newspaper or a special copyright may protect the form of a dispatch, letter, or article containing news." RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 89 (The Riverside Press Cambridge 1912), https://www.gutenberg.org/files/39502/39502-h/39502-h.htm#89/. Drone explains: "But it may be said that the contents of a daily newspaper are two ephemeral and often too insignificant to be worthy of statutory protection. This is doubtless true of much that appears in a newspaper; but … among the contents of such publications are frequently found productions of great value and permanent literary merit. There is, then, nothing in the law of copyright, as made by the legislature or as expounded by the courts, to prevent valid copyright from vesting in a magazine or a newspaper, as a whole, or in any of its contents that may be worthy of protection." EATON DRONE, DRONE ON COPYRIGHT 169, 70 (L. Bently & M. Kretschmer eds., 1879).

[195] *INS*, 248 U.S. at 215.

[196] Wheaton v. Peters, 33 US 591 (1834). *See also* Craig Joyce, *A Curious Chapter in the History of Judicature: Wheaton v. Peters and the Rest of the Story (Of Copyright in the New Republic)*, 42 HOUS. L. REV. 325 (2005).

[197] Wheaton v. Peters, 33 US 591 (1834).

[198] The substantial majority of the Court's opinion in *Wheaton* considered the

also claimed common law property rights in his manuscripts to prevent Peters from republishing them in the updated annotated volumes. Wheaton wanted a monopoly right to publish and sell grounded in his labor and skill, even if he failed to effectuate a federal copyright. Peters claimed the material was in the public domain because it had been published absent notice, deposit, and registration, and thus was free to republish and sell.

Nowhere in the *Wheaton* decision does the Court mention the public domain of facts or knowledge as part of the U.S. copyright regime. However, in deciding that Wheaton may have forfeited his copyright by failing to adhere to statutory formalities, the *Wheaton* Court explained pitfalls of property law and constraints of copyright in light of its purpose: "every man is entitled to the fruits of his own labor . . . ; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general."[199] While this enjoinder nods to the value of work and authorship as a kind of labor, it also recognizes that turning labor into property requires positive law. The law here is the U.S. Copyright Act, which the Court interprets as *preempting* common law copyright when the work at issue was published, as Wheaton's reports were.[200] Because Wheaton (or his publisher) apparently failed to vest and/or renew his copyright in the reports, they were not private property and were instead in the public domain. As *Feist* would say 150 years later, it "may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. . . . [But] this is not some unforeseen byproduct of a statutory scheme. It is, rather, the essence of copyright. . . ."[201]

Wheaton explains that both the scope of statutory protection and its preemptory effect construct and justify copyright's public domain despite the labor of authors, even those on whom the Court relies to disseminate its decisions. They sum to the Court's first holding—that no common law

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relationship and potential conflict between common law copyright (which could ostensibly last in perpetuity) and statutory copyright, which had specific requirements for protection and a limited term. For the full story, see Joyce, *supra* note XX.

[199] *Id*.

[200] Wheaton v. Peters, 33 U.S. at 663 (1834) ("Congress … by this act, instead of sanctioning an existing right as contended for, created it.") *Wheaton* relied on persuasive English law authority, *Miller v. Taylor*, 4 Burr. 2303 (1769) (holding that absent publication exclusivity over a manuscript could be perpetual) and *Donaldson v. Beckett*, 4 Burr. 2408 (1774) (holding that a published manuscript under the English copyright law, Statute of Anne (1710) was subject to statutory limits and thus could expire and become public property). "This right [to exclusive control over published works], … does not exist at common law—it originated, if at all, under the acts of congress. No one can deny that when a legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not … comply with the requisitions of the law."

[201] *Feist*, 499 U.S. at 349.

copyright can exist in published works; only federal copyright pertains, and federal law requires statutory formalities. The Court also announced a second holding before sending the factual issue of statutory compliance back to the trial court—that its own writing is unownable by reporters (and potentially, by anyone): "no reporter has or can have any copyright in the written opinions delivered by this Court, and . . . judges therefor cannot confer on any reporter any such right."[202]

The unanimous decision that judicial opinions cannot be copyrighted stems from Wheaton's argument that his reports of judicial opinions were distinct from "law" or "statutes," which he admitted cannot be copyrighted. In so admitting, Wheaton differentiated between his investment and expertise as a "reporter" and the "law" that he reported, a difference that faded over time, only to be contested again in the early twenty-first century.[203] Wheaton's attorney made his case as follows:

> It is attempted to put judicial decisions on the same ground as statutes. It is the duty of legislators to promulgate their laws. It would be absurd for a legislature to claim copyright. . . . Statutes never were copyrighted. Reports always have been. . . . It is the bounden duty of government to promulgate its statutes in print, and they always do it. It is not considered a duty of government to report the decisions of courts, and they therefore do not do it. The oral pronunciation of the judgments . . . of courts is considered sufficient. Congress never employed a reporter, and they never gave any one compensation, before Mr. Wheaton. Mr. Cranch reported without compensation, and relied upon his copyright; and Mr. Wheaton continued, with full understanding that he was to report in the same way. [Is] the court prepared to deprive all authors of [judicial] reports in this country of their copyrights? Of property which they have labored to acquire?[204]

The answer, according to *Wheaton*, is yes. But the distinction between "judicial decisions" and "reports" remains important. Annotations and abridgments of opinions are copyrightable as to that which the author or

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[202] Wheaton v. Peters, 33 U.S. at 668 (1834). It reaffirmed this holding in Banks v. Manchester, concerning reports of the Supreme Court of Ohio, holding that "what a court or a judge … cannot confer on a reporter as the basis of a copyright in him, they cannot confer on any other person or on the state." Banks v. Manchester, 128 U.S. 244 (1888).

[203] Georgia v. Public.Resource.Org, Inc, 140 S. Ct. 1498 (2020); Matthew Bender & Co v. West Publ'g, 158 F.3d 674 (2d Cir. 2001).

[204] *Wheaton*, 33 U.S. at 20-21.

reporter added himself; this is how, for example, Westlaw retains copyright over its headnotes and summaries.[205] The opinions themselves, as part of the "law," however, are in the public domain. This is one version of the "government edicts" doctrine, embodying the public policy that people must have access to the laws that govern them.[206] As an early incarnation of open access principles, it prevents copyright's monopolization of information—especially useful information. Indeed, Wheaton's lawyer made this precise point to barter a compromise in the case:

> If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by which we guide our actions. . . . [But] it is proper here to draw [a] distinction between *reports*, the immediate emanations from the sources of judicial authority, and . . . *treatises*, or even *compilations*. These may be of great utility, but they are not the law. Exclude or destroy them, and the law and the knowledge of it still exists. . . . The owner may close them at his pleasure, and no one can complain. But the entrance to the great temple itself, and the highway that leads to it, cannot be shut without tyranny and oppression.[207]

Here is yet another clear path to *Feist*: compilations can be copyrighted, but not the "law" or "knowledge" they contain.

Wheaton lost his case at the Supreme Court because of two principles: that there is a copyright public domain even against authors' "natural" right to the fruits of their labor; and that judicial opinions as such are not copyrightable. *Wheaton* is not so strange a precedent for *INS* to declare "news" in the public domain if we understand both cases (as the petitioner in *INS* did) to describe copyright law's construction and preservation of the public domain as essential to the production of knowledge and self-government. Moreover, *Wheaton*'s outcome depends on court reporters' evolving professional identity straddling two roles: mouthpieces of the Court transcribing the "law" (i.e., judicial opinions, which are in the public domain), and expert annotators whose authored additions can be owned and sold as their "work" if copyright formalities are met. *INS*'s outcome likewise depends on the evolving industry of journalism, recognized as producing both truths and knowledge about the world, which form part of the public domain, and articles and essays containing truths about the world, which can be

[205] *Matthew Bender*, 158 F.3d at 674.

[206] Georgia v. Public.Resource.Org, Inc, 140 S. Ct. 1498 (2020)(describing history of doctrine).

[207] *Wheaton*, 33 U.S. at 23-24 (emphasis added).

copyrighted as expressions of authorship if formalities and other statutory requirements are met. Both cases explain that failure to register work prior to publication forfeits copyright and puts the material in the public domain, whatever its nature. And both cases unapologetically prioritize *publici juris* over exclusive rights to preserve what *Feist* eventually calls the "essence of copyright."[208]

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From *Wheaton* to *Feist* is a long journey to establish the bedrock principle that "facts" are in the public domain. But as that journey demonstrates, identifying "facts" is not always self-evident, and their shifting context is subject to dispute. Moreover, the priority of the public domain to accomplish copyright's goal of producing knowledge in furtherance of the public interest is tacit when it should be manifest and unconditional.

One reason for the long road is that the twentieth century saw two overhauls of the 1976 Copyright Act without clarifying the fact-exclusion or prioritizing the public domain to achieve copyright's goals. Instead, the legal debates focused on remunerating authorial labor as technological advances made copying and distribution easier and computing power made catalogs, databases, archives, and libraries the cutting edge of copyright industries. Part II focuses on the story behind the Copyright Act and its newly minted §102, which strangely omits "facts" in its long recitation of subject matter exclusions. This history contains committee reports describing what should be in and out of copyright, but "facts" are only rarely mentioned. The history also includes an illuminating debate between a renowned copyright lawyer seeking stronger exclusive rights for his author-clients and a coalition of librarians advocating for better access to books. We turn now to that history.

II. LEGISLATIVE HISTORY OF THE 1976 COPYRIGHT ACT: AUTHORIAL LABOR AND THE VALUE OF THE PUBLIC DOMAIN

The 1976 Copyright Act was the last major overhaul of U.S. copyright law. It took more than two decades.[209] The legislative history for those revisions is voluminous.[210] Jessica Litman's definitive history of copyright

[208] *Feist*, 499 U.S. at 349.

[209] The first committee reports date from the late 1950s and the Act was finally passed in 1976. See *infra* citing studies from the 1950s. *See also* Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987) (describing "the introduction of at least 19 general revision bills over a period of more than 20 years").

[210] Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV at 865 ("The official legislative history is long, comprising more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six

legislative process explains it as a series of "meetings and negotiations among representative industries with interest in copyright" that helped address the "dilemma of updating . . . a body of law that seemed too complicated . . . for legislative revision." [211]

Throughout the twentieth century, new communicative forms created controversies over whether "the current copyright statute can adjust to the climate of rapid technological change."[212] The advent of moving pictures (film), the modernization of the news industry, the development and diversification of the music industry, and the popularization of radio, television, and copying/recording technology presented all sorts of challenges for copyright law.[213]

The 1976 Act's innovation was to simplify copyrightable subject matter according to general and elastic (as opposed to specific and rigid) categories.[214] It extended copyright to fixed "original works of authorship" within seven broad categories, which are illustrative and not exhaustive in §102(a).[215] At the same time—and for the first time—the 1976 Act also included subject matter exclusions in its new §102(b). Although §102(b) was new, the legislative report accompanying the 1976 Act says that "Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. [216] Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged."[217] The report instructs courts to refer to past case law to interpret §102(b).

At the time, *Feist* was one of just a handful of Supreme Court cases to interpret the 1976 Act and the first to interpret §102(b). It repeats

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series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years.").

[211] JESSICA LITMAN, DIGITAL COPYRIGHT 48 (Prometheus Books 2006) [hereinafter LITMAN, DIGITAL COPYRIGHT], republished in 2017 under a CC-BY-ND Creative Commons license by Maize Books (https://quod.lib.umich.edu/m/maize/mpub9798641).

[212] *Id.* at 35.

[213] *Id*.

[214] Silbey & *Fromer, Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J. L. & ARTS at 371.

[215] *Id.* at 372 ("As the legislative history explains, Congress set out to list as these illustrative categories '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.'").

[216] Section 102(b) reads: "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." Copyright Act of 1976, 17 U.S.C. § 102(b).

[217] H.R. REP. NO. 94-1476, at 57 [hereinafter *House Report*].

Congress's intent to "clarify, not change existing law."[218] Yet *Feist* also says, misleadingly, that the Act's "revisions explain with *painstaking clarity* that copyright requires originality (§102(a)); that facts are never original, (§102(b)); [and] that the copyright in a compilation does not extend to the facts it contains (§103(b))."[219] *Feist* is correct on the first point, but the last two points are versions of the question *Feist* granted certiorari to decide. Section 102(b) does not mention facts, and the legislative history only barely does, as discussed further below. Likewise, §103(b) mentions "preexisting material," not facts.[220] Very little is "painstakingly clear" in the legislative history or the statute itself about the omission of "facts" from §102(b).

Indeed, there is very little in thousands of pages of legislative history to explain why Congress excluded "facts" from the language of §102(b). General comments that the section leaves "unchanged" the "basic dichotomy between expression and idea" and denies "any intention to protect a programmer's algorithms" do not help in identifying and applying the fact-exclusion, as opposed to the idea-exclusion or the method-exclusion.[221] There are, however, three places in the legislative history spread over nearly twenty years that offer some answers to the puzzle and draw from case law precedent described in Part I.

A. 1956: Study 3 and "The Meaning of Writings in the Copyright Clause of the Constitution"

This report, submitted in 1960 to the House of Representatives Committee of the Judiciary's Subcommittee on Patents, Trademarks, and Copyrights, was the third of four studies submitted that year. It is an exhaustive case analysis of evolving copyright subject matter. Of particular interest for the eventual drafting of section 102 is the discussion of "subjects denied copyright protection,"[222] including phonorecords, ideas, names and titles, reports of current events, and dress designs and fabrics.[223] Some of

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[218] Feist, 499 U.S. at 360. The three other cases were Sony v. Universal City Studios, 464 U.S. 417 (1984)(interpreting 107), Harper & Row v Nation Enterprises, 471 U.S. 539 (1985)(interpreting section 107), and Mills Music v Snyder, 469 U.S. 153 (1985)(interpreting section 304(c)).

[219] *Feist*, 499 U.S. at 360 (emphasis added).

[220] Copyright Act of 1976, 17 U.S.C. §§ 102, 103.

[221] *See House Report*, *supra* note 217, at 57; Legislative History of the General Revision of the Copyright Law, Title 17 of the United States Code, and for Other Purposes, Pub. L. No. 94-553, 90 Stat. 2541 (1976) [hereinafter *Legislative History of the General Revision*]; *Copyright Law Revision, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee on H.R. 2223*, 94th Cong., (1975) [Hereinafter *Copyright Law Revision Hearings*].

