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EX-POST FEIST: APPLICATIONS OF A LANDMARK COPYRIGHT DECISION

INTRODUCTION

In 1991, the United States Supreme Court in Feist Publications, Inc. v. Rural Telephone Service Co.\(^1\) ended a seventy year struggle among federal circuits concerning copyright protection of factual compilations.\(^2\) Prior to this decision, courts allowed copyright protection for works if the compiler labored over his project, whether or not the work involved originality or creativity. This doctrine is known as the "sweat of the brow" or "industrious collection" theory.\(^3\) Conversely, other courts espoused the "creative selection" theory, which required an author to show a small amount of creativity in order to receive copyright protection.\(^4\) The Feist Court chose the latter course, thus mandating a creative requirement for compilations.

The holdings of Feist went beyond ending the split among the circuits. In addition, the Supreme Court made three important pronouncements: (1) the creativity requirement for copyright protection is constitutionally mandated;\(^5\) (2) protection for a compilation extends only to the portion of the work original to the compiling author;\(^6\) and (3) the sweat of the brow doctrine is contrary to the letter and intent of copyright law.\(^7\)

The Feist decision immediately created an uproar in the copyright industry. Although the Court firmly set out its doctrinal position on the state of copyright law, many questions have

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\(^2\) A compilation is defined as:

A work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.


\(^3\) Courts subscribing to this theory included the Seventh, Eighth, and Tenth Circuits; see infra note 15 and accompanying text.

\(^4\) The Second, Fifth, Ninth and Eleventh Circuits adhered to this doctrine; see infra note 16 and accompanying text.


\(^6\) 499 U.S. at 348.

\(^7\) Id. at 353.
remained about possible applications of the *Feist* teachings. In the two years following, several circuits have applied the ideologies set forth by the Supreme Court and answered, in part, the concerns of the early commentators.

This Note will examine the applications and impact of *Feist*. Part I outlines the history of pre-*Feist* decisions, highlighting the split among circuits. Part II sets out the facts and analysis of the *Feist* decision. Part III examines the applications of *Feist*. In particular, this section focuses on: (1) the methods used to apply the originality standard; (2) the practical effects of limiting copyright protection to the original contributions; and (3) the courts' adherence to the rejection of the sweat of the brow theory. Part IV explores *Feist*'s philosophical implications and their potential applications.

**PART I: LEGAL BACKGROUND**

United States copyright law originates with the Copyright Clause of the Constitution and has been codified by federal statute. Codification of the constitutional requirement that

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8 *See, e.g.*, Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 339 (1992) ("[T]he Court thus stripped away . . . the copyright protection afforded a variety of 'information products'"); Alfred C. Yen, *The Legacy of Feist: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods*, 52 OHIO ST. L.J. 1343, 1375 (1991) (questioning effectiveness of *Feist* decision in achieving its constitutional goals); L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry Into the Need for a Federal Statute of Unfair Competition*, 17 U. DAYTON L. REV. 385, 385-86 (1992) ("The Supreme Court's unanimous decision in *Feist Publications, Inc. v. Rural Telephone Service Co.* contains an explicit lesson and an implicit warning. The lesson is that copyright law is overextended; the warning is that the time has come to examine both the cause and the effect of the overextension, and, by implication, to consider alternatives for protecting many works that copyright now shields from competition.").


10 The Copyright clause states: "Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" U.S. CONST. art I, § 8, cl. 8.

copyright protection advance and disseminate public knowledge has not yielded consistently applied legal standards. This inconsistency is due in part to the conflicting copyright principles that, although there may be no protection for facts, compilations of facts may be copyrightable. This paradox created confusion regarding the scope of protection for factual compilations. Courts in the Seventh, Eighth, and Tenth Circuits subscribed to the sweat of the brow or industrious collection doctrine. These circuits advocated that copyrights be granted and enforced for factual compilations if the author exerted some identifiable effort in creating the work, whether or not there was a creative element involved in the compilation. In contrast, the Second, Fifth, Ninth, and Eleventh Circuits embraced the creative selection theory. This theory required that a work must exhibit at least a modest amount of creativity, regardless of the amount of effort put into compiling the work, in order to receive copyright protection.

This section explores the legal history of these two approaches in turn.

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12 See infra note 54 and accompanying text.
16 Although the Second circuit produced the seminal case on the sweat of the brow theory, Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (2d Cir. 1922), cert. denied, 259 U.S. 551 (1922), it was later repudiated in Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 308, 150 U.S.P.Q. (BNA) 715 (2d Cir. 1966). See also Miller v. Universal City Studios, Inc., 650 F.2d 1365, 212 U.S.P.Q. (BNA) 345 (5th Cir. 1981) (holding selection and arrangement must be original in order for protection to be extended under copyright law); Cooling Systems and Flexibles, Inc. v. Stuart Radiator, 777 F.2d 485, 228 U.S.P.Q. (BNA) 275 (9th Cir. 1985) (holding that copyright protection can be extended to the original expression or arrangement of facts, not the facts themselves); Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, Inc., 756 F.2d 801, 225 U.S.P.Q. (BNA) 899 (11th Cir. 1985) (holding originality of directory to be dependent on creative selection, organization and arrangement of preexisting facts).
A. SWEAT OF THE BROW DOCTRINE

The sweat of the brow theory allows copyright protection for an entire factual compilation based upon the cost, effort, and labor invested in its creation. Historically, supporters justified the sweat of the brow theory on the grounds that it promoted public policy by encouraging the dissemination of knowledge and the development of new ideas. Adherents to this school of thought believed that the sweat of the brow doctrine furthered these goals by allowing the authors of factual compilations to reap the economic benefits of their work through full control of the material embodied in their production. This theory proposed that anything less than full copyright protection would halt the dissemination of information. Without such protection, a potential author could wait until the basic work was completed and then copy the material. Eventually, fewer authors would be willing to compile facts at all.

