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COPYRIGHT PROTECTION FOR FACTUAL COMPILATIONS—REVIVING THE MISAPPROPRIATION DOCTRINE

INTRODUCTION

A telephone directory generally is not thought to exist in the same category of intellectual property¹ as a book of memoirs. Nevertheless, the copyright law of the United States Code protects them both² as "literary works,"³ even though one merely lists names, while the other conveys nonfiction narrative of historical importance.

Federal copyright law has extended protection to compilations of facts since 1790, when Congress passed the first copyright statute,⁴ pursuant to the copyright and patent clause of the Constitution.⁵ The term "compilations," however, was not statutorily defined until Congress passed the 1976 Copyright Act,⁶ which describes a compilation 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."⁷ Compilations of fact include works such as directories, maps, catalogs and indexes.⁸

1. "Intellectual property" refers generally to the law of patents, trade secrets, trademarks, and copyrights. See E. Kintner and J. Lahr, *An Intellectual Property Law Primer* chs. 2-5 (2d ed. 1982). The term is somewhat of an oxymoron because the creator of such property can only "own" it, that is, exclude others from its use, if he does not let it out of his physical possession. See *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring) ("The notion of property starts . . . from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression."). Authors of intellectual works physically cannot control reproduction and distribution once a copy has left their possession. Thus, the copyright law is necessary to aid authors in controlling the reproduction of their work.

Copyright law traces its roots to the Statute of Anne, the first statute to recognize the rights of authors. See 8 Anne ch. 19 (1709). For a history of copyright law in England and the United States, see L. Patterson, *Copyright in Historical Perspective* (1968).

2. See *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 809 (11th Cir. 1985) (stating "[d]irectories can receive copyright protection as 'literary works'"); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 547-49 (1985) (holding memoirs of President Ford protected by copyright).

3. See 17 U.S.C. § 102(a) (1982) (protecting "original works of authorship" including "literary works"); *id.* § 101 (literary works are "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols").

4. Copyright Act of 1790, ch. 15, 1 Stat. 124, 124 (protecting authors or assignees of any "map, chart, book"); see *Blunt v. Patten*, 3 F. Cas. 763, 764-65 (C.C.S.D.N.Y. 1828) (No. 1,580) (stating charts containing information on surveys and soundings may receive protection under copyright).

5. U.S. Const. art. I, § 8, cl. 8. The Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

6. 17 U.S.C. §§ 101-914 (1982 & Supp. IV 1986).

7. *Id.* § 101.

8. "Compilations," as defined in the statute, encompasses compilations of

Despite this long history of copyright protection for compilations, considerable confusion persists regarding the standards required for copyright protection of factual compilations.⁹ The controversy centers on whether a compiler's labor alone supplies a sufficient basis for copyright protection,¹⁰ or whether other criteria, such as arrangement or selection of the facts in the compilation, constitute the sole determinants of eligibility for such protection.¹¹ The disagreement over protection for labor also pervades the case law addressing the *extent* of protection¹² afforded to copyrightable compilations, which is delimited by the law of infringement¹³ and fair use.¹⁴ In practical terms, for example, these issues arise when one directory publisher uses information from a prior, copyrighted directory.

These controversies continue because certain doctrines of copyright law are not easily applied to factual compilations. In response to these theoretical inconsistencies, some courts and commentators suggest that state misappropriation law should govern the protection of compilations¹⁵ because its rationale is better suited to the nature of factual

noncopyrightable material (facts), such as directories, as well as compilations of copyrightable material, such as literature anthologies. The latter are known as "collective works," which are a particular type of statutory compilation. See 17 U.S.C. § 101 (1982); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 122, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5737 (collective work is a type of compilation composed of material that is copyrightable in its own right). This Note focuses on the peculiar problems of compilations consisting of facts and other noncopyrightable material in the public domain.