[222] *See House Report*, *supra* note 217, at 101.

[223] STAFF MEMBERS OF THE N.Y.U. L. REV, THE MEANING OF "WRITINGS" IN THE

these categories were drawn from current debates and court disputes with specific industries (e.g., music and fashion). The point was to focus legislators on disputes that were gaining traction to statutorily settle some of the questions, if possible.

A few things to note about this list. First, phonorecords eventually received protection under the Sound Recording Amendment of 1971.[224] Second, the 1976 Act granted protection for designs and printing on fabric.[225] Third, the Copyright Office would later deny protection for names and titles, along with short phrases, as lacking sufficient originality, but the statute itself did not so state.[226] And fourth, the 1956 report distinguishes "ideas" from "reports of current events," by which it meant news and other factual reports.

As to the *idea*-exclusion, the report summarizes cases stemming from *Baker v. Selden* that excluded analogous graphic systems for their use as opposed to the expression they convey. The report explains that copyright excludes a range of "ideas" embodied in graphical systems (and thus the systems themselves), such as systems of shorthand, speedwriting, and indexing, as well as charts used in connection with machines measuring temperature and rules of gameplay (for cards).[227] The report further states that the application of *Baker* depends on "whether [the writing] was an object of explanation or use," and that "if it did not teach or convey information, it was not copyrightable." For example, a "chart was not a 'writing of an author' within the meaning of the Constitution since it did not convey the thought of the author, was not intended to communicate facts or ideas, and was solely for use in making records of facts."[228] This summary is confusing: the assumption that works *would be* protected if they communicated "facts or ideas" (or "information") seems to contradict the assertion that "ideas" are unprotectible. Both statements are true, but neither helps to identify any differences between a "fact," "idea," or "information" in light of copyright's

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COPYRIGHT CLAUSE OF THE CONSTITUTION 101 – 07 (1956) [hereinafter *Study 3*].

[224] Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971).

[225] H.R. Rep. No. 94-1476 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, at 55. ("a two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as *textile fabrics*, wallpaper, containers, and the like…") (emphasis added).

[226] COPYRIGHT OFFICE, CIRCULAR 33: WORKS NOT PROTECTED BY COPYRIGHT, https://www.copyright.gov/circs/circ33.pdf. Cf. Justin Hughes, *Size Matters (or Should) in Copyright Law*, 75 FORDHAM L. REV. 575 (2005) (explaining some sort phrases are original, but policy reasons exist to exclude them from protection).

[227] See *Study 3*, *supra* note 223, at 103 – 04. We might today call this the merger doctrine, but as Pamela Samuelson explains, *Baker v. Selden* did not originate the merger doctrine. Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y OF THE USA 417 (2016) (dispelling myth that *Baker* originated the merger doctrine).

[228] See *Study 3*, *supra* note 223, at 104.

subject matter. The report does suggest, however, that a chart made solely for recording facts is unprotectible, implying that when facts and expression merge, the work is not copyrightable.

In excluding "reports of current events" from copyright protection, the 1956 report relies on *INS v. AP* to exclude news reports "not because they are not 'writings,' which they clearly are in the familiar sense of the word, but because they lack distinctive creativity, labor of the brain, and particularly originality."[229] The report interprets *INS* and previous cases as denying protection to "mere annals" because they lack authorship according to *Burrow-Giles*; it does not justify excluding news reports based on the public interest in the public domain—a theme that *INS* emphasizes, especially in Brandeis's famous dissent.

These last two examples concerning news and "facts and ideas" foreshadow *Feist*'s reasoning, particularly its facile definition of facts as "unoriginal" because "they do not owe their origin to an act of authorship," which distinguishes "between creation and discovery."[230] Yet nothing here explains *Feist*'s rejection of sweat-of-the-brow, denying authors of factual works copyright protection in order to promote the progress of science and art.

B. 1961: Kaminstein *Register's Report*

The 1961 *Copyright Register's Report*, written by newly appointed Register of Copyrights Abraham Kaminstein, holds more clues to *Feist*'s reasoning and result.[231] Jessica Litman describes Kaminstein as a compromiser (compared to his predecessor, who considered interindustry compromise a weakness of prior revision efforts).[232] Kaminstein's new approach would take fifteen years to reflect consensus among participants.[233]

In the 150 pages of Kaminstein's initial report, only two mention the eventual §102(b)'s idea-exclusion. The report states that "[c]opyright does not preclude others from using ideas or information revealed in an author's work."[234] It also explains that "anyone is free to create his own expressions of the same concepts, or to make practical use of them," and that the work is always subject to "fair use," whose four factors would be codified in the 1976

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[229] *Id*. at 105.

[230] *Feist*, 499 U.S. 347.

[231] *See* LITMAN, DIGITAL COPYRIGHT, *supra* note 211, at 50. Kaminstein was appointed in 1960 after the death of Register Arthur Fisher. *Id*

[232] *Id*.

[233] *Id*. at 51.

[234] REGISTER OF COPYRIGHTS, GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3 (1961). *See also id.* at 24 (same, but changing "revealed" to "disclosed").

Act for the first time.[235] Neither of these statements are revolutionary, and they are not about "facts" (as opposed to "ideas"). But they do endorse as lawful the unauthorized copying of another author's work for certain purposes related to efficiency and other practical uses. In other words, these are not statements about the defense of independent creation; they support a controversial (at the time) view of copyright law that allows copying from previously authored works to promote iterative productivity—a view that some case law approving sweat-of-the-brow would prohibit.[236]

C. 1975–76: Hearings Before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and Administration of Justice

In the mid-1970s, the Subcommittee on Courts, Civil Liberties, and Administration of Justice met several times to take testimony and issue reports. Two of these reports specifically discuss the copyrightability of facts.

One mention was in a list of subject matter to be omitted from the new §102(b) and expressly considered by a future Congress. A October 19, 1976 report discussed this list in the context of a deleted footnote from prior 1967 and 1974 Senate reports:

> Although the coverage of the present statute is very broad, and would be broadened further [under the revision bill] . . . , there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to. . . . Without implying that they would be wholly without protection under one or another of the seven categories listed in sec. 102, or that they are necessarily the "writings" of "authors" in the constitutional sense, we cite the

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[235] *Id.*

[236] Famously, *Bleistein v. Donaldson* said that "Others are free to copy the original. They are not free to copy the copy" and cited *Blunt v. Patten,* 2 Paise 397, 400 (1828) (upholding copyright in map that corrected errors in an old map, but otherwise was substantially the same and was based on author's independent discoveries). *Bleistein*, 188 U.S. at 249. *Feist*, in ruling against Rural, criticized (or silently overruled) the line of cases that required independently sourcing facts to avoid copying from authored works. See *Feist*, 499 U.S. at 352-53 (criticizing *Jeweler's Circular Publishing Co. v. Keystone Publishing Co*., 281 F. 83 (2nd Cir. 1922) in which a "subsequent compiler was 'not entitled to take one word of information previously published' but rather than to 'independently work out the matter for himself, so as to arrive at the same result from the same common source of information"). Justice Stevens' paper containing the *Feist* file indicate he was focused on whether *Jewelers Circular Publishing Co.* should remain good law. A copy of the case exists in his file and his oral argument notes mention how both *Jeweler's* and *Leon v. Pacific Telephone & Telegraph* Co., 91 F.2d 484 (9th Cir. 1937) are (in his words) "old cases" upholding "sweat of the brow." *See supra* note 67.

> following as examples. *These are areas of subject matter now on the fringes of literary property but not intended, solely as such, to come within the scope of the bill*: typography; unfixed performances or broadcast emissions; blank forms and calculating devices; titles, slogans, and similar short expressions; certain three-dimensional industrial designs; interior decoration; ideas, plans, methods, systems, mathematical principles; formats and synopses of television series and the like; color schemes; [and] *news and factual information considered apart from its compilation or expression*. Many of these kinds of works can be clothed in or combined with copyrightable subject matter and thus achieve a degree of protection under the bill, but any protection for them as separate copyrightable works is not here intended and will require action by a future Congress.[237]

Strikingly, the soon-to-be-enacted §102(b) contains many of the exact words listed above—"ideas," "principles," "methods," and "systems." Here, finally, is a near-complete draft of what would become the first subject matter exclusion section in the Copyright Act. However, most listed items were eventually expressly mentioned in legislation or regulation, *except for news and factual information*. *Feist* does not cite this history to fill in the absence of "facts" in §102(b) or to justify its holding, perhaps understandably since this passage is from a deleted footnote in an obscure and superseded Senate report. But its relevance to the question in *Feist* seems clear. The copyrightability of news and factual information was left for other Congresses to decide—which they did not, leaving the question for federal courts or the states under common law.

The subcommittee mentioned the deleted footnote in its report, one of the final reports issued before the vote on the new Copyright Act, to clarify the application of statutory preemption regarding the subject matter exclusions in the soon-to-be-enacted §102(b):

> Since section 301 pre-empts only what is covered by section 102, and since the Supreme Court's *Goldstein* decision held that pre-emption is statutory and not constitutional, the States would presumably be free to give unlimited protection to any subject matter outside the scope of section 102. This may be a desirable result, but Congress should consider the

[237] Legislative History of the General Revision of the Copyright Law, Title 17 of the US C, and for Other Purposes, P.L. 94-553: 90 Stat. 2541: October 19, 1976, p. 3-4 (emphasis added).

consequences before adopting it.[238]

According to this report, §102(b)'s eventual omission of "news and factual information" is relevant to federal preemption. The above guidance worries that statutory preemption requires clarity. A future Congress (or Court) can decide that "news and factual information" is within the penumbra of §102(b) and not copyrightable.[239] Otherwise, states are free to protect such material.

The bulk of the subcommittee report urges the new legislation to offer more clarity about the copyrightability of computer programs, architectural works, and typeface designs, given their national commercial significance;[240] it does not revisit "news or factual information," and thus, the preemption issue with regard to this subject matter is left tacit. Protecting "news and factual information" under state law as private property raises substantial and fundamental First Amendment concerns regarding freedom of press and speech, unlike computer programs, typeface, and architectural works.[241] The report did not discuss this constitutional implication, suggesting that "news and factual information considered apart from its compilation or expression" is not seriously at risk for state protection under common law copyright. But then why include it on the list in the deleted footnote?

Apparently, reassurance was necessary. The non-copyrightability of facts was mentioned earlier, on May 14, 1975, during a long day of heated testimony from the American library community represented by Edmon Low,[242] and from Irwin Karp, counsel for the Author's League of America. The testimony concerned library photocopying on behalf of patrons. Low described the question as "whether libraries will be permitted—at no additional expense—to continue to serve the public by the long-standing practice of providing single copies of copyrighted-material for users' research or study."[243] The reason for the question was recent prolonged

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[238] *See id.* at 15.

[239] Goldstein v. California, 412 U.S. 546 (1973) (holding that US copyright law preemption is statutory not constitutional).

[240] *See Legislative History of the General Revision, supra* note 221, at 6.

[241] Of course, computer programs (Bernstein v. U.S. Dep't of Justice, 192 F.3d 1308 (9th Cir. 1999) (encryption software as speech)), typeface art (Compendium (Third) § 906.4, citing 37 C.F.R. § 202.1(a), (e) (excluding typefaces as such but not when it forms part of "original pictorial art … such as a representation of an oak tree, a rose, or a giraffe that is depicted in the shape of a particular letter"), and architectural drawings can also be "speech." Jessica Rizzo, *Federal Architecture and First Amendment Limits*, 16 WASH. J. L. TECH. & ARTS 47 (2021).

[242] Edmon Low was the representative of the six major library associations. Included in that group was the Music Library, Special Library Association, Harvard University Library, American Library Association and Association of Research Libraries. *See Copyright Law Revision Hearings, supra* note 221, at 184.

[243] *Id.* at 185.

litigation in which a library was sued for copying medical journal articles. The case lasted seven years and ended with a 4–4 Court decision affirming the library's use as fair.[244] Proposed revisions to the Copyright Act would add language prohibiting libraries from engaging in "systematic reproduction" of either single or multiple copies of copyrighted material, which the library community thought was problematically ambiguous, risking more lawsuits and substantial harm to library patrons and the public.

The librarians argued that without an exemption for library photocopying, information would be restrained, frustrating the purpose of copyright to promote the progress of science. They also argued that because copyright is a public good, and unlike real or personal property, limitations and exemptions such as for libraries are commonplace. Low's testimony was urgent:

> When we are talking about library copying practices, we are talking about the schoolboy in California who may need a copy of an article in the Los Angeles Times for a project . . . ; or about a judge in the county court . . . who may find he needs a copy of a law review article which bears directly upon a difficult question of law which has arisen in the course of his work. Or about the doctor in downstate Illinois who has a patient with an unusual and rare disease and the only recent material to be found is contained in an obscure journal published in Sweden, and available only through the Regional Medical Library system, but which article may aid him in saving his patient's life. . . .
>
> The list is endless, but . . . we are talking about an issue that very broadly affects the ability of people in this country to make use of their libraries which are the repository and storehouse of man's knowledge.
>
> . . . [C]opyright is not a constitutional right, such as trial by jury of one's peers. The Constitution simply authorizes Congress to create the right. It is therefore a statutory right—one created by law—and may be changed, enlarged, narrowed, or abolished altogether by the Congress here assembled. It is a law enacted not for the benefit of an individual or a corporation but for the public good and with the purpose, as the Constitution expresses it, "to promote the

[244] Williams & Wilkins Co. v. U.S., 420 U.S. 376 (1975) (the case was 4–4 because Justice Blackmun recused himself).

progress of science and useful arts."[245]

How does one respond to a librarian's plea to consider the public good above individual pecuniary interests? With an equally righteous assertion of individual rights. Karp did not dispute the librarian's public interest framing; he inverted it in the service of a right to the fruits of one's labor, echoing copyright's sweat-of-the-brow principle that *Feist* eventually eviscerates:

> The instrument chosen by the Constitution to serve the public interest—i.e., the securing of literary and scientific works of lasting value—is an independent, entrepreneurial property-rights system of writing and publishing. The Copyright Act establishes the rights which prevent others from depriving authors and publishers of the fruits of their labor. But it does not guarantee a fair reward, or any reward. For authors and publishers . . . must depend on income derived from uses of their books and journals to compensate for the talent, labor and money expended in creating them. . . . Congress should not disrupt the delicate balance of this essential system. Carving exemptions out of the "enforceable rights" of authors and publishers does not serve the public interest. . . . It has become ritual for library organization and Ad Hoc Committee spokesmen to accompany their demands for new exemptions with a series of attacks on copyright, calculated to suggest that the author has no legitimate claim to reasonable protection for the work he creates.[246]

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[245] *See Copyright Law Revision Hearings*, *supra* note 221, at 185. Other testimony followed by a variety of libraries and librarians. See, e.g., Wisconsin Interlibrary Loan Service: "I am deeply concerned that the interests of the consumers of library and information resources be represented. Too often the user is overshadowed and not heard and remains the silent majority, even though s/he is the ultimate recipient for good or ill in many legislative actions. … Of particular concern is the fact that … the Bill could be interpreted to effectively discontinue the traditional right of libraries of making a single copy of a copyrighted journal for a single user, even when the number of users and the volume of single copies is substantial. … Wisconsin is not alone in this concern. … the National Commission on Libraries and Information Science … restates its philosophy of greater, not less, access to library and information resources by all the citizens of the United States." *See House Report*, supra note 217, at 216. Alaska Methodist University, College of Nursing, "Photocopying of books and articles is extremely helpful to both students and faculty. It provides an inexpensive and rapid way to acquire, read, and synthesize new materials, thus greatly enhancing the quality of education in schools and universities." *Id.* at 222.