This doctrine stems from a fairness approach to copyright law that evolved from English decisions interpreting the Statute of Anne, Great Britain's copyright statute, which was the basis for early American copyright acts. English courts applying the Statute of Anne developed the principle that a second author may not gain an advantage by taking a free ride on the labors of another. This doctrine first appeared in the United States as

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17 See supra note 15 and accompanying text.
18 See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 220 U.S.P.Q. (BNA) 665 (1984). Note that these two purposes tend to conflict because incentive through total control of a work by the author prevents others from using public domain ideas and information.
20 See generally Yen, supra note 8, at 1345 (discussing development of sweat of the brow theory).
21 See 8 Anne c. 19 (1710), preamble (stating that purpose of act is to discourage piracy and is "for the encouragement of Learned Men to Compose and Write useful Books"); cf. U.S. CONST. art. I, § 8, cl. 8. Note that the Copyright Clause of the Constitution parallels the language in the Statute of Anne and American courts emphasize the similarity in underlying purposes: to foster creation and disseminate knowledge.
early as 1845.23

American cases linked the doctrine with the requirement that the
work be original by asking "whether the production is the result of
independent labor or of copying."24 The *Jeweler's Circular Pub-
lishing Co. v. Keystone Publishing Co.*25 opinion, written by Judge
Learned Hand, is the seminal case outlining the sweat of the brow
theory. That case involved an infringement claim against a
directory publisher that copied listings from another publisher.
The court held that copyright protection does not depend upon
whether the information was in the public domain or created by the
author, but rather protection should be granted to anyone who
"produces by his labor" a compilation.26 Circuits adhering to the
doctrine often adopt this court's rationale.27

B. CREATIVE SELECTION

The creative selection theory, on the other hand, limits copyright
protection to compilations which demonstrate some creativity in the

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23 Emerson v. Davies, 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4436). One commentator
notes:

[s]ince our 1790 Copyright Act adopted virtually in toto the English
Statute of Anne, this should not be surprising. What is surprising is that
American courts in the 1980s continue to cite and rely on early nine-
teenth century English decisions, apparently unaware that those
decisions were based upon the exercise of general common law powers no
longer recognized in the U.S. federal courts and on a bareboned statute
(Anne) that is radically different from the 1976 U.S. Copyright Act.

Patry, supra note 13, at 44 n.23.

24 *E. Drone, A Treatise on the Law of Property in Intellectual Productions in
Great Britain and the United States* 208 (1879). The originality requirement in the
United States was first mandated by the interpretations of the words "author" and "writings"
in the Constitution and the 1909 Copyright Act. The 1976 Copyright Act makes the
originality requirement explicit. See generally Ginsburg, supra note 8, at 1865 (discussing
history of conflicting definitions of originality).

25 281 F. 83 (2d Cir. 1922), cert. denied, 259 U.S. 581 (1922).

26 Id. at 88.

27 E.g., Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); Rockford Map
work's selection, coordination, or arrangement. Further, where the compilation meets this threshold creativity, the resulting protection extends only to the original components of the compilation and not to the work as a whole. Unlike the industrious collection theory, the creative selection doctrine embodies interpretations of the Copyright Clause of the Constitution.

This theory first appeared in the early Supreme Court decisions: The Trade-Mark Cases and Burrow-Giles Lithographic Co. v. Sarony. In The Trademark Cases, the Supreme Court interpreted the Constitution to hold that originality is required for a work to be considered a writing of an author. The Court distinguished the sweat of the brow rationale by stating that protectable writings are those which are "the fruits of intellectual labor," or creativity.

The Supreme Court in Burrow-Giles reiterated originality as a requirement for protection. The Court explained that in order to meet the originality requirement, there must be independent conception plus a minimal amount of creativity. Taken together, these cases remain the cornerstone for the creative selection

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28 See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884). See generally M. & D. NIMMER, NIMMER ON COPYRIGHT §3.04(B) (1994) (advocating creative selection test for factual compilations). The language of the Copyright Act of 1976 provides the basis for this theory:

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.


29 See Southern Bell Tel. & Tel. Co v. Associated Tel. Directory Publishers, 756 F.2d 801 (11th Cir. 1985) (applying creative selection test). Note that the disparity between the circuits is for a narrow group of works, specifically, "low authorship" factual compilations. The sweat theory encompasses a larger universe of works that it would deem copyrightable. The creative selection would eliminate a few wholly unoriginal compilations from total protection, and a much larger group would lose protection from partial copying where there were facts that were not considered original components of the work.

30 100 U.S. 82 (1879).
31 111 U.S. 53 (1884).
32 The Trademark Cases, 100 U.S. at 94.
33 Id. (emphasis added).
34 Burrow-Giles, 111 U.S. at 58-60.
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approach. 35

The Feist decision arose against this background of conflicting views of copyright among the circuits. The Supreme Court’s decisive end to this controversy displayed a preference for the creative selection approach, thereby sharply limiting the scope of coverage given to works in those circuits which previously adhered to the industrious collection doctrine.

PART II: THE FEIST CASE

In Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 36 the Supreme Court imposed a uniform approach to copyright protection of compilations. 37 The Feist company published area-wide telephone directories. 38 The region covered by the Feist directory at issue included the area that Rural Telephone had serviced exclusively with a phone directory. 39 Both directories contained white and yellow page sections, and they profited from the sale of advertisements in the yellow page section. 40

Feist was unable to contract for the use of Rural’s listings, so it copied listings from Rural’s directory. 41 Feist’s employees excluded listings outside the scope of its directory and independently verified and supplemented the listings copied from the Rural white pages. 42 Some of Feist’s listings, however, mirrored those in the Rural directory, including four false entries designed to detect


39 Id. at 343. As a public utility, state regulations require Rural Telephone Service Company to publish a directory of its subscribers.

40 Id. 342-43.

41 Id. at 343. Feist tried to contract for the information in each of the eleven constituent areas. However, Rural Telephone held out as the sole telephone company to refuse Feist a license to use its information.

copying. In an unpublished opinion, the Tenth Circuit affirmed the lower court's ruling. Subsequently, the United States Supreme Court granted Feist's petition for certiorari.

The Supreme Court unanimously reversed, thus ending the seventy year split among circuits. The Court considered the sweat of the brow and the creative selection doctrines, and opted in favor of the latter. In reaching its conclusion, the Court held that the Constitution mandated the creative selection approach.

Further, the Court announced that only a taking of original material infringes a compilation copyright, and explicitly overruled the sweat of the brow doctrine.

The Feist Court emphasized originality as a constitutional requirement for copyright protection. The Supreme Court articulated this requirement as early as 1879. In The Trademark Cases, the Court defined the constitutional term "writings" as "only such as are original, and are founded in the creative powers of the mind."
The Feist Court took the constitutional mandate for originality and further imposed a constitutional requirement for creativity. The Court emphasized that the originality standard is twofold, requiring "that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity." Not only is creativity the intended requirement of the Constitution, but it is also intended by Congress. Congress explicitly included the creativity requirement by defining subjects of copyright protection as "original works of authorship." The legislative history of the 1976 Copyright Act indicates that Congress intended to explicitly codify existing criteria of protection: originality and fixation. As a result, the Feist Court stood on a solid constitutional and statutory foundation when it mandated a minimal level of creativity for copyright protection.

