

ST. THOMAS UNIVERSITY SCHOOL OF LAW
INTRODUCTION TO LEGAL STUDIES (ILS)
CONDITIONAL, SECTION 1

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ASSIGNMENT FOR TUESDAY, JUNE 7

TOPIC: COPYRIGHT

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DAY 2 ASSIGNMENT

ASSIGNMENT FOR DAY 2 (TUESDAY, JUNE 7)

First, read the study questions. They will help you with the readings.

Second, carefully read the materials in the order shown below. Fully brief any cases and bring your printed briefs to class:

- U.S. CONSTITUTION, Article I, sec. 8, cl. 8
- Statutory selections from Copyright Act
- Sample Copyright regulation
- *Feist v. Rural Telephone Service Co.*

Finally, after you've read the assigned materials, answer the study questions. Be prepared to discuss the study questions and assigned readings in class. To answer the study questions, you will likely need to go back and reconsider the readings.

DAY 2 STUDY QUESTIONS

Constitution, Copyright statutes, Copyright regulations

1. What is the difference between the Constitution, statutes, and regulations?
 - a. Article I, section 8, clause 8 is part of the Constitution. Does it *create* copyright law?
 - b. The statutes all have “U.S.C.” (United States Code) as part of their citation. These are copyright statutes enacted by the U.S. Congress.
 - c. The last provision is a “regulation” created by the U.S. Register of Copyrights.
 - d. If any of these laws conflict, which one(s) prevail? Think “rock, paper, scissors.”
2. Are facts copyrightable? Are ideas copyrightable? See 17 U.S.C. § 102(b).
3. Use the statutes to answer these questions:
 - a. What kind of “work of authorship” is a book? A movie? The Statue of Liberty? A movie version of a *Harry Potter* book? See section 101, 102(a).
 - b. When Netflix streams a movie, is it making a “display” or a “performance”? Whether it’s a display or a performance, would a Netflix stream be “public”? See section 101.
 - c. Does section 102(a) list the *only* kinds of works of authorship that are possible?
 - d. Can something that is in computer cache memory for 1/10 of a second be copyrighted? See section 102(a).
 - e. Suppose I invent a new accounting technique. Can it be copyrighted? See section 102.
 - f. You own the copyright in a particular “musical work” (lyrics & melody). I own the copyright for a “sound recording” of the same musical work (see section 101 definition). Can you prevent an analog radio station from playing the song on air? Can I?
 - g. Suppose I write and record parodies of Beatles songs. I post my songs to YouTube. The parodies poke fun at The Beatles as well as 1960s culture. Further suppose I get sued by the copyright owner of the Beatles songs I use. What is your best argument that my songs constitute “fair use”? See 17 U.S.C. § 107.
 - h. A Tweet is limited to 140 characters. Can it be copyrighted? See 37 CFR 202.1. If your answer under section 202.1 is “no,” can you make an argument that section 202.1 conflicts with the 17 U.S.C. § 102(a) or the Constitution?

Feist

1. Why did Rural sue Feist?
 - a. What is the *legal* reason Rural sued Feist?
 - b. What is the *real* reason Rural sued Feist?
2. How did the lower two courts rule? What does the Supreme Court do?
3. Note that the opinion is broke into parts and subparts. What is the function of Part I? Part II.A? Part II.B? Part II.C? Part III?