[246] *Id.*

Karp quoted "enforceable rights" presumably because he thought copyright insufficiently strong for authors—that it should better protect what he considered a basic human right: to own the fruits of one's labor. He nevertheless admitted to copyright's limits, responding to the librarian's concern about restraint of information and knowledge:

> Library and Ad Hoc Committee spokesmen charge that a copyright places a restraint on information. This is not so. . . . Anyone is free to use the ideas, facts or information presented in a copyrighted book or article. The copyright only protects the author's expressions, not the ideas, facts or information. Other writers can draw on them. Other writers are free to independently create similar (indeed closely similar) works; the copyright only prevents substantial copying of the author's expression.[247]

For this most relevant proposition, Karp quoted the nineteenth-century economist Henry George, who is famous for his theory of redistributive taxation on the rising value of land to alleviate poverty. Karp quoted George presumably because the best-selling social theorist and economist of the 1880s was an early leader in the Progressive Era, when wealth redistribution was embraced to support public goods.[248] Quoting a Progressive theorist would appeal to those who thought copyright should yield to the public interest. And because George supported authorial copyright, Karp must have thought that public interest advocates should too. Karp quoted George as saying:

> "Copyright . . . does not prevent any one from using for himself the facts, the knowledge, the laws or combinations for similar production, but only from using the identical form of the particular book or production—the actual labor which has been expended in producing it. [Copyright] rests upon the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of anyone else to do likewise." The [c]opyright is therefore in accordance with the moral law.[249]

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[247] *Id.* at 221-2.

[248] "Henry George," NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Henry_George/.

[249] *Copyright Law Revision Hearings*, *supra* note 221, at 222 (quoting HENRY GEORGE, POVERTY AND PROGRESS 411 (Robert Schalkenbach Foundation 1929) (1879) [hereinafter *Poverty and Progress*]).

Karp repeated in his testimony the part he deemed most helpful: that authors have a "natural, moral right . . . to enjoy the products" of their labor.[250] In emphasizing this principle, Karp apparently hoped it would persuade legislators to exclude library copying from new proposed authorized uses. As already noted, the "right to own the fruits of one's labor" (or sweat-of-the-brow justifications for ownership, even of intangible statutory property) runs deep.[251] It was a well-calculated plea.

Yet reliance on George helps only superficially. To be sure, George did pen the passage, but it is the only part of his famous treatise that mentions copyright. The force of George's overall theory is redistributivist.[252] It is predominantly a theory of taxation that justifies limiting absolute claims to returns on investment from private property, and it only concedes the retention of some private wealth from private property in order to build or maintain community solidarity (i.e., public welfare).[253] Karp's use of George was hardly a slam dunk for stronger authorial copyright at the expense of public libraries.

George's *Poverty and Progress* explores structuring taxes "productively" so as not to depress incentives or rewards from labor and land.[254] His most famous innovation is a tax of wealthy landowners on what he called the "unearned increment" of rising land prices, a value the government may tax and redistribute to ameliorate poverty. It resembles an early form of capital gains tax on land only. This theory identifies a windfall to property owners based on societal change (e.g., land values rising) and circumstances wherein, absent government intervention, only already prosperous landowners reap the rewards. His theory "prescribed a land-value tax as way of returning that collectively produced wealth back toward the commonweal."[255] Unlike other taxes, George said, this tax on the "unearned increment" does not disincentivize investments. He compared its mechanism to copyrights (of all things!) as examples of a beneficial tax or temporary monopoly that does not interfere with productivity because, as he says in the above passage, copyright is not a monopoly on the things that actually

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[250] *Id.*

[251] *See supra* note 21 (sweat-of-the-brow debates).

[252] Oscar B. Johanneson, *Henry George and His Philosophy: He Sought Equality of Opportunity to Use the Earth's Resources as Well as the End of Land Monopoly*, 45 AM. J. OF ECON. & SOCIO. 379 (1987).

[253] *Id.*

[254] *Poverty and Progress*, *supra* note 249, at 358 (Book IX, Chapter 2).

[255] Annika Neklason, *The 140-Year-Old Dream of 'Government Without* Taxation', THE ATLANTIC (April 15, 2019), https://www.theatlantic.com/national/archive/2019/04/henry-georges-single-tax-could-combat-inequality/587197/.

matter—"the fact, knowledge, the laws or combination for similar production"[256] that are public domain material.

And this is where we come full circle. As an appeal to copyright's balance between private rights and public access on behalf of his author-publisher clients, Karp cited the progressive theorist Henry George for the proposition that copyright rests on "the natural, moral right of each one to enjoy the products of his own exertion."[257] He assures legislators this does not mean copyright will limit access to "ideas, facts or information presented in the copyrighted book" because "copyright only protects the author's expressions, not the ideas, facts or information."[258] This is the question squarely presented in *Feist*. Karp's appeal is one of the only places in thousands of pages of legislative history that discusses the fact-exclusion in the context of sweat-of-the-brow, and it arises in the context of Karp arguing that sweat-of-the-brow should prevail. This is exactly what *Feist* says the Constitution does not allow because it "flout[s] basic copyright principles," which *Feist* claims §102(b) makes clear.[259] But, to state the obvious, *Feist* does not refer to Progressive Era policies like George's tax proposal, and §102(b) required the Court's interpretation to justify its broader application in the public interest.

Karp invoked George to assert authors' "natural rights" to charge license fees for all copies, even those librarians make for the purpose of research, restoration, and repair. George's theory is most innovative and interesting for its radical redistributivist impulse—taking from private investment and giving to the public domain. Most emphatically, it does not simply reserve for the public that which was already public property. And yet that is what Karp said in asserting that ideas, facts, and information belong to no one. *Feist* begins there but goes further to hold that the labor and investment in producing factual matter does not alone justify exclusive rights in its collection.[260] This was a precedent-setting legal change, which the legislative history and case law demonstrate remained undecided in 1976. Fast-forward fifteen years, though, and *Feist* claims to be merely restating a

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[256] *See Poverty and Progress*, *supra* note 249, at 411. "The copyright is not a right to the exclusive use of a fact, an idea, or a combination, which by the natural law of property all are free to use; but only to the labor expended in the thing itself. It does not prevent anyone from using for himself the facts, the knowledge, the laws or combinations for a similar production, but only from using the identical form of the particular book or other production—the actual labor which has in short been expended in producing it. It rests therefore upon the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of anyone else to do likewise."

[257] *See Copyright Law Revision Hearings*, *supra* note 221, at 122.

[258] *Id*.

[259] *Feist*, 499 U.S. at 353.

[260] *Id*. at 353 – 54.

"constitutional requirement" and correcting previously misunderstood cases.[261]

As mentioned earlier, none of this means *Feist* is wrong. It just does not say enough—perhaps typical for Supreme Court decisions, which are jointly authored, resemble brokered deals, and frequently use general terms to fashion compromise, leaving debates about edge cases for later. But the edge cases are now. Copyright disputes over the nature and scope of "facts" in the public domain and privately owned "original expression" of those facts arise with alarming regularity.[262] Were copyright owners to prevail in these cases, knowledge and useful information would be sequestered. In addition to the disputes already cited above, recent cases concern copyrighting annotated state statutes,[263] aircraft maintenance and repair manuals,[264] emergency room forms,[265] credit scores,[266] weekly average interest rates offered by banks,[267] residential property listings,[268] pesticide instructions,[269] evaluation criteria for building products, components and methods,[270] and legal forms.[271] Many copyright owners say that these works are not factual but original expressions of expertise and judgment, which copyright law privatizes for sale or sequestering. Whether these works are factual or contain "facts" depends on what we mean by that term.

The sparse but illuminating legislative history alleviates some ambiguity by explaining how keeping "facts" in the public domain is important for the dissemination of knowledge, such as with news. This history provides a loose constitutional anchor in the First Amendment for the explanation of public domain "facts," but little else. It does not help define the scope of "facts," except to leave the debate concerning sweat-of-the-brow and rights in fruits of authorial labor to future adjudication. Part I provided

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[261] *Feist*, 499 U.S. at 346, 352, 354. *See supra* note 80 (describing basis for "constitutional requirement").

[262] See *supra* at notes 4-10 (describing scenarios and past cases) and Conclusion (describing pending cases).

[263] Georgia v. Public.Resource.Org, Inc, 140 S. Ct. 1498 (2020). *See also* Am. Soc'y for Testing & Materials v. Public Resource.Org, 597 F. Supp. 3d 313 (D.D.C. 2022) (DC litigation on standard/codes). *See also* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791 (5th Cir. 2002).

[264] Honeywell Intern., Inc., v. Western Support Group, Inc. 947 F. Supp. 2d 1077 (D. Ariz. 2013).

[265] Utopia Provider Sys. v. Pro-Med Clinical Sys., 596 F.3d 1313 (11th Cir. 2010).

[266] Experian Info. Sols. v. Nationwide Mktg Servs., 893 F.3d 1176 (9th Cir. 2018).

[267] BankCorp v. Costco Wholesale Copr. 978 F. Supp 2d. 280 (S.D.N.Y. 2013).

[268] Salstraq America v. Zyskowski, 635 F. Supp 2d 1178 (D.Nev. 2009)

[269] FMC Corp v. Control Solutions Inc., 369 F. Supp. 2d 539 (E.D. Pa. 2005).

[270] ICC Evaluation Serv. L.L.C. v. Nat. Ass'n of Plumbing and Mechanical Officials, No. 16-CV-54-EGS-ZMF, 2022 WL 3025241(D.D.C. April 27, 2022).

[271] Ross Brovins & Ohmke PX v. Lexis Nexis Grp., 463 F.3d 478 (6th Cir. 2006).

some examples of debated public domain materials (*publici juris*) akin to "facts" grounded in new industries developing epistemological authority, like photography, financial services, news, and law. Part III examines the history of knowledge production in the nineteenth and early twentieth centuries, when the canonical cases that *Feist* relies on were being decided. It explains that twenty-first-century "facts" are the result of disciplinary expertise and social scientific pursuits—which places much more in the public domain, at the expense of hard work and investment. But, more importantly, it serves the interest of promoting progress of science and the useful arts as the Constitution demands.

III. THE EMERGENCE OF "FACTS" AS A TWENTIETH-CENTURY CATEGORY OF TRUTH AND KNOWLEDGE

It turns out that "facts" as a category of "truth" developed slowly over time, reaching ascendancy in the mid-twentieth century along with the institutions (and their processes) that produce them. Of course, historic events, geographical details, and scientific truths were age-old subjects of knowledge and debate.[272] The emergence and diversity of "facts" is as much about the measure of knowledge as about how it is produced. The very idea of the "fact-exclusion" could not arise in copyright without understanding how modern facts in all their variety came to be understood. This third path to *Feist* describes the development of institutions and industries producing facts at the turn of the twentieth century, which are mentioned in both the cases and the legislative history—institutions such as law and courts; journalism and photography; information technologies (including libraries); and the social sciences. Modern facts arise from a nineteenth-century epistemological revolution and gain authority and prominence within the context of knowledge-producing institutions in the early twentieth century.

This Part argues that early twentieth-century pragmatist philosophy's challenge to universal truths combined with the parallel legal realist challenges to formalist jurisprudence to eventually shape what is (or should be) copyright law's broad public domain in "facts." As the authority and influence of new knowledge-producing institutions develop (along with the

[272] *See* HAYDEN WHITE, CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION (1987). *See also* M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD 1066-1307 (2nd ed. 1993). As both White and Clanchy describe in their pathbreaking histories of medieval literacy, knowledge of historical events, metes and bounds of land claims, and seasonal harvest yields became important to record especially with the spread of legal claim-making and dispute resolution. These were records of "events" and "measures" (perhaps the precursors to "facts" and "data" today) and their contestability became more viable as, ironically, their recordings by multiple "authors" proliferated.

increasingly dominant role of social sciences in shaping public policy and law), the facts they produced became less contestable and more self-evidently "facts."[273] But as their authority and influence grew—and were later challenged in the process of knowledge contestation—copyright law came to focus instead on the characterization of the new form of "expression" as "authored" (i.e., a privatization of copyright) instead of on the value of common property (i.e., the public interest in "science" inherent in the copyright system).[274] This third path to *Feist* is a story about the organization of knowledge production and shifting epistemological paradigms, which, taken together, are the prehistory of the twentieth-century fact-exclusion and more fully explain the context of the cases *Feist* relies on. The result justifies a very broad fact-exclusion—one as broad (if not broader) than the idea-exclusion expressly contained in §102(b).[275]

As described below, the story starts in the mid-1800s with contests over universal truths that culminated in early 1900s paradigm shifts with the new sciences, university structures, and understandings of law's function to promote the public good. Before debating whether a "fact" is in or out of copyright, the institutions or professional communities that produce "facts" require authority: an ability to command deference on the basis of established disciplinary practice and expertise.[276] Copyright is a strange intervenor in this

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[273] *See, e.g.*, Dan Burk, *Method and Madness in Copyright Law*, 3 UTAH L. REV. 587, 595-96, 602 (2007) (describing this process based in attuned judgment and constrained choices determined by disciplines, with examples *inter alia* of rounding decimals or using telescopes to look at stars).