9. See *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2d Cir. 1984) ("Copyright law and compilations are uneasy bedfellows. . ."); *Rand McNally & Co. v. Fleet Management Sys.*, 634 F. Supp. 604, 608 (N.D. Ill. 1986) ("The copyrightability of factual compilations . . . presents intellectual difficulties in determining where protectible copying of facts ends and unlawful copying of the compilation begins."); *Moore v. Lighthouse Publishing Co.*, 429 F. Supp. 1304, 1309 (S.D. Ga. 1977) ("One emerges from this jungle of generality, contradiction and uncertainty with the impression that the only thing certain in this area of law is the lack of it.").

10. This view emphasizes the labor expended by a compiler and is called the "sweat of the brow" test. See *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131-32 (8th Cir. 1985) (finding proper focus is effort expended by compiler); *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5-6 (7th Cir. 1977) (same). See *infra* notes 77-83 and accompanying text.

11. This view, known as the "subjective selection" approach, examines the merit of the compiler's judgment in arranging and selecting the material, explicitly disregarding the labor of the compiler. See *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 207 (2d Cir. 1986) (determining that subjective selection and arrangement of information merits copyright protection, not sweat of an author's brow), *cert. denied*, 108 S. Ct. 79 (1987); *Rand McNally & Co. v. Fleet Management Sys.*, 634 F. Supp. 604, 606-07 (N.D. Ill. 1986) (same); see also *infra* notes 84-90 and accompanying text.

12. The controversy here concerns whether a subsequent compiler can make use of the data contained in the first compilation or whether he must repeat the original research in order to use the same data. See *infra* notes 114-124.

13. See 17 U.S.C. § 501(a) (1982); *infra* notes 106-128 and accompanying text.

14. See 17 U.S.C. § 107 (1982); *infra* notes 60-61 and accompanying text.

15. See *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 810 n.9 (11th Cir. 1985) (citing 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 3.04, at 3-19; *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1370 (5th

compilations.¹⁶

This Note proposes instead that copyright law is the proper means of protection, but that its application to compilations of fact requires clarification. Part I defines the nature of factual compilations and discusses the constitutional and statutory bases of copyright law in general. Part II examines the confusion in the law over the correct standard of originality resulting from the mismatching of copyright law and factual compilations. It also discusses the disagreement over the proper standard of infringement applied to factual compilations: whether and to what extent a subsequent compiler may make use of an existing compilation. Part III recommends that where factual compilations are concerned, courts should apply a broad standard of originality, based on the language of the statute, which suggests that both labor and arrangement/selection factors must be considered. Because the traditional infringement analysis often cannot be applied meaningfully to these works, the resolution of these cases must often turn on whether the alleged infringement is a fair use.

I. BACKGROUND

A. *Bases and Requirements for Copyright Protection of Factual Compilations*

The first copyright statute¹⁷ passed by Congress pursuant to the copyright and patent clause of the Constitution¹⁸ named charts and maps¹⁹ among works protectible by copyright. Since then, the presumption that compilations of facts are copyrightable under the Constitution's grant of authority has not been questioned.²⁰

Cir. 1981)); Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569, 1571 (1963). Another view dismisses the dilemma simply by classifying the directory cases as a "category by themselves." See *Miller*, 650 F.2d at 1370.

16. See *infra* note 135 and accompanying text.

17. See Copyright Act of 1790, ch. 15, 1 Stat. 124, 124.

18. See U.S. Const. art. I, § 8, cl. 8; *supra* note 5.

19. See *supra* note 17. Maps are pictorial compilations of geographic data. See 17 U.S.C. § 101 (1982).

20. See, e.g., *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 547 (1985) (ruling that "compilation of pure fact, entails originality" and is thus copyrightable); *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 85 (2d Cir.) (holding directory copyrightable), *cert. denied*, 259 U.S. 581 (1922).