4. Where did Rural's white pages listings come from?
 - a. Who "created" the phone numbers?
 - b. Who "created" the names?
 - c. Does Feist deny copying from Rural? If so, why isn't Feist automatically liable?
5. Rural created four fictitious listings that were copied by Feist. Rural does not seem to argue that it has copyright in those listings. Do you think it should have?
6. What kind of "work of authorship" is a white pages book? See 17 U.S.C. § 101, 102(a).
7. In paragraph 7, the Court holds that "This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are."
 - a. Exactly *what* is Rural claiming copyright in? The individual white page listings? The listings as a grouping?
 - b. Hint: re-read 17 U.S.C. § 101 (definitions of "compilation" and "derivative work"); also read 17 U.S.C. § 103(b).
8. Justice O'Connor talks about "originality." What is required for a work to be "original?"
9. Is it hard or easy to show "originality"?
 - a. Are Rural's white pages "original"?
 - b. What if you and I independently take the same photo of the law school building? Whose work is original? The first photographer's only? Both photographers? Why?
 - c. Is this handout original? If "yes," consider that significant parts of this handout were written by people other than Professor Nathenson. Did your answer change?
10. Let's talk about "labor" and tie today's case into yesterday's case.
 - a. Recall John Locke's theory of property rights arising from labor. Additionally, consider Justice Pitney's majority opinion in *INS v. AP* (par. 14), where the majority discussed the importance of the "money, skill, and effort" of the Complainant.
 - b. Contrast Justice Holmes' dissent in *INS* (par. 1), where he argues that property requires "exclusion by law from interference."
 - c. Now consider Justice O'Connor's discussion of "sweat of the brow" theory. Is Justice O'Connor's opinion more like Locke and Pitney or more like Justice Holmes? Or does O'Connor have a very different approach?
11. Suppose Congress disagreed with Justice O'Connor and wanted to allow copyright rights in white pages listings. Could Congress overrule *Feist* to allow copyright? Why or why not?
12. Regardless of the law, what result do you think is the best? Why?
13. Should Google have a copyright in its search-engine database?

CONSTITUTION, STATUTES, REGULATIONS

U.S. Constitution, Article I, Section 8, clauses 3, 8, and 18

The Congress shall have power . . .

. . . .

[3] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

. . . .

[8] 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;

. . . .

[18] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

17 U.S.C. § 101. Definitions [selections]

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

“Audiovisual works” are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

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 term “compilation” includes collective works.

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

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

“Literary works” are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

“Motion pictures” are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

To perform or display a work “publicly” means—

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

17 U.S.C. § 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

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

(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.

17 U.S.C. § 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section[106], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

37 CFR 202.1. Material not subject to copyright.

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

- (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;
- (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;
- (c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;
- (d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.
- (e) Typeface as typeface.

FEIST PUBLICATIONS V. RURAL TELEPHONE SVC. CO.

FEIST PUBLICATIONS, INC. v. RURAL TELEPHONE SERVICE COMPANY, INC.

Supreme Court of the United States

499 U.S. 340

Argued Jan. 9, 1991

Decided March 27, 1991

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

I

- [1] Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural's subscribers, together with their towns and telephone numbers. The yellow pages list Rural's business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.
- [2] Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories. Unlike a typical directory, which covers only a particular calling area, Feist's area-wide directories cover a much larger geographical range, reducing the need to call directory assistance or consult multiple directories. The Feist directory that is the subject of this litigation covers 11 different telephone service areas in 15 counties and contains 46,878 white pages listings—compared to Rural's approximately 7,700 listings. Like Rural's directory, Feist's is distributed free of charge and includes both white pages and yellow pages. Feist and Rural compete vigorously for yellow pages advertising.
- [3] As the sole provider of telephone service in its service area, Rural obtains subscriber information quite easily. Persons desiring telephone service must apply to Rural and provide their names and addresses; Rural then assigns them a telephone number. Feist is not a telephone company, let alone one with monopoly status, and therefore lacks independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the 11 telephone companies operating in northwest Kansas and offered to pay for the right to use its white pages listings.
- [4] Of the 11 telephone companies, only Rural refused to license its listings to Feist. Rural's refusal created a problem for Feist, as omitting these listings would have left a gaping hole in its area-wide directory, rendering it less attractive to potential yellow pages advertisers. In a decision subsequent to that which we review here, the District Court determined that this

was precisely the reason Rural refused to license its listings. The refusal was motivated by an unlawful purpose “to extend its monopoly in telephone service to a monopoly in yellow pages advertising.”