[274] *Id*. at 594-596 (criticizing evaluation cases for their apparent distinction between "subjective" ideas (opinions), which are copyrightable, and "objective" or "hard" ideas, which are "facts" and uncopyrightable). Burk writes that "it seems obvious that the valuations [of coins and cars published in competing books] are themselves valued for their accuracy, for their predictability, for their determinacy." *Id*. at 594. That there are competing books of valuations doesn't make the valuations any less authoritative in view of those relying on the books. And yet competition made their copyright status contestable in court. *Contra* Baker v. Selden, 101 U.S. 99 (1879) (holding that similar but not identical forms in competing accounting books uncopyrightable).

[275] Thanks to Tyler Ochoa and Justin Hughes whose comments at IPSC 2022 (Stanford) and later in email correspondence helped me think through the relative breadth of "ideas" versus "facts."

[276] Margaret Chon writes about this difference between copyright "content" (which may be protected) and "knowledge" which perhaps cannot if it is "sticky knowledge" – accurate, authentic, reliable knowledge. She highlights the difference in French between "connaissance" and "savoir," the latter of which is "reliable" in the certified, institutional way. Quoting Paul David and Dominique Foray, "Reliable knowledge ('savoir') means certified, robust knowledge that has been legitimized by some institutional mechanism (be it scientific peer review or collective memory and belief systems). Other forms of knowledge ('connaissance') also enable action (knowing how to do the gardening, DIY) but have not been put through the same tests as certified knowledge. What separates the two has less to do with the contrast between the scientific and the non-scientific than

history, but as Margaret Chon writes, "copyright is one of many modalities of knowledge governance and is itself composed of numerous policy levers."[277] The key copyright cases described in Part I that *Feist* relies on date from this earlier time period and have profoundly shaped copyright law. Writing at the same time, sociologist Émile Durkheim wrote his canonical essay "What Is a Social Fact?," which was paradigm-shifting for the burgeoning social sciences.[278] In that essay, Durkheim asserted the existence of "facts" produced by culture that are as durable as natural or scientific facts.[279] The existence and status of facts qua facts—from natural facts to institutional and social facts—developed at this time and continued to evolve as the copyright debate emerged. This history is central to a full understanding of modern facts in copyright law as a species of disciplinary knowledge produced through societal institutions and therefore in the public domain.

This third path also helps clarify the debate in the legislative history concerning the protection of the author's labor as a matter of natural or moral right. *Feist* expunges from copyright law the sweat-of-the-brow doctrine that, until *Feist*, had been debated as both viable policy and law among prominent legal scholars and courts.[280] Collection, production, and dissemination of "facts" can be hard work. Copyright's first subject matter categories of "maps, charts, and books" were informational, fact-intensive works whose laborious production was meant to be incentivized by the grant of a fourteen-year copyright.[281] Throughout the nineteenth century, and until reproduction

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whether or not the knowledge has been subjected to institutional testing." Margaret Chon, *Sticky Knowledge and Copyright*, 2011 WIS. L. REV. 177, 181. In this parlance, "facts" as developed in the early 20th century are a variety of "savoir."

Robert Post has developed a similar theory around the First Amendment especially in the digital age and a "growing pessimism about the future of free speech in the United States." Robert Post, *The Unfortunate Consequences of a Misguided Free Speech Principle*, DAEDALUS (forthcoming) ("The best test of truth … is not the marketplace, but instead the judgment of those trained to assess intellectual quality. And intellectual quality is inseparable from compliance with relevant disciplinary standards."), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4255938/.

[277] Margaret Chon, *Sticky Knowledge and Copyright*, 2011 WIS. L. REV. at 202

[278] ÉMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 1 – 13 (Sarah A. Solovay and John H. Mueller trans., 1982) (1938).

[279] "Social facts" are "collective aspects of the beliefs, tendencies, and practices of a group that characterizes social phenomena." *Id*. at 7. "Currents of opinion, with an intensity varying according to time and place, impel certain groups [to behave in certain ways]. … These currents are plainly social facts. At first sight they seem inseparable from the forms they take in individual cases. But statistics furnish us with the means of isolating them. … It is a group condition repeated in the individual because imposed on him." *Id*. at 8-9.)

[280] *See supra* note 21 (sweat-of-brow scholarship).

[281] Copyright Act of 1790, 1 Stat. 124. For a comprehensive account of constitutive relationship between the map-making and copyright doctrine, see ISABELLA ALEXANDER,

and distribution technology radically reshaped industries (such as journalism), the labor theory was entangled with the originality doctrine, which glorified a person's intellectual labor as inseparable from the physical efforts of collecting information.[282] Indeed, the dignity of work and protection of a person's independent labor was a political current running through the nineteenth and early twentieth centuries, undergirding socio-political movements from abolition to the Progressives.[283] As described in Part II, dignity of labor even played a role in copyright law reform.[284] If facts were produced through hard work, and hard work was to be elevated and incentivized, then rendering facts public property produced through that hard work posed a political problem.

Responses to this political problem in copyright took the forms of philosophical, political, and economic theories like possessive individualism, laissez-faire capitalism, and radical subjectivity.[285] The effect was an exalted originality doctrine originating in *Burrow-Giles* and grossly enlarging the scope of copyright subject matter to the detriment of the public domain.[286] This doctrine would culminate in one of the most famous copyright decisions, *Bleistein v. Donaldson*, penned by Justice Holmes his first year on the Court.[287] *Bleistein* is considered the culmination of *Burrow-Giles*' originality doctrine glorifying "personality" and "singularity" in authored works that always have in them "something irreducible, which is one man's alone."[288] *Bleistein* represents a doctrinal broadening of subject matter and an ideological shift in copyright law—a democratization of sorts, wherein any

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COPYRIGHT AND CARTOGRAPHY: HISTORY, LAW, AND THE CIRCULATION OF GEOGRAPHICAL KNOWLEDGE (2023).

[282] Robert Brauneis recounts in *The Transformation of Originality* that "sweat of his own brow" is a more modern phrase akin to "intellectual labor" or "labor of the mind" or "labor and skill" found in earlier copyright cases. *See* Brauneis, *supra* note 21, at 329 n. 34 (citing *Amsterdam v. Triangle Publications*, 93 F. Supp. 79 (D. Pa. 1950)). "Sweat of the brow," Brauneis claims, did not appear in a copyright case until 1950. And it wasn't used in "its recognized sense" he says until 1984 in the case of Financial Information Inc v. Moody's Investor Services 751 F. 2d 501, 506 (2nd Cir. 1984). *Id.*

[283] This labor movement drew force from abolition, reconstruction, the early women's movement for full citizenship, and progressivism's push for social and economic welfare policies to address problems of poverty. CORINNE MCCONNAUGHY, THE WOMAN SUFFRAGE MOVEMENT IN AMERICA: A REASSESSMENT 167-170 (2013).

[284] *Supra* Part II.C.

[285] C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: FROM HOBBES TO LOCKE (1962) (describing these political theories). *See also* PHILLIP HANSEN, RECONSIDERING C.B. MACPHERSON: FROM POSSESSIVE INDIVIDUALISM TO DEMOCRATIC THEORY AND BEYOND 125–186 (2015).

[286] Beebe, *Aesthetic Progress*, *supra* note 22.

[287] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[288] *See Beebe, Aesthetic Progress*, *supra* note 22, at 330.

person can be a copyright author.[289] *Bleistein* is recognized as a "principal turning point" in copyright, arriving chronologically in the middle of the other cases discussed in Part I.[290] (As already mentioned, *Feist* itself cites *Bleistein* only once.[291]) But, as Barton Beebe notes, the case and its influence have a dark side.[292] Taken to its extreme, it hurts progressive causes that rely on the incontestability of public goods—a commonweal producing common property; and it celebrates individual hard work (with an emphasis on the individual) to the detriment of expanding social welfare and equal citizenship.[293]

This third path to *Feist* is thus the most helpful and the most complicated (political questions always are). The policy question of whether to protect an author's labor to the detriment of the public domain and the public interest becomes a legal question when human labor produces what are called "facts" in copyright.[294] This quandary raises the specter of the debate between "facts" and "values"—an "ontological politics"[295] that preoccupied the new sciences (and the legal philosophies that drew on them) in the late nineteenth and early twentieth centuries, when the canonical copyright cases leading to *Feist* were being decided.[296] This last Part describes that evolution, including a debate Justice Holmes was having about this very issue (but which did not explicitly appear in his copyright decisions). By situating *Bleistein* in this larger context, Part III aims to tame its bloated originality doctrine and reinforce the authority of institutions producing facts (as well as the importance of access to those facts) that are vital for rational debate over today's pressing socio-political problems. Doing

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[289] Jessica Silbey, *Justifying Copyright in the Age of Digital Photography*, 9 U.C. IRV. L. REV. 405, 420-424 (2019) (describing the case, its reputation, and subsequent history). *See also* SILBEY, AGAINST PROGRESS, at 8 (2022) (describing *Bleistein*'s influence as lowering copyright originality so much that today "everything from everyday Instagram photographs to shampoo labels" may be copyrighted protected).

[290] *Beebe, Aesthetic Progress*, *supra* note 22, at 330.

[291] *Feist*, 499 U.S. at 359.

[292] *See* Beebe, *Aesthetic Progress*, *supra* note 22, at 319-20 (describing Bleistein's "damaging influence" and starting "regressive cultural trends").

[293] At the turn of the 20th century, political clashes between progressives and industrial magnates produced policy debates about how to promote the good society. Expanding citizenship privileges (welfare, voting, labor rights) and notions of the "common good" were at the forefront of these debates, but so was freedom of contract and the priority of private property. MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF PROGRESSIVE MOVEMENT IN AMERICA 143 (2005).

[294] According to Brauneis and explained infra at XX, one explanation for the rise of copyright's originality doctrine at the turn of the century was in response to the changing structure of the news industry. *See Brauneis*, at 373.

[295] Law & Urry, *Enacting the Social*, *supra* note 54, at 390.

[296] As described *infra*, Part III.C.3., the modern reading of Holmes's *Bleistein* opinion short-circuits this analysis and *Feist* fails to address it head on.

so revitalizes *Feist* and broadens its fact-exclusion for twenty-first-century copyright disputes.

A. Pragmatism, the New Disciplines, and Situated Truths

American pragmatism, said to originate with Charles Sanders Peirce in the late 1800s, was (among other things) a rejection of universalist thought and absolutism.[297] Peirce, like other pragmatists in his American cohort—William James, John Dewey, and Jane Addams[298]—propounded the notion that what is true should be tested with scientific experimentation, grounding truth in empirically observable reality.[299] While this may seem basic from a twenty-first-century perspective, an epistemology based on experience, rejecting the notions that truths are universal and what we know is stable, was innovative in the nineteenth century.[300] Pragmatism was not a theory of relativism; it was about situated truths, knowable and testable but contingent. Peirce was famous for developing the idea of "fallibilism," an anti-Cartesian perspective holding that absolute certainty is unnecessary to accept something as true and that all knowledge requires is "fallible progress" based on self-correcting methods of inquiry.[301]

Just a few decades later, in the early 1900s—dubbed the "golden age" of Cambridge philosophy—G. E. Moore, Ludwig Wittgenstein, and Bertrand Russell developed a new form of analytical philosophy that also rejected idealism in favor of realism.[302] The methods developed in Cambridge were more mathematical than empirical, based more in logic than lived experience. But the conclusions and theories for which the Cambridge philosophers became both famous and influential confirmed the new understandings of the contingencies and contextual constraints of knowledge that were circulating

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[297] Catherine Legg & Christopher Hookway, *Pragmatism*, STAN. ENCYCLOPEDIA OF PHILOSOPHY [hereinafter *Pragmatism Stanford Encyclopedia*]. *See also* Robert Tsai, *Legacies of Pragmatism*, 69 DRAKE L. REV. 879, 881 (2021).

[298] Jane Addams invented the profession of social work as an expression of pragmatist ideas and was awarded the Nobel Peace Prize in 1931. *See Pragmatism Stanford Encyclopedia, supra* note 229.

[299] Tsai, *Legacies of Pragmatism*, 69 DRAKE L. REV. at 881-885 (describing the pragmatist's "epistemological modesty" and practice of using "their mind and experience to sift through information acquired through external senses" while "resisting the inclination to pre-judge the meaning or value of that information").

[300] WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF Thinking 67 (1907) (the "pragmatist talk[s] about truths in the plural, about their utility and satisfactoriness").

[301] *See Pragmatism Stanford Encyclopedia, supra* note 297. https://plato.stanford.edu/entries/pragmatism/#MeanPragJame/.

[302] HERBET HOCHBERT, RUSSELL, MOORE AND WITTGENSTEIN: THE REVIVAL OF REALISM (2001).

among American pragmatists. All three British philosophers combined metaphysics with epistemology. Wittgenstein's metaphysics famously described the world as consisting of facts, not objects; facts, he said, are a collection of states of affairs, which are themselves combinations of objects.[303] Wittgenstein was primarily concerned with the problem of logically representing facts and the connection between pictures and reality, asserting a distance but inevitable relation between them that demanded explanation. Moore's *Principia Ethica*, published in 1903, did to ethics what Wittgenstein did to facts by insisting on context to assess ethical mores and problematizing the notion of intrinsic nature or value.[304] The American pragmatists, including Justice Holmes, read and debated the work of these philosophers.[305]

Principia Ethica rejects a universal definition of "good" with definable, intrinsic properties, asserting that what is taken as good are "intuitions" incapable of proof or disproof.[306] Moore instead embraces a modified form of consequentialism.[307] This philosophy resonated with the American pragmatists, some of whom adopted legal realism as their judicial philosophy and whose legal innovation would be to defer to iterative policies grounded in shifting but knowable situational facts about groups of people.[308] *Principia Ethica*'s last chapter departs from a consequentialist frame and, perhaps paradoxically, asserts two "ideal" goods: human affection and the appreciation of beauty: "Personal affections and aesthetic enjoyments include all the greatest, and by far the greatest goods we can imagine."[309] Alasdair MacIntyre summarizes this part of *Principia* (while also critiquing it as "highly contentious"), saying that "[t]he achievement of friendship and the contemplation of what is beautiful in nature or in art become certainly almost

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[303] LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 2.01 (1922)

[304] G. E. MOORE, PRINCIPIA ETHICA (1903).