From this foundation, the Court derived the standard for the level of creativity required for copyright protection. Creativity requires the "production of thought, and conception." In comparison to this standard, novelty requires innovation. Although the Court emphasized that creativity is a minimal standard, it will preclude some compilations from protection. In effect, this threshold places "unoriginal" arrangements with other facts in the public domain, and prevents their recapture through compilation copyright.

At the outset, the Feist Court recognized the tension between the proposition that facts do not warrant copyright protection, yet

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54 Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991). Note the importance of holding the creativity standard to be constitutionally mandated. The Supreme Court effectively overruled years of precedent in industrious collection jurisdictions. Most importantly, Congress cannot legislate around this decision by incorporating the sweat of the brow doctrine into the copyright statute.
55 Id. at 345.
56 Id. 5-56 (discussing legislative history of 1976 Copyright Act).
60 Id. at 361-62.
61 Id. at 363.
compilations of facts generally do. The idea/expression dichotomy explains how this tension may be resolved under copyright law. It is well established that copyright protection may not extend to facts or ideas. It is rather the author's expression that merits protection, whereas the underlying fact or idea, as public domain material, may be freely exploited by all. As the Feist decision explained, there is a contrast between creative authorship and the reproduction of facts:

[F]acts 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.

Therefore, only the creative elements in a compilation merit protection under the copyright statute.

Citing the 1976 Copyright Act, the Court outlined selection, arrangement, and coordination as elements that an author must exhibit in order to merit copyright protection. This means that even a compilation solely consisting of public domain data may be copyrightable if the selection, coordination, or arrangement is...
original to the author. A compilation copyright however, protects only the original arrangement, and will not prevent a subsequent compiler from using the underlying data. Creative selection emphasizes the public domain interest in ideas and information, and encourages new authors to create by expanding upon the raw ideas of others. Because the sweat of the brow theory fails to recognize these copyright principles, the Court explicitly repudiated it.

In rejecting the sweat of the brow theory, the Court noted that this theory arose from a misinterpretation of the 1909 Copyright Act. This Act, although drafted as a vehicle for the creative selection doctrine, was not well articulated and led to confusion among the lower courts. The Court noted that its cases decided under the 1909 Act stated that copyright protection applied only to an author's original contributions.

While acknowledging the fairness argument that circuits adhering to the sweat of the brow doctrine often employed, the Court stated that "[t]his result is neither unfair nor unfortunate, [i]t is the means by which copyright advances the progress of science and art." The exclusion of facts from copyright protection is designed to allow authors to rely upon and use facts and other public domain information set out in earlier works.

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69 Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 430, 348 (1991). It is important to note that the terms selection, coordination, and arrangement are alternatives under the Copyright Act. 17 U.S.C. § 101 (1988). Therefore, if any one of these elements are original, the work may be protected. See Howard B. Abrams, Originality and Creativity in Copyright Law, 55 LAW & CONTEMP. PROBS. 3, 19 (1992) (discussing impact of this requirement on past and future copyright decisions).

70 Feist, 499 U.S. at 359. This policy remains true to the constitutional goal of disseminating knowledge by encouraging authors to find ways of assembling data that readers may effectively use. Id. at 346.

71 Id. at 349-50.

72 Id. at 355-56. The misunderstanding apparently arose from court interpretations of the statute's list of categories under which an author may register her work. This list was designed to aid the Registrar, however, courts interpreted the list, which enumerated "compilations" to mean that all compilations were copyrightable and that protection extended to the entire work. See Feist, 499 U.S. 352-53.


74 Id. at 350.

75 Id. at 353.
In applying these principles to the facts in the case, the Court held that Feist Publications did not infringe the copyright held by Rural Telephone. The data contained in Rural's directory, subscriber names and phone numbers, were uncopyrightable facts. Further, the selection, coordination, and arrangement of the white pages were insufficiently original to qualify for protection. In reaching this conclusion, the court characterized the organization of the directory as "an age-old practice, firmly rooted in tradition," "commonplace," "unoriginal," and "practically inevitable." This holding implies that some methods of selection, coordination, and arrangement are available in the public domain. The realm of such possibilities, however, may be very narrow.

PART III: APPLICATIONS OF FEIST

Courts applying Feist have generally followed its directives. They have taken the holdings of Feist and elaborated upon the standards to be utilized in applying the Supreme Court's doctrines. Cases decided since Feist may be evaluated according to the three mandates the Supreme Court announced in Feist. First, some courts have established factors to consider in determining whether minimal creativity exists, elaborating upon the constitutional creativity requirement. Second, other cases have indicated that the strongest impact of the Feist decision arises from the limited scope of protection afforded compilations. For these courts, the emphasis falls upon which portions of the work were copied, rather than whether the work as a whole meets the low creativity threshold. Third, some courts have attempted to evade the explicit repudiation of the sweat of the brow doctrine by mislabeling industrious collection as "creativity."

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76 Id. at 364.
77 Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) ("[T]hey existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory").
78 Id. at 362.
79 Id. at 363.
80 Note the Court's language: "Given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that Rural's white pages pass muster, it is hard to believe that any collection of facts could fail." Id. at 364.
A. CONSTITUTIONAL CREATIVITY REQUIREMENT

Courts applying the creativity requirement must look at each work of authorship as a whole. In factual compilations, creativity may be found in the selection, coordination, or arrangement of the underlying data. Any work displaying more than "garden-variety," "typical," or "commonplace" organization principles meets the minimal requirement. Courts may take into account industry standards, triviality, functionality, and useful possibilities in making the determination of originality.

The constitutional requirement of creativity stems from the broader concept of originality. Originality demands two things: original authorship and original expression. Original authorship simply means that a work is not copied. Original expression is creativity.

In Kregos v. Associated Press, the Second Circuit emphasized the distinction between authorship and creativity by implementing a strict two-part test: (1) a determination of whether the work was copied from another source; and (2) a determination of whether the work contains a minimal amount of creativity. The panel considered whether a baseball pitching form displayed sufficient originality to merit copyright protection. In applying their two-part test, the Second Circuit considered identical factors for each analysis. Practically speaking, examination of the creativity

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86 Id. at 358.
87 Id.
88 937 F.2d 700 (2d Cir. 1991), 19 U.S.P.Q.2d (BNA) 1161.
90 Kregos, 937 F.2d at 704. The court considered such factors as total number of possible arrangements, differences between Kregos' and other forms published in both the discussion of independent creation and creativity.
element alone would yield the same result as bifurcating the originality test. It is not the element of original authorship that adds to the dialogue of copyright protection. Rather, independent creation is a well established requirement. *Feist*'s contribution is the constitutional mandate of the creativity requirement. 