- [5] Unable to license Rural’s white pages listings, Feist used them without Rural’s consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired personnel to investigate the 4,935 that remained. These employees verified the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual’s street address; most of Rural’s listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist’s 1983 directory were identical to listings in Rural’s 1982–1983 white pages. App. 54 (¶ 15–16), 57. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.
- [6] Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural’s white pages. Rural asserted that Feist’s employees were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural, explaining that “[c]ourts have consistently held that telephone directories are copyrightable” and citing a string of lower court decisions. In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed “for substantially the reasons given by the district court.” We granted certiorari, to determine whether the copyright in Rural’s directory protects the names, towns, and telephone numbers copied by Feist.

II

A

- [7] This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that “[n]o author may copyright his ideas or the facts he narrates.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985). Rural wisely concedes this point, noting in its brief that “[f]acts and discoveries, of course, are not themselves subject to copyright protection.” Brief for Respondent 24. At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. Compilations were expressly mentioned in the Copyright Act of 1909, and again in the Copyright Act of 1976.
- [8] There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data—*i.e.*, wholly factual information not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope.
- [9] The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be

original to the author. Original, as the term is used in copyright, means only 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. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.

- [10] Originality is a constitutional requirement. The source of Congress’ power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to “secur[e] for limited Times to Authors ... the exclusive Right to their respective Writings.”
- [11] The originality requirement articulated in *The Trade–Mark Cases* and *Burrow–Giles* remains the touchstone of copyright protection today. . . . It is this 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.” 1 M. Nimmer & D. Nimmer, *Copyright* §§ 2.11[A], p. 2–157 (1990) (hereinafter Nimmer). 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. . . . The same is true of all facts—scientific, historical, biographical, and news of the day. “[T]hey may not be copyrighted and are part of the public domain available to every person.” *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 (CA5 1981).
- [12] Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Nimmer §§ 2.11[D], 3.03. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement. See *Harper & Row*, 471 U.S., at 547. Accord, Nimmer § 3.03.
- [13] This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. . . . Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection. No matter how original the format, however, the facts themselves do not become original through association.
- [14] This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a

valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "[N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking... [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." Ginsburg 1868.

[15] 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*, 471 U.S., at 589, 105 S.Ct., at 2245 (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." Art. I, § 8, cl. 8. 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, assuming the absence of original written expression, 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.

[16] 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 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." *Baker v. Selden*, 101 U.S. 99, 103 (1880). We reiterated this point in *Harper & Row*:

"[N]o author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality.

[17] "[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—as long as such use does not unfairly appropriate the author's original contributions." 471 U.S., at 547–548 (citation omitted).

[18] This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation, 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.

B

[19] As we have explained, originality is a constitutionally mandated prerequisite for copyright protection. The Court's decisions announcing this rule predate the Copyright Act of 1909, but ambiguous language in the 1909 Act caused some lower courts temporarily to lose sight of this requirement. . . . Most courts construed the 1909 Act correctly, notwithstanding the less-than-perfect statutory language. . . . But some courts misunderstood the statute. . . .

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 classic formulation of the doctrine appeared in *Jeweler’s Circular Publishing Co.*, 281 F., at 88:

“The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill *or originality*, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author” (emphasis added).

[20] The “sweat of the brow” doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement—the compiler’s original contributions—to the facts themselves. 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 “independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information.” *Id.*, at 88–89 (internal quotation marks omitted). “Sweat of the brow” courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas. . . .

[21] Without a doubt, the “sweat of the brow” doctrine flouted basic copyright principles. Throughout history, copyright law has “recognize[d] a greater need to disseminate factual works than works of fiction or fantasy.” *Harper & Row*, 471 U.S., at 563. Accord, Gorman, Fact or Fancy: The Implications for Copyright, 29 J. Copyright Soc. 560, 563 (1982). But “sweat of the brow” courts took a contrary view; they handed out proprietary interests 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.” *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (CA2 1966), cert. denied 385 U.S. 1009 (1967). “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 without the necessary justification of protecting and encouraging the creation of ‘writings’ by ‘authors.’” Nimmer § 3.04, p. 3–23 (footnote omitted).