Case law is sparse on the construction of the copyright and patent clause. See 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 1.02, at 1-29 (1987). In general, courts have construed the clause expansively. See, e.g., *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (liberally construing "writings" to include pictorial art such as engravings and prints); *Harper & Bros. v. Kalem Co.*, 169 F. 61, 64-65 (2d Cir. 1909) (finding "writings" includes motion pictures), *aff'd*, 222 U.S. 55 (1911); see also 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 1.06[A], at 1-37 (1987) (construing "author" broadly to require 'originality'); *id.*, § 1.08[A], at 1-44 (1987) (construing "writings" broadly); W. Patry, *Latman's The Copyright Law* at 18 (6th ed. 1986) ("['W]ritings' and 'authors' have been construed very broadly. Thus, 'writings' . . . 'may be interpreted to include any physical

Under the 1976 Copyright Act, copyrightability requires two basic elements.²¹ A work must be original, and it must be fixed in a tangible form from which it can be "perceived, reproduced or otherwise communicated."²² Fixation generally is not an issue contested in compilation cases because compilations exist on paper or in data bases from which they can be perceived with the aid of a computer.²³

Originality²⁴ refers to independent creation,²⁵ and it poses a conceptual difficulty in the context of factual compilations because facts can be discovered but not created.²⁶ A compilation of facts can be assembled independently, but the compiler must copy the individual facts from pre-existing sources.²⁷ Consequently, courts disagree whether it is the compiler's labor expended to collect the facts²⁸ or his selection and arrangement of those facts that satisfies the independent creation (originality) requirement.²⁹

rendering of the fruits of creative intellectual or aesthetic labor.' ") (quoting *Goldstein v. California*, 412 U.S. 546, 561 (1973)).

21. See 17 U.S.C. § 102(a) (1982).

22. See *id.*; see also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 52, reprinted in 1976 U.S. Code Cong. & Admin. News, 5659, 5665.

23. See, e.g., *Eckes v. Card Prices Update*, 736 F.2d 859, 860 (2d Cir. 1984) (published catalog); *Koontz v. Jaffarian*, 617 F. Supp. 1108, 1113 (E.D. Va. 1985) (data compilation on computer data base copyrightable), *aff'd*, 787 F.2d 906 (4th Cir. 1986).

24. In contrast to fixation, originality is more susceptible to challenge by an opponent. Disputes over copyrightability arise in the context of infringement claims. See *Baker v. Selden*, 101 U.S. 99, 100 (1879); *Januz Mktg. Communications, Inc. v. Doubleday & Co.*, 569 F. Supp. 76, 76 (S.D.N.Y. 1982).

Noncopyrightability may be shown by demonstrating a lack of originality. For example, compilation cases often involve challenges to the validity of the plaintiff's copyright on the ground that the work is not original. See, e.g., *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 207-08 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 79 (1987); *Eckes v. Card Prices Update*, 736 F.2d 859, 861 (2d Cir. 1984). In order to bring suit, the copyright plaintiff must have a valid registration certificate. See 17 U.S.C. § 411(a) (1982). This constitutes prima facie evidence of a valid copyright, whose evidentiary weight is within the discretion of the court. See 17 U.S.C. § 410(c) (1982).

25. Courts have identified independent creation as the test of originality. See, e.g., *Hutchinson Tel. Co. v. Frontier Directory Co.*, 770 F.2d 128, 131 (8th Cir. 1985) (originality requires "simply that the work be independently created"); *Puddu v. Buonamici Statuary, Inc.*, 450 F.2d 401, 402 (2d Cir. 1971) (originality means "'only that the work owes its origin to the author, i.e., is independently created and not copied from other works' ") (quoting 1 M. Nimmer, *Nimmer on Copyright* § 11, at 33 (1971 ed.)); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970) ("the originality necessary to support a copyright merely calls for independent creation").

26. 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.11[A], at 2-158 (1987).

27. See, e.g., *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 206 (2d Cir. 1986) (compiler copied data from newspaper), *cert. denied*, 108 S. Ct. 79 (1987); *Hutchinson Tel. Co. v. Frontier Directory Co.*, 770 F.2d 128, 130 (8th Cir. 1985) (compiler relied on existing business records); *Eckes v. Card Prices Update*, 736 F.2d 859, 860 (2d Cir. 1984) (compiler surveyed market).