[305] See Postal Card from Judge Pollock to Justice Holmes (Feb. 24, 1904) *in* HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932 116 (Belknap Press 1961) [hereinafter CORRESPONDENCE].

[306] ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 15 (Notre Dame Press 1981) [hereinafter MACINTYRE].

[307] *Id*.

[308] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 209 (1992) ("the Brandeis Brief, by highlighting social and economic reality, suggested that the trouble with existing law was that it was out of touch with that reality"). This begins the rise of legislative facts that "inform[] a court's legislative judgment on questions of law and policy" and emerged with the Brandeis Brief, made famous in *Muller v. Oregon*, 208 U.S. 412, 419 (1908). *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404 (1942).

[309] MACINTYRE, *supra* note 306, at 15–16.

the sole and perhaps the sole justifiable ends of all human action."[310] Moore's theory of ethics appears to swing between consequentialism and an aesthetic idealism, which MacIntyre says are (and probably have to be) logically independent of one another.[311] This debate becomes relevant for Holmes's *Bleistein* opinion.[312]

American pragmatism and Cambridge's "golden age" shake up the state of certainty—about what we know, the manner of pursuing truth, and the ideal object of law or life. This shake-up produces epistemological paradigm shifts that fracture disciplines, like philosophy, but birth others, like sociology, psychology, economics, and geography (including urban studies). Thus begins the modern university with its "disciplines" backed by new methods of empiricism and fallibility, housing learned societies and journals that explain, authorize, and propel expertise in the new fields.[313] From skepticism about truth comes multiple forms and topics of truths, along with institutions and associations that propose new ways of knowing.

University leaders refrained from micromanaging the quality of this exponential output, leading to "the growth of professional societies and the creation of an organized peer review system."[314] The Modern Language Association was established in 1883; the American Economic Association in 1885; the *American Journal of Psychology* in 1887; and the *American Journal of Sociology* in 1895.[315] Until then, the job of assessing quality in scholarly and scientific work "was left in the hands of university presidents. . . . As time went on, the locus of authority to determine academic competence . . . was increasingly vested in faculty members, their academic departments and their peers at other universities."[316] In other words, the epistemological revolution of the late nineteenth century generated the

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[310] *Id.*

[311] *Id.*

[312] Justice Holmes in *Bleistein* was evidently caught within this "highly contentious" debate. In Holmes's attempt to reconcile that which perhaps cannot be reconciled—consequentialism with aesthetic idealism—he birthed via *Bleistein* a problematic originality doctrine that grossly expanded copyright protection and unmoored it from a foundation in a reasonable commercial basis for anti-copying protection. *See supra* Part III.B.

[313] JONATHAN COLE, THE GREAT AMERICAN UNIVERSITY 43 (2012) [hereinafter COLE]. *See also id.* at 46 "The founders of the research universities were linked to the new ideas of a host of thinkers in different fields. Those in the intellectual limelight included pragmatist philosophers and psychologists John Dewey and William James; legal philosophers such as Oliver Wendell Holmes Jr., and the stars of the new discipline of sociology—people like Lester Ward and Charles Sumner. The professional culture in law, medicine, and in many academic disciplines developed, and higher education witnessed enormous economic growth."

[314] *Id.*

[315] *Id.*

[316] *Id.* at 43.

modern institutions and organizations that produce what we think of today as disciplinary *knowledge*—humanistic, social, and scientific pursuits of study following generally accepted reality-based epistemic rules for establishing truth (or facts) about the world and its objects.[317] This revolution eventually changes how courts decide cases and how legislatures inform legal policy.[318]

With the birth of the modern university came new "professions"—medicine, law, journalism, social work, accountants, and statisticians—some with their own schools, licensing requirements, and disciplinary experts.[319] For example, the first school of professional journalism opened in 1908 at the University of Missouri.[320] This followed the news industry's reorganization in the 1880s as a response to the recent fake news crisis and "yellow journalism."[321] The professional newsroom, with its fact-checkers, expertise, and authority, was born at this time.[322] The same was true of law. Not until the late 1800s did law schools proliferate, although they did not have entrance requirements or final examinations and were mainly vehicles for apprenticeships.[323] In 1890, when Harvard's Christopher Columbus Langdell revamped the university's legal education program with the case method as a more "scientific" method of studying legal doctrine,[324] most lawyers in the country had not graduated from a law school.[325] But the study of law, like journalism—and medicine and other professions—evolved quickly within institutions of higher learning, asserting qualitative standards of excellence

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[317] Jonathan Rauch calls these "reality-based inquir[ies]" "orderly, decentralized, and impersonal social adjudication" characterized by objective, iterative, and transparent processes of error-correction. RAUCH, THE CONSTITUTION, *supra* note 28, at 103.

[318] *See supra* at note 308.

[319] *See* COLE, *supra* note 313, at 46. RAUCH, *supra* note 28, at 100-103 (describing world of "professional scholarship, science, and research," journalism, government agencies, and law/jurisprudence).

[320] Betty Houchin Winfield, *Introduction*, in JOURNALISM, 1908: BIRTH OF A PROFESSION 9 (ed. Betty Houchin Winfield, 2008).

[321] *See* Merrill Fabry, *Here's How the First Fact-Checkers Were Able to Do Their Job Before the Internet*, Time.com (August 24, 2017) (describing the professionalization of journalism as a response to "sensational yellow journalism of the 1890s" and the early history of professional "fact-checkers" within Time Magazine as mostly performed by women), https://time.com/4858683/fact-checking-history/.

[322] *See id*. *See also* Jean Folkerts, *History of Journalism Education*, 16 JOURNALISM & COMMC'N MONOGRAPHS 227 (2014).

[323] Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775, 800 (2003) [hereinafter *Moline*]. *See also* Hugh MacGill and R. Newmyer, *Legal Education and Legal Thought, 1970-1920*, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA 36-67 (Michael Grossberg and Christopher Tomlin eds., 2008).

[324] Dorsey Ellis, Jr., *Legal Education: A Perspective on the Last 130 Years of American Legal Training*, 6 WASH. U. J. L & POL'Y 157, 166 (2001).

[325] *See Moline*, *supra* note 232, at 801.

for their practice and metrics of "truths" within each discipline.[326] In Jonathan Rauch's explanation, this is the story of the "constitution of knowledge," grounded in democratic processes that enable the social adjudication of disciplinary truths ("science" in the words of the Constitution) through impersonal, professional institutional mechanisms. The notion of "facts" as outputs of disciplinary communities arose in this historical context. Not until this time, therefore, could copyright law begin to wrestle with what to do with "facts" in terms of its constitutional goal of "Progress of Science."

B. Legal Realism and Deference to Disciplinary Knowledge

Oliver Wendell Holmes, considered a forerunner of legal realism,[327] was a participant in the above-described revolution within the philosophy of knowledge and its new institutions.[328] Legal realism was a reaction to legal formalism.[329] As Joseph Singer writes in the context of reviewing Laura Kalman's *Legal Realism at Yale: 1927–1960*, "[t]he original realists sought to understand legal rules in terms of their social consequences. To better their understanding of how law functions in the real world, they attempted to unify law and the social sciences."[330] The realists "hoped to make judicial decision-making more predictable by focusing on both the specific facts of cases and social reality in general, rather than on legal doctrine."[331] A realist critique of nineteenth-century jurisprudence was similar to that made by pragmatists of universalist philosophy: "Rules do not decide cases; they are merely tentative classifications of decisions reached."[332] The concern was that universal or formal principles applied to concrete cases in an increasingly complex and

[326] *See* COLE, *supra* note 313, at 46.

[327] *See* David Seipp, *Holmes' Path*, 77 B.U. L. REV. 515, 553 (1997) [hereinafter *Seipp*]. *But see* Neil Duxbury, *The Birth of Legal Realism and the Myth of Justice Holmes*, 20 ANGLO-AM. L. REV. 81 (1991) (admitting that Holmes while is understood as the "primary intellectual inspiration behind American legal realism" he was in fact not a "forerunner of legal realism" but an "apologist for legal formalism").

[328] An avid reader and writer beyond the law, Holmes' letters and writings provide insight into the backdrop of his many decisions. See Seipp, at 553. *See* also Beebe, *Aesthetic Progress*, at 358-361, 368-69 (proposing extra-judicial influences on Holmes' *Bleistein* opinion).

[329] Legal realism has been described as a "form of functionalism and instrumentalism." Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 468 (1988) [hereinafter *Singer*]. See also, LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986).

[330] *Singer*, *supra* note 329, at 468.

[331] *Id*.

[332] *Id*. at 469. This echoes Holmes's famous statement in *Lochner* that "general propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." Lochner v. New York, 198 U.S. 45, 65 (1905) (Holmes, J. dissenting).

diverse society lead to inconsistent and unjust outcomes—abstractions divorced law from reality draining it of legitimacy.[333]

The realists pursued a "larger enterprise" than unifying law and social science:

> The legal realists wanted to replace formalism with a pragmatic attitude toward law generally. This attitude treats law as made, not found. Law therefore is, and must be, based on human experience, policy, and ethics, rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends.[334]

This enterprise included an attack on the "public/private distinction" and on "the idea of the self-regulating market,"[335] which Singer traces to, among other influential texts, Holmes's *Privilege, Malice, and Intent* (1894).[336]

Pragmatism and the new sciences directly affected legal realism. The studies of socio-economic institutions and organizational behavior became the fodder on which realist judges based their decisions. When applying general rules to specific cases, judges could defer to experiences and behaviors that the new sciences explained—whether economics, urban studies, labor relations, or industrial production. Constitutional litigators know this historical practice to originate with the "Brandeis Brief," what Philippa Strum describes as "the first brief that had more pages of statistics by far than of legal principles."[337] Then-attorney Louis Brandeis first filed such a brief in the 1908 case of *Muller v. Oregon*, justifying restrictions on work hours as reasonable for women to protect their health and well-being.[338] *Muller* was decided just three years after *Lochner v. New York* held otherwise for working men.[339] Holmes joined *Muller* and dissented in *Lochner*, believing that the state's legislative factual findings amply supported the

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[333] *See* Singer, *supra* note 329, at 470.; *see also* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM L. REV. 809, 809-21, 838-42 (1935).

[334] *See Singer*, *supra* note 329, at 474

[335] *See Singer*, *supra* note 329, at 475

[336] *Id.* Another text Singer cites as influential is Walter Wheeler Cook's *Privileges of Labor Unions in the Struggle for Life* (1918).

[337] Philippa Strum, *Brandeis and the Living Constitution*, in BRANDEIS AND AMERICA 120 (Nelson Dawson ed., 1989). *See also Seipp*, *supra* note 329327, at 517 (explaining Holmes said that lawyers need to study economics and statistics). *See also supra* note 308 (citing Horwitz and Davis).

[338] Muller v. Oregon, 208 U.S. 412 (1908).

[339] Lochner v. NY, 198 U.S. 45 (1905).

labor regulations protecting all workers. Brandeis would go on to author the famous *INS* opinion that *Feist* relies on, writing that "the general rule of law is that the noblest of human production—knowledge, truths ascertained, conceptions, and ideas—[become], after voluntary communication to others, free as the air to common use."[340]

Legal realism can be understood as an abdication of judicial authority in favor of reasonable state (or federal) legislative judgment, which should be given substantial latitude. The alternative is for an unaccountable and elite judiciary, isolated from the facts and lived experience under consideration, to decide substantive government policy. When Justice Holmes in *Lochner* said in dissent that it is not the judiciary's job to second-guess the legislature's judgment when it rests on some rational basis, even if disagreement about that basis exists,[341] he embodied the then-pragmatist imperative of deferring to legislative facts as authoritative. These legislative facts derived from the legitimacy of the legislature itself, its representative nature, and its fact-finding practices, all fueled by the new social sciences that would substantiate Progressive social policies like welfare-sustaining programs and economic and industrial regulation benefitting laborers.[342] The *Lochner* crisis, preceding legal realism's heyday, was a failure of formalism in which the Supreme Court denied to local legislatures the ability to craft policies tailored to specific local contexts and instead prioritized universalist principles like "freedom of contract." *Lochner*'s dissents and eventual demise were a success of pragmatism (and its eventual jurisprudential instantiation, legal realism) by emphasizing factual investigations and "empirical research designed to answer questions about the efficacy of institutions and rules of law in aid of understanding what social policy was appropriate in each functionally defined area" of society.[343]

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[340] *Supra* Part 1.B.3. INS v. AP, 248 U.S. 215, 250 (1918).

[341] "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract." Lochner, 198 U.S. at 75 (Holmes, J. dissenting).

[342] *See* HOROWITZ, supra note 308.

[343] John Henry Schlegel, *Legal Realism, in* 13 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIOR SCIENCE 774 (2nd ed. 2015). Justices Harlan and Holmes each authored famous dissents in *Lochner*. Harlan cites as justification for the New York labor law various studies, including Professor Hirt's "Diseases of Workers" and the "Eighteenth Annual Report by the New York Bureau of Statistics of Labor." *Lochner*, 198 U.S. at 69. Harlan's dissent is based on the new facts of the day. Similarly, Holmes pens the famous

When Holmes wrote in *Lochner* that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*," he was writing about the New York labor law, which aimed to protect the safety of industrial workers, who were in weak bargaining positions vis à vis employers.[344] This famous passage criticized constraining state legislatures with antique notions of "natural law." Holmes's dissent, which would become the majority thirty years later,[345] proclaimed that "[a constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution."[346]

Holmes was talking about labor law, but he could have been talking about copyright. Two years earlier in *Bleistein*, he said that copyrightable subject matter should not be constrained by judges' elite sensibilities. The circus advertisements at issue in *Bleistein* were just as much copyrightable expression as the fine arts, he said:

> If there is a restriction, it is not to be found in the limited pretensions of these particular works. *The least pretentious picture has more originality in it than directories and the like*,

line "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics" criticizing the majority opinion for deciding the case "upon an economic theory which a large part of the country does not entertain." *Lochner*, 198 U.S. at 75. Justice Holmes writes: "General propositions do not decide concrete cases. … I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work." *Lochner*, 198 U.S. at 76.

[344] *Id.*

[345] *Lochner*'s overly formalistic concepts did not stand the test of time. The Supreme Court would eventually adopt Holmes's *Lochner* dissent as the majority decision, embracing a more flexible view of constitutionalism. West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (historizing "freedom of contract" through the due process clause and proclaiming "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.") *Id*. at 392.