The creativity requirement is not limited to judicial application. In *Homer Laughlin China Co. v. Oman,* the court held that the Register of Copyrights did not abuse his discretion in citing a lack of creativity as justification for denial of copyright. For this reason, just as a certificate of registration merits a presumption of validity, there is a parallel presumption of originality. The *Homer Laughlin* decision further illustrates the use of the creativity prerequisite beyond factual compilations. Courts have applied the *Feist* requirement to fabric design and sculpture.

Where factual compilations are concerned, however, the Copyright Act guides the examination into originality. A compilation results from original selection, coordination, or arrangement. These categories are alternatives and creativity in any one meets

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The Registrar stated: "overall authorship on each of these pieces of China is really a familiar chinaware presentation which constitutes too minimal an amount of original creative authorship to meet even the low standard". *Id.* at 1075 (emphasis added).


*See, e.g., Folio Impressions, Inc. v. Byer California, 937 F.2d 759 (2d Cir. 1991) (applying Feist test to floral textile pattern, finding no infringement); Runstadler Studios, Inc., v. MCM Ltd., 768 F. Supp. 1292 (N.D. Ill. 1991) (using Feist requirements to deny infringement claim involving glass spiral sculpture).*

"A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.*


the requirement. A court's definitions of selection, coordination, and arrangement prove to be critical in making determinations of creativity in factual compilations.

In Feist, the Court defined selection as the scope of information included in the Rural telephone directory. The Court held the inclusion of the name, address, and phone listing of each subscriber to the local telephone service was insufficiently creative to be considered copyrightable selection. Post-Feist cases have adhered to this definition of selection as the scope of coverage.

In Victor Lalli Enterprises v. Big Red Apple, Inc., the court denied original selection where the author of horse racing charts failed to "exercise selectivity in what he report[ed]." The chart at issue contained numbers calculated from formulae used throughout the industry to predict winning numbers in illegal "numbers games." This selection, standard to all horse racing charts, failed to meet the minimal creativity requirement. Another Second Circuit panel offered a working definition of selection: "selection implies the exercise of judgment in choosing which facts from a given body of data to include in a compilation."

1976 Copyright Act states: "[t]he copyright in a compilation... does not imply any exclusive right in the preexisting material" 17 U.S.C. § 103 (1988). The Feist Court emphasized this idea and reiterated that existing facts or works are not to be considered in determining whether the minimal creativity standard is met. 499 U.S. at 356-57.

Feist and cases following have verified this reading of the statute; see Feist, 499 U.S. at 362-63. See also Kregos v. Associated Press, 937 F.2d 700, 709 (2d Cir. 1991) (finding original selection sufficient to merit copyright protection); BellSouth Advertising & Publishing Corp. v. Donnelley Info. Publishing, Inc., 999 F.2d 1436, 1441-42 (11th Cir. 1993), cert. denied, 114 S. Ct. 943 (1994) (finding originality in coordination and arrangement alone sufficient to support infringement claim).

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101 Feist, 499 U.S. at 362.


104 936 F.2d 671 (2d Cir. 1991).

105 936 F.2d at 673.

106 Key Publications, Inc. v. Chinatown Today Publishing Enters., 945 F.2d 509, 513, 20 U.S.P.Q.2d (BNA) 1122 (2d Cir. 1991). Note that the Key Publications court defined creative selection, where judgment is exercised the selection will pass muster. The Feist decision implied that, first, selection must be identified, then, examined to determine creativity. The
Coordination and arrangement have been less clearly defined. The *Feist* Court groups the two together in its own analysis.\(^{107}\) One commentator suggests that coordination is merely "linkage" and arrangement is "sequencing principles."\(^{108}\) Several courts, however, have taken *Feist's* lead and grouped together the categories of coordination and arrangement into a concept of organization.\(^{109}\)

In addition to defining these terms, courts have elaborated upon practical aspects of the selection, coordination, and arrangement of compilations in determining creativity. First, the selection, coordination, and arrangement must be examined by looking at the work in its entirety. The panel in *Key Publications, Inc. v. Chinatown Today Publishing*,\(^{110}\) considered the originality in a directory for New York's Chinese-American community which categorized businesses under headings similar to those in yellow pages.\(^{111}\) The court held that "individual categories chosen are irrelevant to [the] inquiry [of originality]."\(^{112}\) Rather, the question should be "whether the arrangement ... viewed in the aggregate, is original."\(^{113}\)

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\(^{108}\) See Gorman, supra note 103 at 752-55 (discussing application of creativity test to compilation elements).


\(^{110}\) It should be noted that the Copyright Office sees the classifications in much the same way: "'Arrangement' or 'coordination' refers to the ordering or grouping of data into lists or categories ... ". Copyright Office, *Guidelines for Registration of Fact-Based Compilations* 1 (Rev. Oct. 11, 1989), cited in Patry, supra note 13, at 60.

\(^{111}\) Note that although some categories are similar to a typical yellow page directory, e.g., "Accountants", others are of particular interest to the community that the directory serves, e.g., "Bean Curd & Bean Sprout Shops". Id. at 514.

\(^{112}\) Id.

\(^{113}\) Id.; see also Atari Games Corp. v. Oman, 979 F.2d 242, 24 U.S.P.Q.2d (BNA) 1933 (D.C. Cir. 1992) (overturning judgment for Register on basis that he failed to examine work as a whole).
Second, the Sixth Circuit in *Sem-Torq, Inc. v. K Mart Corp.*\(^{114}\) held that the selection, coordination and arrangement must be purposeful.\(^{115}\) The work at issue was a grouping of five plastic signs, which were displayed as a set, but neither sold nor packaged together.\(^{116}\) The parties stipulated that individually the signs were not copyrightable.\(^{117}\) The court found no value in the arrangement of the signs as a set and established purposefulness as a threshold issue in examining a compilation for originality.\(^{118}\)

Finally, methods of factual discovery do not qualify as copyright selection.\(^{119}\) The *Kregos* court developed a test applying this principle:

> [a]s long as selections of facts involve matters of taste and personal opinion, [copyright protection is justified]. . . . However, where a selection of data is the first step in an analysis that yields a precise result or even a better-than-average probability of some result, protecting the 'expression' of the selection would clearly risk protecting the idea of the analysis.\(^{120}\)

The court applied the merger doctrine,\(^{121}\) precluding a finding of originality.