28. See *Hutchinson*, 770 F.2d at 131-32; *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 6 (7th Cir. 1977).

29. See *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 207-08 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 79 (1987); *Rand McNally & Co. v. Fleet Management Sys.*, 634 F. Supp. 604, 606-07 (N.D. Ill. 1986).

In addition, the Supreme Court has inferred a third limitation, known as the idea-expression dichotomy,³⁰ from the policy goals on which copyright is based.³¹ It mandates that copyright law protect expression only, and not ideas.³² Facts are not protected because no one can claim authorship of a fact.³³ A companion principle, the merger doctrine, prohibits copyrighting expression of an idea that can be conveyed in only a limited number of ways.³⁴ These doctrines, based on the incentive-to-disseminate theory³⁵ underlying copyright law, limit the extent of copyright protection.³⁶

The incentive-dissemination theory of copyright law attempts to provide incentives to authors,³⁷ in the form of exclusive rights to their works, to encourage the creation and dissemination of works which, in turn, benefit the public.³⁸ Because the dissemination of ideas constitutes

30. See *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (copyright protects only "the expression of the idea—not the idea itself"); see also *infra* notes 32-34 and accompanying text; 17 U.S.C. § 102(b) (1982).

31. The primary goal of copyright is the dissemination of knowledge, attained by providing economic incentives to authors. See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) (citing *Mazer*, 347 U.S. at 209).

32. See *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); see also 17 U.S.C. § 102(b) (1982) (codifying the idea-expression doctrine).

33. 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.11[A], at 2-158 (1986).

34. Because copyright protects expression only, the expression must be separable from the nonprotectible elements, such as facts and ideas. If the underlying idea can be conveyed only in one or a very limited number of ways, the expression is said to be "merged" with the idea. See *Patry, Copyright in Collections of Facts: A Reply*, 6 Comm. & the Law 11, 35-36 (1984) (quoting *Herbert Rosenthal Jewelry Co. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971)).

35. See *infra* notes 37-38 and accompanying text.

36. The idea-expression dichotomy doctrine limits copyright protection to expression, whereas its companion principle, the merger doctrine, excludes from protection expression that conveys what can be expressed only in a very limited number of ways. See *Educational Testing Servs. v. Katzman*, 793 F.2d 533, 539-40 (3d Cir. 1986).

37. See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); see also U.S. Const. art. I, § 8, cl. 8 (reflecting an incentive-to-disseminate theory of intellectual property, rather than a theory based on a natural property right or commercial morality); H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 ("The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted. . .").

38. Congress may grant copyrights, "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public." H.R. Rep. No. 2222, 60th Cong. 2d Sess. 7; see 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 1.03[A], at 1-31 to 1-32.2 (1987) (primary purpose "not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors.'" (footnote omitted) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932))). For factual compilations in particular, one commentator states copyright law emphasizes a greater need to "disseminate and add to knowledge in the public domain." Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. Copyright Soc'y 560, 560 (1982). But see Chafee, *Reflections on the Law of Copyright: I*, 45 Colum. L. Rev. 503, 506 (1945) (arguing that, ideally, primary purpose of copyright is to "benefit the author").

the primary goal of copyright law, protection is limited to an author's expression,³⁹ preserving free access to facts and ideas.⁴⁰ Although an author labors in creating expression, that effort is not the basis upon which copyright protection is granted under the incentive-to-disseminate theory.⁴¹ Similarly, as applied to a compilation of facts, the copyright only protects the compiler's expression or *presentation* of the material—not the facts themselves.⁴² Otherwise, the first compiler to copyright a set of facts would exercise exclusive control of those facts.⁴³

The following conundrum necessarily arises in compilation cases. Compilations of facts and public domain material expressly fall within the subject matter encompassed by the copyright statute.⁴⁴ A strict application of the idea-expression and merger doctrines, however, would eliminate or greatly reduce the extent of copyright protection for these works because they can be arranged in only a limited number of ways.⁴⁵ Such a failure to protect compilations would ultimately undermine copyright policy, which is designed to "assure contributors to the store of knowledge a fair return for their labors."⁴⁶ Thus, courts should resolve questions of originality more liberally in favor of copyrightability. The

39. See *supra* notes 30, 36 and accompanying text.

40. See *Mazer v. Stein*, 347 U.S. 201, 217-18 (1954); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); see also *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 547 (1985) (copyright protects only the expression of facts, not the facts themselves).