C

[22] “Sweat of the brow” decisions did not escape the attention of the Copyright Office. When Congress decided to overhaul the copyright statute and asked the Copyright Office to study existing problems, the Copyright Office promptly recommended that Congress clear up the confusion in the lower courts as to the basic standards of copyrightability. The Register of Copyrights explained in his first report to Congress that “originality” was a “basic requisit[e]” of copyright under the 1909 Act, but that “the absence of any reference to [originality] in the statute seems to have led to misconceptions as to what is copyrightable matter.” Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., p. 9 (H. Judiciary Comm. Print 1961). The Register suggested

making the originality requirement explicit. *Ibid.*

- [23] Congress took the Register’s advice. In enacting the Copyright Act of 1976, Congress dropped the reference to “all the writings of an author” and replaced it with the phrase “original works of authorship.” 17 U.S.C. § 102(a). In making explicit the originality requirement, Congress announced that it was merely clarifying existing law: “The two fundamental criteria of copyright protection [are] originality and fixation in tangible form.... The phrase ‘original works of authorship,’ which is purposely left undefined, is intended to incorporate without change *the standard of originality established by the courts under the present [1909] copyright statute.*” H.R.Rep. No. 94–1476, p. 51 (1976) (emphasis added)
- [24] Congress took another step to minimize confusion by deleting the specific mention of “directories ... and other compilations” in § 5 of the 1909 Act. As mentioned, this section had led some courts to conclude that directories were copyrightable *per se* and that every element of a directory was protected. In its place, Congress enacted two new provisions. First, to make clear that compilations were not copyrightable *per se*, Congress provided a definition of the term “compilation.” Second, to make clear that the copyright in a compilation did not extend to the facts themselves, Congress enacted § 103.
- [25] The definition of “compilation” is found in § 101 of the 1976 Act. It defines a “compilation” in the copyright sense 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*” (emphasis added).
- [26] The purpose of the statutory definition is to emphasize that collections of facts are not copyrightable *per se*. It conveys this message through its tripartite structure, as emphasized above by the italics. The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an “original” work of authorship. “[T]his tripartite conjunctive structure is self-evident, and should be assumed to ‘accurately express the legislative purpose.’ ” Patry 51, quoting *Mills Music*, 469 U.S., at 164, 105 S.Ct., at 645.
- [27] At first glance, the first requirement does not seem to tell us much. It merely describes what one normally thinks of as a compilation—a collection of pre-existing material, facts, or data. What makes it significant is that it is not the *sole* requirement. It is not enough for copyright purposes that an author collects and assembles facts. To satisfy the statutory definition, the work must get over two additional hurdles. In this way, the plain language indicates that not every collection of facts receives copyright protection. Otherwise, there would be a period after “data.”
- [28] The third requirement is also illuminating. It emphasizes that a compilation, like any other work, is copyrightable only if it satisfies the originality requirement (“an *original* work of authorship”). Although § 102 states plainly that the originality requirement applies to all works, the point was emphasized with regard to compilations to ensure that courts would not repeat the mistake of the “sweat of the brow” courts by concluding that fact-based works are treated differently and measured by some other standard. As Congress explained it, the goal was to “make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works ... containing preexisting material.” H.R. Rep., at

57; S. Rep., at 55, U.S. Code Cong. & Admin. News 1976, p. 5670.