\(^{114}\) 936 F.2d 851 (6th Cir. 1991), 19 U.S.P.Q.2d (BNA) 1219.
\(^{115}\) 936 F.2d at 855.
\(^{116}\) *Id.* at 852.
\(^{117}\) *Id.* at 854.
\(^{120}\) Kregos v. Associated Press, 937 F.2d 700, 707 (2d Cir. 1991).
\(^{121}\) The merger doctrine originated with the case, Baker v. Selden, 101 U.S. 99, 103 (1879). The 1976 Copyright Act states:

> 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.

17 U.S.C. § 102(b) (1988). The merger doctrine applies only where there is only a small, limited number of ways to express an idea and granting copyright protection would unduly prevent public use of the idea. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[D], at 34-35 (1993).
Copyright law will not protect every selection, coordination, or arrangement. "[T]o merit protection, the facts must be selected, coordinated, or arranged 'in such a way' as to render the work as a whole original." Feist thus mandates a case by case analysis of creativity. Although the study may be furthered by case analogies, each situation should be viewed on its own merit.

The Feist decision did not set out a test by which to judge creativity, however. The Court used phrases such as "commonplace," "practically inevitable," and "garden-variety" to establish negative guidelines. A work that fails to meet these minimal standards does not merit protection. In Kregos v. Associated Press, the Second Circuit expanded the Feist directive; if a work's creativity surpasses these minimal guidelines, it merits copyright protection.

Some courts have applied these negative phrases by determining whether these terms could describe the works at issue. Dissatisfied with this criteria, courts developed other standards for determining whether the minimal creativity standard has been met, including industry standards, triviality and functionality.

The industry standard test works in conjunction with the illustrative terms set forth in Feist. There is no creativity

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123 Id. at 357-59; see also CNN v. Video Monitoring Servs., 940 F.2d 1471, 1485 n.23, 20 U.S.P.Q.2d (BNA) 1081, vacated, 949 F.2d 378 (11th Cir. 1991). Note that this case was vacated on technical grounds. The Eleventh Circuit's analysis in this case has not since been contradicted.

124 Feist, 499 U.S. at 362-63.

125 937 F.2d 700 (2d Cir. 1991).

126 937 F.2d at 704; see also Abrams, supra note 68, at 24.

127 E.g., Atari Games Corp. v. Oman, 979 F.2d 242, 246 (D.C. Cir. 1992) (finding that motion and overall effect of "Breakout" computer game was not "mechanical," "garden-variety," or "obvious"); Victor Lalli Enters., Inc. v. Big Red Apple, Inc., 936 F.2d 671, 673 (2d Cir. 1991) (finding horse-racing grids to be "purely functional" and, like arrangement in Feist, unoriginal); Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991) (holding that baseball pitching form could not be subjectively described as "entirely typical," "garden-variety," or "obvious").

when a work is "typical" or "obvious" in a given field.¹²⁹ For example, in Victor Lalli Enterprises v. Big Red Apple,¹³⁰ a horse racing chart arranged with months on one axis and days of the month on the other lacked creativity, because this organization was the norm in the industry.¹³¹ Conversely, in Kregos v. Associated Press,¹³² the court found that the baseball pitching form at issue, distinctive from others previously published in the market, displayed significant creativity both in the selection of statistics and their grouping into useful headings.¹³³

Courts have taken a cue from Feist terminology and courts have found originality where an author demonstrated more than a trivial amount of creativity.¹³⁴ In Runstadler Studios, Inc. v. MCM Ltd.,¹³⁵ the court found a glass spiral sculpture sufficiently creative to merit copyright protection.¹³⁶ Judge Moran stated, "[t]he choice of location, orientation and dimensions of the glass panes, and the degree of arc of the spiral, show far more than a trivial amount of intellectual labor and artistic expression on plaintiff's part."¹³⁷

Post-Feist courts have been less consistent in applying functionality to the study of originality. Generally, the more functional the selection, coordination and arrangement, the less protection a

¹²⁹ Note that this standard is not contrary to Feist, in which the telephone directory was considered typical of other phone directories. Rather, it highlights and utilizes what was merely implied by the Supreme Court.
¹³⁰ 936 F.2d 671 (2d Cir. 1991).
¹³¹ 936 F.2d at 673.
¹³² 937 F.2d 700 (2d Cir. 1991).
¹³³ Id. at 705.
¹³⁴ Courts have turned the Feist negative rule into a positive one. Justice O'Connor wrote: "[t]here remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359 (1991).
¹³⁶ 768 F. Supp. at 1296.
¹³⁷ Id. See also Kregos v. Associated Press, 973 F.2d 700, 705 (2d Cir. 1991). Note that for both cases this trivial standard is a quid pro quo. Just as the standard is low for originality in the plaintiff's authorship, "if someone else displays the requisite creativity by making a selection that differs in more than a trivial degree, [the plaintiff] cannot complain." Kregos, 937 F.2d at 710.
compilation deserves. For example, the Second Circuit denied protection where a horse racing form was a "purely functional grid" offering "no opportunity for variation." On the other hand, a fabric design received protection where the court held that the choices the author made in designing the pattern were artistic and not contrived for manufacturing ease.

Courts factor the total number of possible arrangements in determining creativity as well. In Kregos v. Associated Press, a baseball pitching form displayed nine categories of statistics. The court stated:

there are at least scores of available statistics about pitching performance available to be calculated from the underlying data and therefore thousands of combinations of data that a selector can choose to include in a pitching form. It cannot be said as a matter of law that in selecting the nine items for his pitching form out of the universe of available data, Kregos has failed to display enough selectivity to satisfy the requirement of originality.

Although helpful, this analysis should be qualified. The Feist decision explicitly required that the consideration of alternative outcomes be limited to useful arrangements. An Eleventh Circuit panel reiterated this point: "[t]he relevant inquiry is not whether there is some imaginable, although manifestly less useful, method of arranging business telephone listings." Careful application should thus factor an author's choice among meaningful possibilities into whether creativity exists.

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141 937 F.2d 700 (2d Cir. 1991).
142 Id. at 704. It is interesting to note that the court calculated the possibilities if Kregos had used a universe of only 20 items—167,960 combinations.
B. LIMITED SCOPE OF PROTECTION

Even when a work meets the minimal creativity requirement, the plaintiff must prove "copying of constituent elements of the work that are original." Post-Feist courts have followed this mandate with two notable effects. First, this rule has opened the door for defendants to present a "creativity defense." Second, the narrowing of copyright protection that concerned early commentators has occurred under this requirement rather than under the minimal creativity standard.