41. See *supra* text accompanying notes 135-140. By contrast, under the misappropriation doctrine, labor supplies the basis for protection. Misappropriation refers to several different types of wrongful taking. See *Abrams, Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 Sup. Ct. Rev. 509, 513 n.24. As used in this Note, misappropriation refers to the type recognized in *International News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918). Under the *International News Service* form of misappropriation (a branch of unfair competition), a compiler's labor and expense in creating a compilation gives rise to a quasi-property right as against direct business competitors. *Id.* Present copyright standards, on the other hand, reward labor only to the extent that it reflects original expression, which includes synthesis and arrangement in compilation works. See *Eckes v. Card Prices Update*, 736 F.2d 859, 860, 862 (2d Cir. 1984); *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5 (7th Cir. 1977).

42. See 17 U.S.C. § 102(b) (1982) (copyright does not 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."); 37 C.F.R. § 202.1(b) (1987) (examples of works not copyrightable include "[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing").

43. See *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 207 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 79 (1987); see also *Shipley & Hay, Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C.L. Rev. 125, 126 (1984) (stating that because facts may not be copyrighted, subsequent author may use facts gathered by first author without consent).

44. See 17 U.S.C. § 103(a) (1982) ("The subject matter of copyright as specified by section 102 includes compilations. . .").

45. See *Matthew Bender & Co. v. Kluwer Law Book Publishers Inc.*, 5 U.S.P.Q.2d 1363, 1364-65 (S.D.N.Y. 1987).

46. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 546 (1985).

usefulness of broad eligibility for such protection, however, can be reached only through consistent regulation of the use of copyrighted factual compilations by others. This is determined by the law of infringement⁴⁷ and fair use.⁴⁸

B. *Scope of Protection: Infringement and Fair Use*

The law of infringement and fair use governs the scope of copyright protection.⁴⁹ The limitations imposed by the idea-expression dichotomy and merger doctrines also play a role in this aspect of copyright analysis.⁵⁰ For example, if a defendant accused of infringement can show that he copied only an idea, he may prevail on a motion for summary judgment.⁵¹ Thus, even a valid copyright does not bar copying of ideas, facts, or merged expression.⁵²

Infringement occurs when any of the exclusive rights⁵³ protected by copyright are violated.⁵⁴ These rights include the right to "reproduce the copyrighted work in copies[,] . . . to prepare derivative works based on the copyrighted work [and] to distribute copies."⁵⁵ The copyright statute does not specify how a violation of these rights must be proved,⁵⁶ because Congress left the development of the law of infringement to the courts. In general, courts hold that infringement is established by evidence of

47. See *infra* note 49.

48. See *infra* note 49.

49. See 17 U.S.C. § 107 (1982) (fair use); 17 U.S.C. § 501(a) (1982) (infringement). Section 501(a) defines infringement as any violation of rights granted in sections 106-118. In fact, section 106 defines rights of the copyright holder, see *id.* § 106 (reproduction, distribution, preparation of derivative works, and, for dramatic or musical works, the rights of performance and display), whereas sections 107-118 place limitations on those rights, see *id.* §§ 107-118; see also *infra* notes 53-59 and accompanying text.

The common law doctrine of fair use permits certain uses of a copyrighted work, expressly excluding such uses from the infringement label. See *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977). The fair use doctrine has been codified in 17 U.S.C. § 107 (1982) (fair use privilege includes use for purposes of criticism, comment, news reporting, teaching, scholarship, or research); *infra* notes 60-61 and accompanying text.

50. See *supra* notes 32 and *infra*, note 95 and accompanying text.

51. See, e.g., *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.) (granting summary judgment to defendant because only the idea copied), *cert. denied*, 429 U.S. 980 (1976).