[346] *Id*. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

> *which may be copyrighted*. . . . [T]he act, however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to "illustrations or works connected with the fine arts" is not works of little merit or of humble degree, or illustrations addressed to the less educated classes. . . . Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a real use—if use means to increase trade and to help to make money. A picture is nonetheless a picture, and nonetheless a subject of copyright, that it is used for an advertisement. And if pictures may be used to advertise soap, or the theater, or monthly magazines, as they are, they may be used to advertise a circus.[347]

We see here impulses of pragmatism's consequentialism and deference to majoritarian preferences. We also see (in dicta) confirmation that even directories contain the requisite originality for copyright. Twenty years later, the Court of Appeals for the Second Circuit (affirming a district court decision by Judge Learned Hand) would repeat *Bleistein*'s language and protect a jeweler's catalog from copying by a competitor.[348] *Bleistein*'s holding expands copyrightable subject matter even to advertisements, catalogs, directories, and other commercial matter that may contain low originality or "authorship," as typically understood in terms of intellectual labor and creativity. Holmes's deference to the new industries, their laborers, "and people of fundamentally differing views" meant that anyone can be an author and almost everything is authored.

Bleistein is celebrated for its "aesthetic democracy" and for inaugurating the "aesthetic nondiscrimination" principle.[349] Holmes's often-quoted sentences from *Bleistein* foreground the risk of judicial elitism in copyright:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of

[347] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (emphasis added).

[348] Jeweler's Circular Pub. v. Keystone Pub. 281 F. 83, 85 (2d Cir. 1922) ("It was at one time intimated in certain judicial opinions that directories were not entitled to copyright. But the law is now well established to the contrary in England. … Mr. Justice Holmes, writing for the court, speaks of directories as being capable of copyright."). *See supra* note XX (discussing Justice Stevens's notes on *Jewelers* in his *Feist* file).

[349] *Beebe, Aesthetic Progress*, *supra* note 22, at 359 (citing LINDA DOWLING, THE VULGARIZATION OF ART: THE VICTORIANS AND AESTHETIC DEMOCRACY (1996)).

> pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. . . . That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.[350]

Bleistein results in copyright for the circus advertisement because, as Holmes says, "personality always contains something unique . . . a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."[351] This "personality" theory of copyright is *Bleistein*'s other legacy, lowering the originality standard below even *Burrow-Giles* (which reserves the possibility that "ordinary" photographs lacked originality[352]). By setting the originality bar at "personality," *Bleistein* trades the value of a person's labor for the value of individualism, measured here by market preferences and commercialism.[353] Who needs sweat-of-the-brow if all human expression for which there is demand and is copied contains something copyrightable?

Just two years after *Bleistein*, Holmes's *Lochner* dissent argues against the power of a "free" market to define rights and supplant legislative choices regarding contractual limits and labor standards. This view is plausibly inconsistent with *Bleistein*'s result, which defers to markets to shape rights (in copyright) and arguably overrode the Copyright Act, which did not expressly extend to advertisements.[354] Holmes's views seem in flux, caught between abdicating judicial authority for aesthetics, his deference to legislatures, and his own reverence for the practice of art (and the pursuit of science) as an ideal.[355]

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[350] *Bleistein*, 188 U.S. at 252.

[351] *Id*. at 250.

[352] *Burrow-Giles*, 111 U.S. at 59.

[353] Beebe, *Aesthetic Progress*, *supra* note 22, at 363.

[354] *Id*. "The advertisements were not fine art by even a broad definition of the term, and the *Bleistein* Court should not have granted them copyright protection. Present-day accounts of *Bleistein* strangely overlook the statutory context of Holmes's ruling. They celebrate his declaration later in the opinion that judges should not impose their own aesthetic standards when deciding copyright cases, but they omit the fact that this is precisely what he did in his highly tendentious statutory interpretation." *Id*.

[355] Holmes was an art connoisseur and his wife an accomplished artist. Rebecca

Holmes's engagement with evolving strands of philosophical debate about both aesthetics and utilitarianism might explain his confusion. He read Moore's *Principia Ethica*, published the same year as *Bleistein*.[356] In Holmes's letter to Sir John Pollock, one of hundreds in their thirty-year correspondence, he appears to have expressed dismay with Moore's theory of the "good" as a universal ideal (as opposed to a contingent and situated value).[357] Pollock corrected Holmes in a response dated February 24, 1904:

> I don't think you differ with the ingenious G.E.M. so much as you suppose. He does not set up an absolute good; on the contrary, he says that the predicate "good" in our various judgments of what is "good" is *sui generis* and unanalyzable, and therefore no universal external criterion of goodness can be assigned—such as pleasure-giving quality, utility however defined, or conformity to any one ideal. In short, so far as we know there is not one good but very many goods with

Curtin, *The Art (History) of Bleistein*, J. OF COPYRIGHT SOC'Y OF THE USA (forthcoming) (describing Holmes's affection for and attention to his wife's artistic work as another explanation of his decision in *Bleistein*). Barton Beebe describes Holmes reverence for the pursuit of knowledge and art for its own sake in a 1902 speech at Northwestern University School of Law just one year before the *Bleistein* decision, in which he appears to take an opposing view. Beebe, *Aesthetic Progress*, at 360. Holmes says in that speech, "[t]he justification of art is not that it offers prizes to those who succeed in the economic struggle, to those who in an economic sense have produced the most, and thus that by indirection it increases the supply of wine and oil. The justification is in art itself, whatever its economic effect." OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 272–73 (1920). Holmes goes on: "the opening which a university is sure to offer to all the idealizing tendencies—which I am not afraid to say, it ought to offer to the romantic side of life—makes it above all other institutions the conservator of the vestal fire." *Id.* at 275. Beebe describes *Bleistein* as having an "almost schizophrenic quality" when compared to Holmes's Northwestern University speech only a year earlier in 1902. Beebe, *Aesthetic Progress*, *supra* note 22, at 360-361. As David Seipp writes, Holmes was known for his "playful cynicism" with many people failing to get the joke. *See Seipp*, *supra* note 327, at 558. Whether Holmes was being playful, hypocritical, changed his mind, or remained undecided on his views of copyright, it may be time to stop taking *Bleistein* so seriously and to reconsider copyright originality.

[356] HOLMES, CORRESPONDENCE, *supra* note 305, at 116. Moore's lectures previously circulated as draft lectures. G.E. MOORE, PRINCIPIA ETHICA (Revised Edition) xiii (Thomas Baldwin, ed. 1993).

[357] This letter is missing from the correspondence, but Holmes' journal at the time indicates he read Moore's work. HOLMES, CORRESPONDENCE, *supra* note 305, at 116. The editor's footnote to "G.E.M" says: "In Holmes' Journal there appears among the volumes read in the early part of 1904, George Edward Moore, Principia Ethica (1903). The letter concerning the book, which he had apparently written to Pollack is missing." *Id.* David Seipp describes Sir Pollock as "one of England's leading legal historians." *See* Seipp, *supra* note 327, at 532.

> apparently nothing in common but just being good. And the question—what ought we to judge good?—seems on this view to be rational only in the sense: By preferring what sort of "goods" do men and nations succeed? Not much catching the tail of the Cosmos there. I don't say that I agree with this view myself, but I think it at least worth going through. A great deal of the detailed criticism—on utilitarianism e.g.,—seems to me quite excellent.[358]

If we are to understand Pollock's assurance, Holmes was having an internal debate with Moore about the possibility of an ideal good, questioning the Cambridge philosopher's groundbreaking work, and perhaps also misinterpreting it given its somewhat confusing embrace of *both* utilitarianism and aesthetic idealism.[359] *Bleistein*'s similarly confounding result—celebrating both aesthetic practice and market consequences as a justification for copyright protection—might reflect Holmes's extracurricular study of Moore. Prompted by Moore's celebration of the aesthetic as an ideal, *Bleistein* also celebrates it by blessing almost anything as authored expression despite the Copyright Act's ambiguity on the subject of advertisements as fine art. Holmes defers to market behavior in *Bleistein* as a measure of rational preferences of "men and nations" (as Pollock says), only to reject it as a guiding principle in *Lochner* two years later in deference to New York's labor regulations.

Holmes's unsettled philosophy of aesthetics and utilitarianism does not alleviate *Bleistein*'s troublesome effect on twentieth-century copyright law. But it may explain the instability of the "two sides of *Bleistein*."[360] It also may justify limiting *Bleistein*'s expansive reach and constraining its aesthetic nondiscrimination principle to pragmatism's core tenets. These include deference to institutional and disciplinary expertise, even when disputes exist concerning facts that experts base their judgments on. In this context of revitalizing *Feist*, note that *Feist* tacitly repudiates *Bleistein* by denying copyright to the directory in the case (Rural's phone book), and it expressly overrules another case, *Jeweler's Circular v. Keystone* (1922), as to sweat-of-the-brow. In this light, *Feist* counsels an even less deferential originality standard in tandem with a broader application of §102(b).

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[358] HOLMES, CORRESPONDENCE, *supra* note 305, at 116.

[359] *See* MACINTYRE, *supra* note 306, at 15. *See supra* Part III.A.

[360] *See* Beebe, *Aesthetic Progress*, *supra* note 22, at 376 ("one side was driven by the imperatives of romanticism and the aesthetic. The other was driven by the imperatives of industrial capitalism, the very imperatives against which romanticism and the aesthetic at least in part defined themselves").

C. Taming *Bleistein* and Broadening the Fact-Exclusion

Bleistein was the beginning of Holmes's tenure on the Court, during which he became known for operationalizing his conception of "experience." Perhaps contrary to how *Bleistein* is understood today, "experience" is not "individual and internal but collective and consensual; it is social, not psychological."[361] This is to say that *Bleistein* should be read with more humility than it is today, as Holmes might have meant it in light of the full panoply of his judicial philosophy—not as a justification for copyright protection over all human expression exhibiting even a spark of "personality," but as merely one manifestation of Progressive Era and pragmatist theory that embraces diverse aesthetic forms reflecting changing socio-economic institutions and practices. *Bleistein*'s celebration of radical subjectivity or "personality," in other words, should not undermine (and indeed should give way to) the authoritative production of facts and their designation as objective truths, which produce institutional stability and ideological common ground.

When Holmes decided *Bleistein* in 1903, there was no free speech doctrine as we know it today.[362] There were, however, many crises of propaganda and misinformation at the turn of twentieth century, which were eventually managed by journalistic standards, protection of a free press, and the rise of university disciplines.[363] When in 1918, Brandeis proclaimed in *INS* that "knowledge, truths ascertained, conceptions, and ideas become after voluntary communication to others free as the air to common use," he and Holmes were developing that early free speech doctrine in which freedom of information was critical to the testing and assessment of facts as foundations of knowledge.[364]

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[361] LOUIS MENAND, THE METAPHYSICAL CLUB 343–45 (2001).

[362] John Witt, *Weaponized from the Beginning*, 22-13 KNIGHT FIRST AMEND. INST. (November 18, 2022), https://perma.cc/A5H6-EFE3/ [hereinafter Witt, *Weaponized*]. For historical accounts of First Amendment free speech law forcing a reexamination and critique of the contemporary approach a, see, e.g., Joseph Blochner, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439 (2019); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2167 (2015); and ROBERT POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012).

[363] Witt, *Weaponized*. Early observers for the World War One-ear crisis of propaganda and misinformation did not treat it as a problem of free speech law, or not exactly. Freedom of speech in 1919 had barely been invented as a judicial doctrine; courts would not begin to protect speech against repressive laws until at least the late 1920s and 1930s. Absent a First Amendment to rely on, critics and advocates turned not to free speech doctrine in the courts … but to mediating institutions that offered bulwarks against distortions in the domain of public opinion." *Id*.

[364] *INS*, 245 U.S. at 250 (Holmes, J. dissenting). In 1919, Justice Holmes authored

Holmes was paying attention when, in the early 1900s, philosophers like Peirce, Wittgenstein, and Moore, and new "social scientists" like Durkheim and Max Weber, began a century-long debate over the difference between "facts" and "values."[365] This epistemological paradigm shift troubles copyright law's fact-exclusion. If, as some believed, objectivity is impossible and human subjectivity both inevitable and celebrated, facts are always "created" by intellectual labor and therefore copyrightable. In *Bleistein*, this may have manifested as Moore's highest ideal—the appreciation of beauty—as Holmes worked through the intersection of consequentialism and aesthetic contemplation in *Principia Ethica*. On the other hand, pragmatists and burgeoning legal realists established that objectivity may be contingent and contextual but still grounded in social processes and institutions that establish institutional authority and stability. That is, facts may be products of institutional labor. Yet more important than protecting individual labor in every instance is sustaining those institutions that protect the public interest. This is what Brandeis said eventually in *INS*, and it is what *Feist* should be understood to say seventy-five years later.

As discussed above, a "modern notion of objectivity" producing a new understanding of "facts" arose from the turn-of-the-century epistemological debates, professional organizations, and emerging institutions of learning.[366] Lorraine Daston and Peter Galison explain that

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another famous dissent in *Abrams v. United States*, a case in which the Supreme Court upheld the 1918 Sedition Act that criminalized critique of the United States' war policies. Abrams v. U.S., 250 U.S. 616 (1919). Disagreeing with the majority's statutory interpretation and its finding of criminal intent to incite resistance to the U.S.'s war effort in Germany, Holmes pens the famous "fighting faiths" passage in which he melds theories of free speech, democratic resilience, and pragmatism, again espousing the humility with which he believes judges should approach contested issues of fact. "To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.* at 630.

[365] John Law and John Urry, *Enacting the Social*, *supra* note 54, at 1 (describing this debate as "ontological politics").

[366] LORRAINE DASTON & PETER GALISON, OBJECTIVITY 26-34 (2007).