Like the creativity requirement, courts following Feist refined the limited protection standard to allow for easier application. The Eleventh Circuit established a two part-test similar to that introduced by Feist: (1) identification of the original elements of a work (selection, coordination and arrangement); and (2) examination of which elements of the work were taken with each act of copying. A court should find infringement only where the original elements were copied. This principle is reiterated in Key Publications, Inc. v. Chinatown Today Publishing Enterprises, which held that substantial similarity must be shown "between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation."

The Second Circuit in Kregos v. Associated Press focused on the limited protection principle, mandated by Feist, as an infringement defense, rather than an infringement test. The baseball
pitching forms at issue in that case illustrate the thin protection afforded compilations, as well as the duality of the creativity requirement. The panel held:

[the plaintiff] cannot have it both ways. If his decision to select . . . statistics . . . in combination with his other selections, [is] enough creativity to merit copyright protection, then a competitor's decision to select in that same category performance statistics . . . may well insulate the competitor from a claim of infringement.156

This emphasizes the potential for an affirmative defense to an infringement claim based on the defendant's work meeting the creativity requirement.

The infringement test, rather than the creativity requirement, marked the change in copyright protection following the Feist decision. Several cases found minimal creativity but no infringement where the creative elements were not copied.157 For example, in BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing,158 the court found no infringement of the creative arrangement of a yellow page directory where the defendant did not copy "text or graphic material from the advertisements, . . . positioning of these advertisements, . . . or textual material."159 Similarly, the Second Circuit held that a fabric design did not infringe by a similar design of hand-sketched roses when the drawings of those roses were not copied.160 Even courts finding no creativity have pointed out that if originality had been

156 Id. at 710.
157 See, e.g., Kregos v. Associated Press, 937 F.2d 700, 709 (2d Cir. 1991) (finding no infringement where first pitching form was creative, but second form duplicated only six of nine categories and added its own original contributions); Key Publications, Inc. v. Chinatown Today Publishing Enters., 945 F.2d 509, 515-16 (2d Cir. 1991) (finding no infringement by minimally creative business directory where only seventeen percent of second work was derived from first).
158 999 F.2d 1436 (11th Cir. 1993), cert. denied, 114 S. Ct. 943 (1994).
159 Id. at 1445.
met, the limited scope of protection would have precluded recovery.\textsuperscript{161}

C. REPUDIATION OF THE SWEAT OF THE BROW DOCTRINE

In applying the principles enumerated in \textit{Feist}, courts have generally been true to the repudiation of the sweat of the brow doctrine. However, some courts have used language associated with industrious collection to justify creativity in some works, thereby circumventing the Supreme Court's explicit renunciation of the doctrine.\textsuperscript{162}

Most courts, however, have abided by the Court's teachings as well as its tests. Notably, the Eleventh Circuit in \textit{Cable News Network v. Video Monitoring Services},\textsuperscript{163} expounded upon the philosophical difference between the creative selection and sweat of the brow theories.

Despite the Supreme Court's dictate, the industrious collection doctrine seems to have reappeared in several post-\textit{Feist} decisions.\textsuperscript{164} Courts that fail to follow the Supreme Court's guidelines may produce analytical results which arguably recreate the sweat of the brow doctrine. Justifying its finding of originality in state tariff summaries, the Fourth Circuit stated:

The evidence suggests that . . . Payphone expended a great deal of time creating the single-page-per-state format. The Guide, according to Payphone, is the result of hundreds of hours of reviewing, analyz-

\textsuperscript{161} \textit{E.g.}, CNN v. Video Monitoring Servs., 940 F.2d 1471, 1486 (11th Cir. 1991) (restating \textit{Feist} requirement that only original elements are to be granted protection); Sem-Torq, Inc. v. K Mart Corp., 936 F.2d 851 (6th Cir. 1991) (stating that elements copied do not consist of original selection, coordination or arrangement).

\textsuperscript{162} \textit{E.g.}, Mason v. Montgomery Data, Inc., 967 F.2d 135, 142, 23 U.S.P.Q.2d (BNA) 1676 (5th Cir. 1992) (holding that laborious collection is selection element); U.S. Payphone, Inc. v. Executives Unlimited, 18 U.S.P.Q.2d (BNA) 2049 (4th Cir. 1991) (finding selection, coordination and arrangement in research of data).

\textsuperscript{163} 940 F.2d 1471, \textit{vacated}, 949 F.2d 378 (11th Cir. 1991). Note that this case was vacated on technical grounds. The Eleventh Circuit's analysis in this case has not since been contradicted.

\textsuperscript{164} \textit{E.g.}, Mason v. Montgomery Data, Inc., 967 F.2d 135, 140 (5th Cir. 1992); U.S. Payphone, Inc. v. Executives Unlimited, 18 U.S.P.Q.2d (BNA) 2049, 2050 (4th Cir. 1991).
The court in *Mason v. Montgomery Data, Inc.*, used similar reasoning, holding that creativity in constructing maps arose from verifying preexisting maps generated by the United States Geological Survey. Thus, several courts previously adhering to the sweat of the brow theory have avoided the holding of *Feist* simply by labeling industrious collection as originality.

By overturning sweat of the brow, the Supreme Court reemphasized that the primary benefactor of copyright laws is the public, and benefits to the author are secondary. The industrious collection perspective misplaced these priorities. In particular, where factual compilations are concerned, adherence to sweat of the brow risked protecting facts and data which copyright law was not intended to cover.

The Eleventh Circuit, considering a preliminary injunction, applied *Feist* through a discussion and analysis of the repudiation of the industrious collection standard and the principles underlying that choice. The dispute in that case arose between CNN and a monitoring service, VMS. VMS recorded and monitored network programming in order to provide analysis to its customers, including copyright owners of commercials, the Justice Department, and CNN itself. The district court granted an injunction to CNN which enjoined VMS “from copying or selling copies of any of

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166 967 F.2d 135 (5th Cir. 1992).
167 Id. at 136.
168 *See generally L. Ray Patterson, Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 6-9 (1987) (discussing preference for public benefit in achievement of copyright purposes). The Supreme Court articulated this proposition years prior to the *Feist* decision in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 186 U.S.P.Q. (BNA) 65 (1975) (stating that goal of copyright law is to “stimulate artistic creativity for the general public good”).
169 See *L. Ray Patterson, Copyright and "the exclusive Right" of Authors*, 1 J. INTELL. PROP. L. 3 (1993) (discussing conflict between legislative purposes and judicial results in copyright law).
171 Id. at 1474.
CNN's programming, either in whole or in part.\textsuperscript{172} The Eleventh Circuit reversed and emphasized that the injunction would prevent copying of unprotectable facts and future works whose copyrightability had yet to be determined.\textsuperscript{173} The court focused on the repudiation of sweat of the brow as a preference for a regulatory, rather than a proprietary, basis for copyright protection.\textsuperscript{174} The panel emphasized that by taking a regulatory view, the \textit{Feist} Court showed a preference for enhancing the public domain over enriching the author's property rights.\textsuperscript{175} The Eleventh Circuit implied that post-\textit{Feist} injunctions should only be granted where the restrictions extend only to clearly original portions of compilations.