52. See, e.g., *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573 (9th Cir. 1987) (facts copied), *cert. denied*, 108 S. Ct. 1271 (1988); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir.) (defendant copied only facts and ideas of plaintiff's historical interpretation), *cert. denied*, 449 U.S. 841 (1980); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967) (only merged expression copied).

53. See 17 U.S.C. § 106 (1982).

54. See *id.* § 501(a) (1982) ("Anyone who violates any of the exclusive rights . . . is an infringer. . .").

55. See *id.* § 106 (1982).

56. 17 U.S.C. § 501 supplies only a general definition of infringement. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 158, *reprinted in* 1976 U.S. Code & Cong. Admin. News, 5659, 5774 (comparing the prior law, "[t]he bill, unlike the present law, contains a general statement of what constitutes infringement of copyright").

direct copying and substantial taking *or* circumstantial evidence of copying and substantial taking.⁵⁷ In compilation cases, however, the analysis is essentially reduced to one of two approaches. Some courts find infringement if the second compiler does not start from scratch,⁵⁸ while others permit the second compiler to take facts from the first compilation, within certain limits.⁵⁹

Even when copying amounts to a substantial taking, the affirmative defense of fair use may preclude liability for infringement.⁶⁰ The fair use defense requires examination of the purpose and character of the use (whether for commercial or non-profit educational purpose), the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for, or value of, the copyrighted work.⁶¹ This doctrine is based on the policy goal of dissemination.

57. See *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977) (since direct evidence of copying is rare, infringement may be shown by circumstantial evidence—access and “substantial similarity”); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (“no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be *ad hoc*”); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“the question is whether the part so taken is ‘substantial’”), *cert. denied*, 282 U.S. 902 (1931).

58. See *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 812-13 (7th Cir. 1942) (“Any person may produce a directory of restaurants, but he must ‘start from scratch,’ do his own collecting, his own appraisal, and his own description and editing.”). Here, the court was not only stating the sweat of the brow test of originality—it was stating a rule of infringement: because the defendant had not done any original work, he had infringed the plaintiff’s directory. See *id.* at 811-12. See also *Illinois Bell Tel. Co. v. Haines & Co.*, No. 85-C-07644 (N.D. Ill. Apr. 13, 1988) (LEXIS, Patcop library, Cases file) (fair use defense not available when “defendant fails to start with his own independent canvass and instead starts with plaintiff’s copyrighted information”).

59. See *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 219-20 (D. N.J. 1977) (traditional infringement analysis not applied; court focused on defendant compiler’s use of plaintiff’s Index in creating “Personal Name Index to the ‘New York Times Index,’/1851-1974” which was held to be a fair use).

60. See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 549 (1985) (fair use traditionally defined as a privilege to use copyrighted material); *Wainwright Secs. Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) (fair use doctrine “distinguishes between ‘a true scholar and a chiseler who infringes a work for personal profit’”) (quoting *Hearings on Bills for the General Revision of the Copyright Law Before the House Comm. on the Judiciary*, 89th Cong. 1st Sess., ser. 8, pt. 3, at 1706 (1966) (Statement of John Schulman)), *cert. denied*, 434 U.S. 1014 (1978); see also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 reprinted in 1976 U.S. Code Cong. & Admin. News, 5659, 5678 (fair use as a defense to infringement codified for the first time in § 107 of the 1976 Copyright Act).

61. See 17 U.S.C. § 107 (1982). Fair use analysis resembles misappropriation doctrine in that it examines the nature of the use and the extent of commercial damage. See *infra* note 132 and accompanying text.

II. THE INEVITABLE CONTROVERSIES

A. Originality

Although originality is one of the threshold requirements under the 1976 Copyright Act,⁶² the statute purposely left the term undefined.⁶³ Courts have interpreted originality as *independent creation*,⁶⁴ meaning that a work "owes its origin" to the "author."⁶⁵ The originality standard does not require novelty⁶⁶ or aesthetic merit.⁶⁷ One commentator calls it a "modest" or "minimal" quantum of creative effort.⁶⁸

In theory, the requirement of originality should apply uniformly to all works.⁶⁹ Nevertheless, two distinct lines of cases construing originality in factual compilations have developed alongside the cases defining originality in general. At one extreme is the "sweat of the brow" or "industrious collection"⁷⁰ approach, which looks solely to the labor, effort

62. See *supra* notes 24-25 and accompanying text.

63. According to the House report accompanying the 1976 Copyright Act, [t]he 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 copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them. H.R. Rep. No. 1476, 94th Cong. 2d Sess. 51, reprinted in 1976 U.S. Code Cong. & Admin. News, 5659, 5664.