- [29] The key to the statutory definition is the second requirement. It instructs courts that, in determining whether a fact-based work is an original work of authorship, they should focus on the manner in which the collected facts have been selected, coordinated, and arranged. This is a straightforward application of the originality requirement. Facts are never original, so the compilation author can claim originality, if at all, only in the way the facts are presented. To that end, the statute dictates that the principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection.
- [30] Not every selection, coordination, or arrangement will pass muster. This is plain from the statute. It states that, to merit protection, the facts must be selected, coordinated, or arranged “in such a way” as to render the work as a whole original. This implies that some “ways” will trigger copyright, but that others will not. See Patry 57, and n. 76. Otherwise, the phrase “in such a way” is meaningless and Congress should have defined “compilation” simply as “a work formed by the collection and assembly of preexisting materials or data that are selected, coordinated, or arranged.” That Congress did not do so is dispositive. In accordance with “the established principle that a court should give effect, if possible, to every clause and word of a statute,” *Moskale v. United States*, 498 U.S. 103, 109–110 (1990) (internal quotation marks omitted), we conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.
- [31] As discussed earlier, however, the originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (*i.e.*, without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. ...
- [32] Even if a work qualifies as a copyrightable compilation, it receives only limited protection. This is the point of § 103 of the Act. Section 103 explains that “[t]he subject matter of copyright ... includes compilations,” § 103(a), but that copyright protects only the author’s original contributions—not the facts or information conveyed:
- “The copyright in a compilation ... extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.” § 103(b).
- [33] As § 103 makes clear, copyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected. “The most important point here is one that is commonly misunderstood today: copyright ... has no effect one way or the other on the copyright or public domain status of the preexisting material.” H.R. Rep., at 57. . . . The 1909 Act did not require, as “sweat of the brow” courts mistakenly assumed, that each subsequent compiler must start from scratch and is precluded from relying on research undertaken by another. Rather, the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler—the selection, coordination, and arrangement of facts.
- [34] In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not

“sweat of the brow,” is the touchstone of copyright protection in directories and other fact-based works. Nor is there any doubt that the same was true under the 1909 Act. The 1976 revisions were a direct response to the Copyright Office’s concern that many lower courts had misconstrued this basic principle, and Congress emphasized repeatedly that the purpose of the revisions was to clarify, not change, existing law. The revisions explain with painstaking clarity that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101. . . .

III

- [35] There is no doubt that Feist took from the white pages of Rural’s directory a substantial amount of factual information. At a minimum, Feist copied the names, towns, and telephone numbers of 1,309 of Rural’s subscribers. Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. The first element is not at issue here; Feist appears to concede that Rural’s directory, considered as a whole, is subject to a valid copyright because it contains some foreword text, as well as original material in its yellow pages advertisements. See Br. for Petitioner 18; Pet. for Cert. 9.
- [36] The question is whether Rural has proved the second element. In other words, did Feist, by taking 1,309 names, towns, and telephone numbers from Rural’s white pages, copy anything that was “original” to Rural? Certainly, the raw data does not satisfy the originality requirement. 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. *Burrow–Giles*, 111 U.S., at 58, 4 S.Ct., at 281. 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. The originality requirement “rule[s] out protecting ... names, addresses, and telephone numbers of which the plaintiff by no stretch of the imagination could be called the author.” *Patterson & Joyce* 776.
- [37] Rural essentially concedes the point by referring to the names, towns, and telephone numbers as “preexisting material.” Brief for Respondent 17. Section 103(b) states explicitly that the copyright in a compilation does not extend to “the preexisting material employed in the work.”
- [38] The question that remains is whether Rural selected, coordinated, or arranged these uncopyrightable facts in an original way. As mentioned, originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist. . . . As this Court has explained, the Constitution mandates some minimal degree of creativity, and an author who claims infringement must prove “the existence of ... intellectual production, of thought, and conception.” *Burrow–Giles*, *supra*, 111 U.S., at 59–60.
- [39] The selection, coordination, and arrangement of Rural’s white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural’s white pages are entirely typical. Persons desiring telephone service in Rural’s service area fill out an application and Rural issues them a telephone number. In preparing its white

pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

- [40] Rural’s selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is “selection” of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.
- [41] We note in passing that the selection featured in Rural’s white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly “select” to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. Accordingly, one could plausibly conclude that this selection was dictated by state law, not by Rural.
- [42] Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural’s subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But 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.
- [43] We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural’s combined white and yellow pages directory. As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. Rural’s white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, 17 U.S.C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality. 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.
- [44] Because Rural’s white pages lack the requisite originality, Feist’s use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural’s efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, “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.” *Baker v. Selden*, 101 U.S., at 105.

The judgment of the Court of Appeals is

Reversed.