The repudiation of sweat of the brow prevents courts from avoiding the underlying policy considerations of the \textit{Feist} Court by finding "creativity" based on labor. Further, this explicit edict by the Court demonstrates a preference for dissemination of works into the public domain over the extension of property rights for authors. For the most part, decisions following \textit{Feist} abide by the policies and dictates of the Supreme Court. Courts have elaborated upon the standards for creativity and have applied the tests developed in the \textit{Feist} case; however, some courts have strayed from the letter of the Supreme Court's holdings. These courts neglected to follow the explicit repudiation of the sweat of the brow theory.

\textbf{PART IV: BEYOND \textit{FEIST}}

\textit{Cable News Network v. Video Monitoring Services}\textsuperscript{176} demonstrates the ideological importance of the \textit{Feist} decision. Most courts have refined the literal applications of \textit{Feist} for factual compila-

\textsuperscript{172} Id. at 1475.

\textsuperscript{173} Id. at 1481. The circuit court further noted that CNN presented registration only of one edition of its special programming "Crossfire." Allowing this injunction would also be protecting unregistered and unfixed material. \textit{Id.}


\textsuperscript{175} \textit{Id.}

\textsuperscript{176} 940 F.2d 1471 (11th Cir. 1991).
tions. The impact of the *Feist* decision extends well beyond simply stating a test for copyrightability of compilations. The Supreme Court announced a philosophy of copyright priorities that extends to all works of authorship. The purpose of copyright as set forth in the Constitution is to promote learning. Copyright laws and the courts must determine whether this purpose is to be furthered by support for creation or dissemination of new works of authorship. The Supreme Court, in *Twentieth Century Music Corp. v. Aiken*, announced that the primary emphasis of copyright is to enhance the public domain; benefits directly conferred upon authors are secondary. However, courts subsequently applying copyright law have strayed from this ruling. In *Feist*, the court reiterated this position and the major holdings of the decision reflect this underlying philosophy.

Throughout United States copyright history, the statutory guidelines have provided primarily for distribution with reward for the author as a subsidiary concern. The courts, however, have often focused on the statutory monopoly for the author at the expense of encouraging public dissemination of new works. By declaring a constitutional mandate for creativity, the Supreme Court ensures that the focus of the legislature will remain the same. The Court further emphasized that the dictates of *Feist* originated in the statute and legislative histories, illustrating the policy position of Congress.

By limiting the scope of copyright to only those elements of a work which are original to the author, the Court furthers the goal of distribution by prohibiting recapture of the public domain.

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177 The Constitution uses the phrase "To Promote the Progress of Science and useful Arts", U.S. CONST. art. I, § 8, cl. 8. The term "science" has been read in its historical context to mean "knowledge" or "learning". See Patterson, supra note 8, at 404.

178 For a general discussion of the competing views and overview, see Patterson, supra note 168, at 2-13.

179 422 U.S. 151 (1975); see also, supra note 168 and accompanying text.

180 Id. at 155.

181 See generally Patterson, supra note 168 (contrasting legislative purposes and judicial interpretations of copyright law).


183 Id. at 359.
Facts, ideas, and processes do not merit copyright protection. By limiting the protection to the original contributions of an author, the Supreme Court invalidates the concept of copyright as a property right.

Finally, by renouncing the sweat of the brow theory, the Court underscores its ideological stance. Sweat of the brow contradicts the mandate of creativity and limited protection. One of the Court's concerns was that the sweat of the brow doctrine ignores the need for public access to factual works by granting to the author a monopoly allowing recapture of public domain information. Further, the Court was concerned that the monopoly created allows a form of private censorship.

These ideological policies may lead to applications of this landmark decision far outside the narrow boundaries of factual compilations. The Supreme Court's emphasis on public dissemination over the author's property rights has possible applications in all aspects of copyright law.

PART V: CONCLUSION

*Feist Publications, Inc. v. Rural Telephone Serv.* has proven to be a landmark copyright decision. In *Feist*, the Supreme Court issued three major holdings: (1) the Constitution mandates creativity as a prerequisite for copyright protection; (2) such protection is limited to only original elements of a work; and (3) the sweat of the brow doctrine was repudiated.

The constitutional mandate for creativity is a threshold requirement for factual compilations and all works of authorship governed by the copyright laws. However, it remains a low threshold which any work exceeding the *Feist* criteria of practical inevitability and obviousness can meet. In considering whether a work meets this standard, industry norms and functionality may be considered.

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184 499 U.S. at 353; 17 U.S.C. § 102(b) (1988) ("In no case does copyright protection... 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.").

185 See Patterson, supra note 8, at 88.


187 Id. at 354; see also Patterson & Joyce, supra note 48, at 27.
Infringement requires not only a valid copyright of a sufficiently creative work, but also that the defendant copied those elements of the work original to the copyright holder. This requirement has narrowed the number of cases in which infringement is found. This result prevents authors, especially of factual compilations, from recapturing information in the public domain.

Finally, by explicitly repudiating the sweat of the brow doctrine, the Court emphasized the role and purpose of copyright law. This revocation prevents an author from bypassing the requirement set forth in *Feist* by labeling effort as creativity. More importantly, by holding that the sweat of the brow doctrine is contrary to copyright policy, the Court established that the primary goal of copyright is to distribute information to the public. Benefits to authors are secondary. This policy can and should be utilized, not only for factual compilations, but in all aspects of copyright law.

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Atari challenged the Register's refusal to grant copyright to a video game, "Breakout." The game consists of a multi-colored brick wall, bouncing ball, and rectangle paddles. The Register based refusal on the fact that the audio-visual work consisted of uncopyrightable geometric shapes. The court of appeals emphasized that the Register is required to judge the work as a whole and found that rejection of the application was unreasonable in light of Feist's minimal creativity standard. The court held that the organization of these underlying shapes was sufficient to merit a grant of copyright. This was the second hearing of this case by the court of appeals, the first, 888 F.2d 878 (1989), is often cited in textbooks and commentaries.