64. E.g., *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131 (8th Cir. 1985); *Puddu v. Buonamici Statuary, Inc.*, 450 F.2d 401, 402 (2d Cir. 1971); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970).

65. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884)).

66. See *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 53-54 (2d Cir.) (L. Hand, J.), cert. denied, 298 U.S. 669 (1936).

67. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

68. W. Patry, *supra* note 20 at 23; see *id.* at 24 ("doctrine of *de minimis non curat lex* pervades all types of subject matter"). Patry notes, however, that "creative" refers to the origination of the work, not to artistic merit or novelty. *Id.* at 17-18. The standard is higher for derivative works. *Id.* at 24.

69. Because the originality requirement stems directly from the language of the copyright clause in the Constitution, see U.S. Const. art. I, § 8, cl. 8, it should apply to all works protected under the copyright statute. See 17 U.S.C. § 102 (1982) (codifying case law interpretation of the Constitution's copyright clause that "authors" implies a certain level of originality and "writings" implies that the work had to exist in a tangible form); W. Patry, *supra*, note 20, at 17-18 (discussing the case law interpretation of the terms "writings" and "authors") (citing *The Trade-mark Cases*, 100 U.S. 82 (1879)).

Originality was first mentioned explicitly in the 1976 Copyright Act, which codified the requirement that courts had imposed under earlier enactments. See, e.g., *Puddu v. Buonamici Statuary, Inc.*, 450 F.2d 401, 402 (2d Cir. 1971); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951).

70. This notion was articulated in *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 88 (2d Cir.) (Kay, J., concurring) ("The right to copyright a book upon which one has expended labor in its preparation does not depend upon . . . anything

and expense involved in collecting the material in a compilation.⁷¹ At the other extreme is the "subjective selection"⁷² approach, which deems a factual compilation copyrightable only if the compiler exercises some subjective judgment in selecting or arranging the data.⁷³

Ultimately, the two views reflect an inherent tension between two groups with competing interests: creators and users.⁷⁴ The compiler who labors to collect material for his compilation wants to reap the fruits of his labor by selling his work to as many buyers as possible.⁷⁵ As long as the compiler can control the reproduction of his work, his interests are not threatened by the user. If, however, his work can be copied by a subsequent compiler, who can thus produce a similar work at less cost, the subsequent compiler gains a business advantage, allowing him to reap where he did not sow.⁷⁶ This conflict is most acute in factual compilations because of the basic principle that facts cannot be copyrighted.

1. Sweat of the Brow

Jurisdictions following this view hold that courts can determine the originality of a compilation solely by examining the amount of labor and expense involved in creating it.⁷⁷ Proponents find support for this read-

more than industrious collection."), *cert. denied*, 259 U.S. 581 (1922). The Second Circuit no longer follows the *Jewelers' Circular* view, see *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 207 (2d Cir. 1986) (holding copyright statute requires that copyright not be determined by the amount of effort the author expended), *cert. denied*, 108 S. Ct. 79 (1987), but other jurisdictions still rely on its reasoning. See, e.g., *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131-32 (8th Cir. 1985); *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5 (7th Cir. 1977).

71. See cases cited *infra* note 77.

72. *Shipley & Hay*, *supra* note 43 at 141 (citing *Eckes v. Card Prices Update*, 736 F.2d 859, 862-63 (2d Cir. 1984); *Dow Jones & Co. v. Board of Trade*, 546 F. Supp. 113, 116 (S.D.N.Y. 1982)).