"objectivity" of knowledge was advanced through, among other features of modern society, the new technologies of manufacturing, mechanical reproduction, and especially image-making (microscopy, lithography, and photography).[367] As Daston and Galison describe, these new technological practices and outputs depended for their believability on "epistemic virtue," a "moral attribute of the people recognized as makers of knowledge."[368] These early twentieth-century changes begat the further notion of "structural objectivity"—taming individual idiosyncrasies through professional expertise and a new idea of "trained judgment."[369] Holmes was engaged with these ideas as an intellectual interlocutor and a jurist. His opinions about copyright law (and labor law; see *Lochner*) must be understood in this light to appreciate how *Feist* is a subtle but no less critical repudiation of a bloated originality doctrine that started with *Bleistein* and carried through the twentieth century.[370]

Bleistein's deferential evaluation of copyright authorship betrays Holmes's allegiance to pragmatism as a process of knowledge-making.[371] His decision is thereafter marshalled as a misapplication of the aesthetic nondiscrimination principle, which freed copyright judges from being art critics but also helped identify minimal creativity in a slew of information-producing industries rendering facts imperceptible.[372] Disappearing facts undermine expertise and knowledge-producing institutions that Holmes celebrated as a pragmatist and early legal realist. Although it did not originate sweat-of-the-brow, which was debated mid-century until *Feist*, *Bleistein* fed it by glorifying human creativity and the "singular[]" "personality" of each

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[367] *Id*. at 42.

[368] Jan Golinski, *How to Be Objective*, 96 AM. SCIENTIST 332 (2008) (book review), https://www.americanscientist.org/article/how-to-be-objective/. See DASTON & GALISON, OBJECTIVITY at 39-42 (describing "epistemic virtue"). *See also* STEPHEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND 193 (1995) (describing "the role of trust in constituting systems of both social order and empirical knowledge. There have to be working answers to the questions 'whom to trust?' and 'who tells the truth?" if there is to be shared knowledge and shared social order.").

[369] DASTON & GALISON, OBJECTIVITY at 356-57 (structural objectivity); 19, 346-57 (trained judgment).

[370] *See* Joyce & Ochoa, *Reach Out, supra* note 31, at 308 (for proposition that *Feist* is a repudiation of *Bleistein*).

[371] Beebe describes Holmes' betrayal of pragmatism in terms of its deference to the commercial instead of allegiance to aesthetic practice as such. Beebe, *Aesthetic Progress*, *supra* note 22, at 335, 345-50.

[372] For a discussion of cases in which factual works are incorrectly evaluated as original works of expression, see Dan L. Burk, *Madness and Method in Copyright Law*, 2007 UTAH L. REV. 587, 593-597 (2007) (criticizing application of § 102(b) and "fact/expression" dichotomy to evaluation cases as based on "manifestly untrue" assertions about understandings of science).

person who claims copyright authorship.[373] The effect of *Bleistein*'s inflated originality doctrine on the public domain of facts—resulting in cases that protect databases, informational catalogs, financial assessments, and evaluations[374]—could have been undermined by the realist revolution underway beginning with Holmes's *Lochner* dissent. But it was not.

In *Lochner*, Holmes understood and embraced the newly emerging social sciences—organized in institutions and disciplines producing knowledge (and facts) that legislatures (and courts) can and should rely on—as an inevitable feature of law's application.[375] To be sure, that knowledge is produced by human labor and within organizational, often collective and collaborative practices. But at the time, scholars and policy advocates also understood that the value of public property serving the general welfare supersedes the importance of private ownership (and, for our purposes, copyright ownership). *Bleistein* appears to have come too early in Holmes's tenure on the Court for his study of pragmatism as a process of knowledge-making, and its relation to aesthetics as a disciplinary practice, to have influenced him. *Lochner*'s formalism was not overruled until the 1930s; and *Bleistein*'s aesthetic nondiscrimination principle, which promises that anyone can be a copyright author (and almost anything can be copyrighted), remains good law and stronger than ever.[376]

The overextension of *Bleistein* predicts the twentieth-century expansion of copyright as a form of private property and the weakening of copyright's core commitment to the public domain.[377] These outcomes run counter to turn-of-the-century debates about progressivism and capitalism (i.e., critiques of labor and ownership) from which *Bleistein* in fact originates. Holmes's elevation of authorship as a way to celebrate democratic participation and protect labor—both Progressive causes misapplied in the copyright context—is in tension with the current scope of the fact-exclusion, which today is quite narrow in part due to *Bleistein*. This dichotomy makes the result in *Feist* (dispensing with sweat-of-the-brow and enlarging the public domain) all the more surprising *and* compelling. Given *Feist*'s legal roots and the intellectual history from which they sprung, a strong reading of *Feist* and its broader application is appropriate.

The result should be a revitalization of *Feist* for the twenty-first

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[373] *Bleistein*, 188 U.S at 250.

[374] Burk, *Madness and Method in Copyright Law*, 2007 UTAH L. REV. at 593-597.

[375] This is the "logic" in law that is "experience." HOLMES, THE COMMON LAW 1 (1881) ("Lecture 1: Early Forms of Liability").

[376] The Andy Warhol Foundation for Visual Arts v. Goldsmith, 598 U. S. ____ (2023), at Slip Op. 31-32 & n. 19 (affirming the centrality of the aesthetic nondiscrimination principle to copyright law).

[377] SILBEY, AGAINST PROGRESS, *supra* note 22, at 1-12, 20-21.

century, defining "facts" not as "pebbles waiting to be picked up"[378] but as knowledge produced within and through institutions and organizations characterized by contemporary epistemic virtues. This revised reading resets the metric for evaluating copyrightability and puts more pressure on that evaluation than current doctrine dictates. It prioritizes the public interest over the author, which *Feist* does too but *Bleistein* arguably does not. And it reestablishes "Progress of Science and the useful Arts" as a collective good measured not by the aggregate of individual contributions (or "personalities," to use *Bleistein*'s term) but by the institutions and communities they form. The rule is judicial deference to those institutions and communities—not to commerciality and the market.[379] This is not such a substantial change in copyright practice: expertise and disciplinary knowledge have been part of the adjudication of important recent copyright cases.[380] But it does shift legal doctrine and strategy, moving the focus of judicial analysis to the beginning of the copyright dispute—to subject matter protection instead of the affirmative defense of fair use—with the possibility of early and speedier dispositions. As explained in conclusion below, this should affect the outcome of recent disputes, resulting in a richer informational public domain and the judicial imprimatur of knowledge-producing institutions as authoritative and reliable, both of which help defend deliberative democracy.

CONCLUSION: *FEIST*'S FUTURE APPLICATION

A strong reading of *Feist*, as this Article recommends, would result in different outcomes in a slew of important copyright cases.

***Evaluations*.** In cases wherein the copyrighted work is a set of values or projections of value (e.g., about car prices or coin prices), copyright is often asserted over the values themselves. For example, in *CCC Information Services v. Maclean Hunter Market Reports* (1994), Maclean Hunter (the "Red Book" publisher) asserted copyright over its car valuations produced from a selection, coordination, and arrangement of factors made by the book's editors that, the Court said, "were based not only on a multitude of data sources, but also on professional judgment and expertise."[381] Whereas the district court determined that the values were "like the telephone numbers in *Feist*, pre-existing facts that had merely been discovered by the Red Book

[378] Hughes, *Ontology*, *supra* note 31, at 53.

[379] Beebe, *Aesthetic Progress*, *supra* note 22, at 373 (describing *Bleistein* as defining aesthetic progress as "the market's judgment of [the copyrighted work's] worth").

[380] *See, e.g.*, Google v. Oracle, 141 S. Ct. 1183 (2021) (relying on amicus briefs describing the practices of computer programmers and software companies).

[381] CCC Info Servs., Inc. v. Maclean Hunter Mkt, Reports, Inc., 44 F. 3d 61, 63 (2nd Cir. 1994).

editors," the Court of Appeals for the Second Circuit disagreed and held the Red Book and its numerical predictions of value copyrightable.[382] The Court of Appeals described the valuations as "approximative statements of opinion by the Red Book editors," rejecting the Defendant's claim that the valuations were "ideas" or represented the result of a "method, process or procedure" that would be excluded under §102(b).[383] No one argued that the valuations were "facts." But the Supreme Court's lengthy discussion of *Feist*, resulting in a determination that the "compilation of informational matter" is copyrightable as original, demonstrates *Feist*'s influence.[384]

Significant scholarly criticism exists about *CCC*, the most relevant explaining that "all facts involve judgment and creative selection."[385] Understanding facts as produced through expertise and judgment is a lesson from the history this Article recounts. The twentieth-century emergence of modern facts is the result of the new sciences and professional disciplines claiming epistemic authority for their work. The Red Book sought to be known as *the* authoritative source for used car valuations, and it succeeded such that it was the referenced standard for insurance payments and some state statutes.[386] Under a strong reading of *Feist*, much of the Red Book should be in the public domain as asserted facts about car values made by professionals with skill and knowledge purportedly superior to that of others.[387] Are the facts contestable? Yes. Does that make them any less facts according to the Red Book professionals' expertise? No. Does that mean that the Defendant can copy the whole Red Book? Probably not, but much more of it should be in the public domain than *CCC* allows.

There are many cases like *CCC*, concerning evaluations and ratings of a range of items and services, for almost all of which a strong reading of

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[382] *Id*. at 67. "Maclean's evidence demonstrated without rebuttal that its valuations were neither reports of historical prices nor mechanical derivations of historical prices or other data. Rather, they represented predictions by the Red Book editors of future prices estimated to cover specified geographic regions." *Id*.

[383] *Id*. at 73.

[384] *CCC Info Servs.*, 44 F. 3d at 63.

[385] Burk, *Method and Madness*, 2007 UTAH L. REV. at 596. *See also* Hughes, *Ontology*, *supra* note 31, at 68.

[386] *CCC Info Servs*., 44 F. 3d at 73.

[387] In some ways, this is a version of the copyright estoppel doctrine in which courts will not protect parts of the work held out by copyright owners to be factual, even if those parts turn out to be false. These cases are relatively rare and most recently have occurred in the context of historical fiction. *See* Corbello v. Valli, 974 F.3d 965 (9th Cir. 2020) (calling the issue one of "asserted truths"). "It would hinder, not promote the progress of science and useful arts to allow a copyright owner to spring an infringement suit on subsequent authors who built freely on a work held out as factual, contending after the completion of the copyrighted work, and against the work's own averments, that the purported truths were actually fictions." *Corbello*, 974 F.3d at 979

Feist would allow more copying than less.[388] Many of these cases analyze copyrightability in terms of the idea-exclusion (and merger), which makes the analysis more complicated because the appropriate level of generality and the dividing line between idea and expression are frequently fraught questions.[389] Deciding these cases instead as containing factual matter would be more straightforward.

Manuals and Catalogs. Cases concerning manuals and catalogs can be analyzed the same way. In these cases, the plaintiff asserts copyright over technical manuals, practice standards, and catalogs that organize parts and procedures for purchase or practice. In some cases, manuals are necessary to repair or keep track of maintaining critical equipment, such as airplanes.[390] In other cases, catalogs or code books are essential to the continued practice of a skilled profession—be it dentistry, medicine, airplane maintenance, or building construction.[391] It is frightening to think about airplane maintenance or safe hospital construction regressing because access to essential information is constrained by copyright law. To be sure, paying for books that contain knowledge (or "science" in the constitutional sense) is how copyright is supposed to work. Yet a strong reading of *Feist* might prevent only the whole copying of these books—replacing them in the marketplace with exact copies.[392] And it would allow generous quotation and selective

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[388] *Experian Info. Sols. v. Nationwide Mktg Servs*., 893 F.3d 1176 (9th Cir. 2018) (credit scores); *Health Grades, Inc. v. Robert Wood Johnson University Hosp. Inc.*, 634 F. Supp. 2d 1226 (D. Colo. 2009)((healthcare ratings and awards for hospital and other healthcare providers); *New York Mercantile Exchange Inc v. IntercontinentalExchange, Inc*., 497 F.3d 109 (2nd Cir. 2007)(evaluation of settlement prices); *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999) (coin price evaluations).

[389] *Nichols v. Universal Pictures Co*., 45 F. 2d 119 (2nd Cir. 1930) ("Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out … Nobody has ever been able to fix that boundary, and nobody ever can."); Hughes, *Ontology*, at 91 (discussing malleability of merger doctrine).

[390] Honeywell Intern., Inc., v. Western Support Group, Inc. 947 F. Supp. 2d 1077 (D. Ariz. 2013).

[391]Practice Management v. AMA; Am. Dental Ass'n v. Delta Dental Plans Ass'n, 126 F.3d 977 (7th Cir. 1997); ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, 402 F.3d 700, 711 (6th Cir. 2005); Facility Guidelines Institute, Inc. v. UpCodes, (E.D. Missouri, June 15, 2023) 2023 WL 4026185; Southco, Inc. v. Kanebridge Corp., 258 F.3d 148 (3d Cir. 2001) (tools/part numbers and requiring three trips to the Court of Appeals). *See* Hughes, *Ontology*, *supra* note 31 (discussing cases in terms of "naming facts," "evaluative facts" and "legal facts").

[392] This is how the first Copyright Act of 1790 worked, protecting "maps, charts, and books" from exact and whole copying. Fair use (or "fair abridgement") was always a part of copyright law, but that concerned questions of shortening and summarizing. See Matthew Sag, *The Pre-History of Fair Use*, 76 BROOKLYN L REV. 1371, 1377, 1398 (2011) (describing law distinguishing exact copying and comparative uses). *Feist* only implicitly wrestles with the dramatic change to copyright law under the 1976 Act, going from an opt-

copying for use and improvements. Most of these cases resolve on fair use grounds after the earlier and more efficient stage of subject matter analysis, making for more protracted litigation.[393] But when publishers assert that written works contain expertise and skilled knowledge, that information—which a strong reading of *Feist* would call factual matter—should be in the public domain as *publici juris*.

The case of *FMC Corp. v. Control Solutions* (2005) is a particularly egregious example of a court's erroneous and stingy application of *Feist* in upholding copyright in a pesticide label's instructions for use. Defendant Control Solutions copied FMC's label as part of a regulatory filing to the Environmental Protection Agency.[394] Control Solutions produced a generic form of FMC's expired-patented formula and used the instructions on FMC's label to describe use of the exact same product. The pesticide was dangerous, and testimony of FMC employees explained that the label provided instructions for its most effective and safe use.[395] After extensive discussion of *Feist* and copyright's idea-exclusion and merger rules, the court held that the label was protected expression and that its use by Control Solutions was not fair use.[396] The case was decided on a motion for a preliminary injunction, but the very long and thorough court opinion determined that the Defendant had no likelihood of success on the merits and that the public interest favored the Plaintiff. The court described the "public interest" as protecting copyright's exclusivity, saying that "protecting a company's rights to its intellectual property is in the public interest"; that FMC had "invested considerable creativity, talent, resources, time and money to develop the . . . label"; and that "[t]he public interest is not served by permitting [Defendant]

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in system (under the 1909 Act, one had to register copyright for protection) to an opt-out system (under the 1976 Act, original works fixed in a tangible medium of expression are automatically protected). The new framing means now copyright's *absence* requires justification, rather than its protection. The slipperiness of *Feist*'s reasoning is symptomatic of this implicit reframing as it tries to make what should be an obvious point (not everything is under copyright), but which is in fact less often the case.