In this action for infringement, the issues were whether a yellow page directory met the minimal creativity requirement and, if so, whether the second directory copied constituent original parts of the first. The court held that there was minimal creativity in the text, graphics and positioning of the individual advertisements, as well as textual material designed to assist the user. However, the court further found that the elements of the directory that were copied, primarily the individual business listings, were not sufficiently original to merit protection. The court, therefore, held that there was no infringement.


The plaintiff wrote a book about Medicaid which included tables that he created from information derived from a Governor's report. The plaintiff's tables condensed the report's information into a more
clear and readable format. The defendant admitted that he copied the plaintiff's tables, but claimed that since the information originated from a Governor's report, the tables consisted of public domain facts and were, therefore, uncopyrightable. The court agreed that the facts were not copyrightable but held that the plaintiff's arrangement, selection and coordination deserved copyright protection. By copying the tables, the defendant infringed the plaintiff's copyright.


The district court granted a preliminary injunction to the plaintiff, a news broadcasting network. The injunction prohibited copying or selling any portion of the network's broadcasts. The defendant monitors television programs and provides statistical data and copies of programming to its customers, which include producers of commercials and broadcasting companies. On appeal, the court examined the underlying policies of _Feist_ and held that the injunction was contrary to those teachings. The court revoked the injunction on the basis that it protected future works which had not been determined to merit copyright coverage. The panel stated that the first priority of copyright is to encourage the distribution of information, emphasizing the regulatory nature of copyright law. The court stated that allowing this injunction would risk protecting facts available in the public domain contrary to copyright policies.

_Folio Impressions, Inc. v. Byer California, 937 F.2d 759, 19 U.S.P.Q.2d (BNA) 1418 (2d Cir. 1991)._  

The Second Circuit applied the minimal creativity standard to a fabric design. The plaintiff owned a copyright on a fabric design of roses arranged on a background in horizontal rows. The defendant admitted to modeling their fabric design upon one created by the plaintiff; however, the graphic of the roses and arrangement of the defendant's pattern differed from the plaintiff's. The court held that the representation of roses and the arrangement of the roses upon a background met the low threshold of creativity. However, the panel found no infringement by the defendant because of the
limited protection given to the design and the differences between the two patterns.


The district court held that the Register of Copyrights did not abuse his discretion in denying copyright protection to a chinaware pattern. The Register's office examined the plaintiff's application on three occasions and concluded that the pattern lacked sufficient creative authorship to merit protection. The court held that lack of creativity is a proper reason to deny protection. The court emphasized that determinations of creativity require informed judgments and that deference should be given to the Register regarding determinations on this issue.


At issue in this case were two classified business directories geared toward the Chinese-American community in New York City. Both were similar in format to a typical yellow page directory; however, each utilized headings directed toward the particular audience, for example, "Bean Curd & Bean Sprout Shops". The defendant's directory contained substantially fewer listings and headings than the plaintiffs. The court stressed that the important issue was whether the organizing principle guiding the selection for the two publications was similar, not whether there was an overlap in the information contained in the directories. The Second Circuit held that the plaintiff's directory was subject to protection but that the defendant's publication did not infringe that copyright.


The plaintiff brought suit against the defendant for infringement of a baseball pitching form. The plaintiff created a pitching form listing nine categories of baseball statistics. The court held that the plaintiff's form deserved copyright protection based upon the
unique selection of statistics chosen compared with other published pitching forms. However, the Second Circuit found that defendant's form, which used six of the plaintiff's nine categories and added four of its own, did not infringe the copyright. The court emphasized that the copyright given to the plaintiff's work rested solely in the original selection, and protection would only cover infringement of that element.


The plaintiff in this case authored a book containing seventy-six terms relating to nature that served as the organizing principle of the work. These terms were translated and selected based on the plaintiff's knowledge of nature and Middle English. The plaintiff alleged that the defendant infringed his book by imprinting these seventy-six terms on various products sold in their stores. The district court found that the plaintiff's selection met the Feist minimal creativity standard. The book was, therefore, held to be copyrightable. The issue of infringement was reserved for trial.


The plaintiff published maps based upon those of the United States Geological Survey (USGS). In preparation, the plaintiff researched, verified and updated the data contained in the USGS maps. The Fifth Circuit held that these choices made by the plaintiff constituted enough creativity to merit copyright protection for the maps as factual compilations. The court held that, alternatively, the maps were sufficiently creative to merit protection as a pictorial and graphic work of authorship. The case was remanded to determine whether the defendant's products infringed the plaintiff's copyright.
This case involved two taxi drivers' guides to New York City which contain mileage rates, public services, restaurants, and the like. The plaintiff alleged infringement of its guide, in part, based upon the copying of "false facts" contained within both books. The court held that this information, represented as facts, could be freely copied. The court reasoned that the purpose of copyright, to disseminate information, would be restricted if facts could not be copied without risk of violating a copyright. The defendant admitted that portions of its guide were taken from the plaintiff's work. The court applied *Feist's* requirement that infringement occurs only with respect to those elements that are original. Finding the portion of the plaintiff's guide entitled "streets most useful to a taxi driver" to meet the creativity standard, the court issued an injunction preventing the defendant from copying only that segment of the book.


The plaintiff owned a valid copyright on a glass sculpture. The defendant produced a spiral sculpture with general similarities to that of the plaintiff's. The court established that, just as registration is prima facie evidence of a valid copyright, it is likewise presumptive of originality. The court held that the presumption of originality had not been rebutted in this case. However, the second sculpture, although similar to the plaintiff's work, had a different overall concept and feel. The court found no infringement.


The plaintiff argued that five imprinted plastic signs, although not individually copyrightable, could be protected as a compilation when displayed as a set. The plaintiff sold and packaged the signs individually. The court denied copyright protection stating that the grouping did not provide function to the individual signs and,
therefore, the products were evaluated separately.


The Fourth Circuit held that there was sufficient originality in a series of tariff summaries to merit copyright protection. The court emphasized the plaintiff's time-consuming review, analysis and interpretation of the data in preparation for publication. The court failed to discuss the selection, coordination and arrangement of the work. The panel held that the defendant, by inadvertently copying the summaries, infringed the copyright.


The Second Circuit held that a horse-racing chart produced by the plaintiff did not merit copyright protection; therefore, the defendant did not infringe his work. The plaintiff's chart listed the days of the month on one axis and the last thirteen months on the other. This arrangement was standard to all horse-racing charts and, therefore, failed to meet the minimal creativity requirement.