Also, copyright growing scope is related to the viability of infringement claims. If only parts of a work are protected, copying only those parts is plausibly infringing. Determining which parts of the work are in or out of copyright becomes more important as parts of work (information and data) are copied and not the whole work, as was much more common before the 1976 Act. See *supra* note 101 (citing Bracha and Silbey).

[393] *See, e.g*., *Google LLC v. Oracle America, Inc*., 593 U.S __ (2020) (deciding software copyright case on fair use and reserving 102(b) question for another day). *Compare Computer Associates Int'l, Inc. v. Altai, Inc.,* 982 F.2d 693, 707-710 (2d Cir. 1992) (describing unprotectable elements as those dictated by efficiency and those constrained by external factors, such as compatibility needs).

[394] FMC Corp v. Control Solutions Inc., 369 F. Supp. 2d 539, 543 (E.D. Pa. 2005).

[395] *Id*. at 561.

[396] *Id*. at 561-567.

to pilfer and profit from FMC's copyrighted work product."[397] This notion of public interest is contrary to the one in the cases *Feist* cites; it sounds much more like Irwin Karp's 1976 testimony in support of author's rights (and sweat-of-the-brow), which *Feist* rejects.

A strong application of *Feist* in this case and ones like it would interpret the label and its indisputably expert instructions on the pesticide's use as factual matter. The creative choices, expert judgment, and "talent, resources, time and money" spent to devise the instructions for the pesticide should not convert what is meant to be an authoritative explanation of use.[398] Cases like this resemble *Baker v. Selden* and are often decided on merger grounds.[399] But that analysis is fraught with traps and too easily manipulated in the copyright claimant's favor, which here frustrates the dissemination of information about what is admittedly the best and safest use of a dangerous product.[400] A strong reading of *Feist* declaring the instructions as a whole factual matter would avoid that result.

Legal Matter. In some ways, this category of works should be the easiest to declare public domain material under a strong reading of *Feist*, because *Wheaton v. Peters* says as much. Recently, however, the Supreme Court affirmed *Wheaton*'s holding under the "government edicts" doctrine, not under §102(b).[401] The government edicts doctrine says that no one can own the law because its author is "the people," and judges or legislatures work on the people's behalf.[402] *Georgia v. Public.Resource.Org* (2020),

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[397] *Id*. at 578 (and citing *Klitzner*, 535 F. Supp. At 1259-60 ("the public interest can only be served by upholding copyright protections and, correspondingly, preventing misappropriation of the skills, creative energies, and resources [that were] invested in the protected work")).

[398] *Id*.

[399] *See, e.g., PortionPac Chemical Corp. v. SaniTech Systems, Inc.*, 217 F. Supp.2d 1238, 1247-49 (M.D. Fla. 2002) (sanitation reference manual including forms could be copied under merger doctrine). *Continental Micro, Inc. v. HPC, Inc.*, 1997 WL 309028 (N.D. Ill. 1997) (section 102(b) precludes protection of data compilation because it constituted "sets of directions designed to enable locksmiths to accurately cut keys"); *Publ'ns. Int'l, Ltd. v. Meredith Corp*., 88 F.3d 473, 480 (7th Cir. 1996) (holding recipes for yogurt unprotectible under 102(b)); *Morrissey v. Proctor & Gamble Co*., 379 F.2d 675 (1st Cir. 1967) (merger doctrine precluded copyright protection in sweepstake rules). For a thorough discussion of merger cases after *Baker v. Selden*, see Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y OF THE USA 417 (2016).

[400] Burk, *Method and Madness*, 2007 UTAH L. REV. at 596.

[401] Georgia v. Public.Resource.Org, Inc, 140 S. Ct. 1498 (2020).

[402] *Id*. at Slip. Op. 1, 5. ("Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties. … In a democracy, the Court reasoned, 'the People' are 'the constructive authors of the law, and judges and legislators are merely 'draftsmen . . . exercising delegated authority.'").

which concern state statutes annotated by private parties under the state legislature's guidance, extends the government edicts doctrine beyond laws to state-approved annotations of laws. Yet in many cases, the government edicts doctrine is less easily applicable. Those cases confront the question as to whether a previously copyrighted work (not a statute), referenced by law or adopted by law as a standard or best practice, is similarly excluded from copyright protection.[403]

Consider the ongoing dispute of *American Society for Testing and Materials [ASTM] et al. v. Public.Resource.Org*, first filed in 2013 and now on its second appeal to the Court of Appeals for the District of Columbia.[404] Plaintiffs are nonprofit professional organizations that develop private-sector standards to facilitate technical training, ensure compatibility across products and services, and promote public safety.[405] The standards they produce begin as voluntary guidelines for self-regulation, but oftentimes, federal, state, or local governments adopt these standards or incorporate them by reference into law.[406] The Plaintiffs sell the standards as downloadable PDFs or hard-copy books; purchasing the standards is the only way an interested party may obtain a copy. Public.Resource.Org, another nonprofit organization, aims to make "law and other government materials more widely available so that people, businesses, and organizations can easily read and discuss [the] laws

[403] *See* Am. Soc'y for Testing & Materials v. Public Resource.Org, 597 F. Supp. 3d 213 (D.D.C. 2022) (DC litigation on standard/codes); Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791 (5th Cir. 2002); Building Officials and Code Administration v. Code Technology Inc, 628 F.2d. 730 (1st Cir. 1980). Public.Resource.org v. Sheet Metal and Air Conditioning Contractors' National Association, Inc., Case No. 13-CV-00815-SC (resolved in favor of Public.Resource.org, see stipulation and judgment, https://www.eff.org/document/smacna-stipulation-and-judgment/.

https://www.techdirt.com/2013/07/16/sheet-metal-air-conditioning-contractors-agree-not-to-use-bogus-copyright-claims-to-block-publication-official-standards/

[404] ASTM et al. v. Public.Resource.Org., 597 F. Supp. 3d 213 (D.D.C. 2022) (appeal filed April 29, 2022 (No. 22-7063).

[405] *Id*. at 221. "Each Plaintiff relies on volunteers and association members [to produce] . . . standards [that] include technical works, product specifications, installation methods, methods for manufacturing or testing materials, safety practices, and other best practices or guidelines. . . . ASTM has developed over 12,000 standards that are used in a wide range of fields, including consumer products, iron and steel products, rubber, paints, plastics, textiles, medical services and devices, electronics, construction, energy, water, and petroleum products, and are a result of the combined efforts of over 23,000 technical members. NFPA has developed over 300 standards in the areas of fire, electrical, and building safety, including the National Electrical Code, first published in 1897 and most recently in 2020. And ASHRAE has published over 100 standards for a variety of construction-related fields, including energy efficiency, indoor air quality, refrigeration, and sustainability."

[406] *Id.*

and the operations of government."[407] When the Plaintiffs' standards become required reading to follow the law, Public.Resource.Org purchases a copy of the relevant standard and makes it available for free on its website.[408]

The Plaintiffs sued Public.Resource.Org for copyright infringement, and the district court found that they held valid and enforceable copyrights in the incorporated standards, and that Public.Resource.Org did not have a fair use defense. The Court of Appeals reversed the decision, finding that the fair use analysis required a case-by-case analysis for each Plaintiff, "leaving for another day the far thornier question of whether standards retain their copyright after they are incorporated by reference into law."[409] In 2022, the district court ruled that the standards retained their copyright but that the Defendant engaged in fair use for those incorporated by reference into law or are identical in text to standards incorporated by law.[410] Public.Resource.Org was nonetheless liable for copyright infringement of 32 of the 217 standards it posted, because the laws that incorporated the standards differed in "substantive ways."[411]

Amicus briefs explicate this litigation's high stakes. Amici include the American Insurance Association, American National Standards Institute, American Society of Safety Engineers, International Association of Plumbing & Mechanical Officials, and American Society of Civil Engineers (on behalf of Plaintiffs) and 62 Library Associations, Nonprofit Organizations, Legal Technology Companies and Former Senior Government Officials (on behalf of Defendant).[412] Amici on the Defendant's behalf explain its interests as access to the

> text of the law for purposes [of] education, dissemination of knowledge, development of new and innovative technologies, public advocacy, and investigative journalism. . . . These purposes ultimately all work toward the larger project of a vibrant national discourse in advancement of the critical project of constitutional self-government.[413]

Amici on the Plaintiffs' behalf explain their interest as relying on

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[407] *Id*. at 223.
[408] *Id*.
[409] ASTM v. Public.Resource.Org., 896 F.3d 437, 441 (2018)
[410] ASTM et al. v. Public.Resource.Org., 597 F.Supp.3d at 240-41.
[411] *Id*. at 241.
[412] 2017 WL 6055366; 2017 WL 6205552; 2017 WL 4251422.
[413] 2017 WL 4251422.

> the objective, high quality research and guidance that underpins these safety standards. . . . Without copyright protection, the critical source of funding that makes possible the production of these world class standards will disappear, calling into question the future independence, quality and even existence of these standards.[414]

These interests directly reflect the twentieth-century shift in knowledge production and the rise of knowledge-producing institutions, which are implicit in *Feist*'s reasoning and compel a broader public domain in factual matter.

Generating objective knowledge according to disciplinary standards is vitally important to public welfare. When that knowledge becomes "law" to be followed in exact or approximate form, the interests that disciplinary knowledge serves magnify. As the Court of Appeals explained, "faithfully reproducing the relevant text of a technical standard incorporated by reference. . . for purposes of informing the public about the law obviously has great value."[415] This is a version of Defendant's argument that "[t]echnical standards incorporated into law are some of the most important rules of our modern society. In a democracy, the people must have the right to read, know, and speak about the laws by which we choose to govern ourselves."[416] It is a tragedy of the commons that debates over these standards continue in yet a second appeal after a decade of litigation, although not the kind of tragedy Garrett Hardin made famous in his 1968 essay.[417] It is a tragedy of the digital age commons, in which knowledge and information are relied upon for important regulations but are kept sequestered by copyright law from open debate, discussion, and evaluation. Standard-setting organizations produced these codes in unprecedented supply and claim copyright because the contents are "evaluative," the product of human "expertise and judgment," and because professional labor deserves remuneration. A strong reading of *Feist* privileging the role of expertise and knowledge-producing institutions to promote "the progress of science" would designate these codes factual matter in the public domain.

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[414] 2017 WL 6055366.

[415] ASTM v. Public.Resource.Org., 896 F.3d 437, 451 (2018).

[416] Electronic Frontier Foundation, *Freeing the Law with Public.Resources.Org*, https://www.eff.org/cases/publicresource-freeingthelaw/.

[417] Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE (Dec. 13, 1968), pp. 1243-1248.

This Article does not argue that professionals should work for free. But the cases that *Feist* relies on and the historical era that frames its reasoning explain that skilled labor does not justify copyright protection over its output, and that sometimes, it is precisely skill and expertise that make a work "factual" public domain material. Further, the history and the cases *Feist* relies on make clear that copyright's incentive theory insufficiently justifies a property right to subsidize knowledge-producing work, by and through knowledge-producing institutions, whose output can and should be promoted in other ways. Put differently, copyright is not just concerned with property incentives History and experience demonstrate that copyright incentives are peripheral to knowledge-producing or data-driven industries' bottom line, making claims for copyright's necessity self-serving and overblown.[418]

This Article began with troubling scenarios regarding the cartelization of climate data in the insurance market, copyrightability of building codes impeding access to the law, and restricted use of history to tell new stories about the past. The subsequent examples show that a stingy reading of *Feist* (and a typical reading of *Bleistein*) limits facts to discoveries or ideas, metastasizing rather than staunching these problematic scenarios.

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[418] Copyright's economic incentive rational linked to utilitarianism is exaggerated to the point of inaccuracy. The critical literature is vast and continues to expand. *See, e.g.*, Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2823 (2006) Glynn S. Lunney, Jr. and Glynn Lunney, *Reexamining Copyright's Incentives-Access Paradigm*, 49 VANDERBILT L. REV. 483 (1996); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?* 12 THEORETICAL INQ. IN LAW 29 (2011); Eric Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FL. ST. U. L REV. 623 (2011); Jeanne Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012). *See also* GLYNN LUNNEY, COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE U.S. RECORDING INDUSTRY (2018); JESSICA SILBEY, EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 276-279 (2015).

As for copyright protection's marginal relevance to data protection industries, see JEANNE FROMER AND CHRISTOPHER SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS v.4.0 56 (2022) (describing "continuing doubts about the wisdom of database protection" in light of European Union's study that EU database protection had no beneficial impact on production of databases whereas U.S. database production has grown despite lack of copyright protection for fact-based databases). Research on standard setting organizations shows that sale of complementary products and services related to the standards are the substantial contributor to market value, not the standards sold as such. *See, e.g.*, Timothy Simcoe, Stuart Graham and Maryann Feldman, *Competing on Standards? Entrepreneurship, Intellectual Property, and Platform Technologies*, 18 J. OF ECON. & MGMT STRATEGY 775 (2009). *See also* Mark Lemley and David McGowan, *Legal Implications of Network Economics Effects*, 86 CAL. L. REV. 479 (1998) describing how access to a wide selection of complementary products and services creates network effects that drive market behavior.

By contrast, a strong reading of *Feist* resolves them in favor of a richer public domain comprising more factual matter broadly construed as objective explanations about our world. Copyright should not impede the progress of science. When recalibrated according to a strong reading of *Feist* comporting with the history and legal precedent on which *Feist* relies, copyright can tolerate the contestability of facts and knowledge while still designating them public property. Copyright can thus serve the institutions that promote democratic self-governance—such as the university sciences, journalism, and law—by supporting their epistemic authority in public discourse as producers of facts and knowledge in the public domain. This path is the way forward in our information age and is true to the first principles of copyright law. *Feist* was decided before this age blossomed. As the information age is here to stay, a strong reading of *Feist* is both vital and just.