73. See cases cited *infra* note 84. A number of cases fall between these extremes, recognizing both labor and arrangement as elements of originality in compilations. See cases cited *infra*, note 146.

74. See Chafee, *supra* note 38, at 516 ("copyright law involves an adjustment between the interests of the author . . . and the interests of the consuming public").

75. See generally Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 Colum. L. Rev. 516, 519-20 (1981) (explaining the tension between incentives to creators and the goal of dissemination).

76. See *id.* at 528.

77. See, e.g., *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1226-27 (8th Cir. 1986) (affirming preliminary injunction to bar defendant from using page numbers appearing in West reporters, court emphasized the labor and expense incurred by West in assembling headnotes and case summaries of the reporters, and noted that Mead was a competitor), *cert. denied*, 107 S. Ct. 962 (1987); *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131-32 (8th Cir. 1985) (responding to directory publisher's challenge to the validity of telephone company's copyright of a "yellow pages" directory, court stated that the relevant consideration was whether "the directory itself is derived from information compiled and generated by [plaintiff's] efforts"; *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 6 (7th Cir. 1977) (ruling valid copyright rested on "substantial independent effort").

The sweat of the brow, or industrious collection, view of originality dates back to early copyright jurisprudence. See, e.g., *Blunt v. Patten*, 3 F. Cas. 763, 764-65 (C.C.S.D.N.Y.

ing in the first part of the statutory definition of compilations, which refers to "collection and assembling" of material or data.⁷⁸ These cases reflect a concern for rewarding the author for his labor.⁷⁹ Thus, the sweat of the brow view emphasizes the incentives aspect of the incentive-to-disseminate theory.⁸⁰ This test tends to result in broad protection.⁸¹ Under the sweat of the brow test, for example, telephone directories,⁸² and even the page numbers within case reporters,⁸³ have received protection under copyright.

2. Subjective Selection

In contrast to the sweat of the brow school, a second group of courts posits that only the compiler's subjective judgment in the selection or arrangement of material entitles him to copyright protection.⁸⁴ This ap-

1828) (No. 1,580); *see also* *Amsterdam v. Triangle Publications, Inc.*, 189 F.2d 104, 106 (3d Cir. 1951) (holding copyright in map required direct observation of the terrain); *Adventures in Good Eating, Inc., v. Best Places to Eat, Inc.*, 131 F.2d 809, 812-13 (7th Cir. 1942) (holding copyright in a directory required original research); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 485-86 (9th Cir. 1937) (finding copyright in a directory valid because it was an "expensive, complicated, well-organized endeavor, requiring skill, ingenuity, and original research").

78. 17 U.S.C. § 101 (1982). *See* *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 132 (8th Cir. 1985).

79. *See, e.g.*, *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1226-27 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 962 (1987); *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131-32 (8th Cir. 1985); *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 6 (7th Cir. 1977); *see also* *Denicola, supra* note 75, at 528 ("It is the effort of collecting that must be rewarded in order to preserve incentive and safeguard the author's investment of time and money. . .").

80. *See* *Denicola supra* note 75, at 528. By focusing on labor as the object of protection, rather than the nature of the work itself, cases following this view ensure that the economic incentives will be available to the initial compiler.

81. The potential scope of protection is broader under the sweat of the brow view because it does not require the compiler to exercise skill or editorial judgment in the selection or arrangement. *See* *West Publishing Co. v. Mead Data Cent. Inc.*, 799 F.2d 1219, 1228 (8th Cir. 1986) (basing eligibility for protection on effort and extended actual protection to page numbers in West's reporters), *cert. denied*, 107 S. Ct. 962 (1987). Compare this result with *Financial Information Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 208 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 79 (1987), where a compilation of bond notices was not copyrightable, even though it required much labor, because no editorial selectivity was involved.

82. *See* *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 129 (8th Cir. 1985).

83. *See* *West Publishing Co. v. Mead Data Cent. Inc.*, 799 F.2d 1219, 1228 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 962 (1987).

84. *See, e.g.*, *Financial Information Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 207 (2d Cir. 1986) ("statute thus requires that copyrightability not be determined by the amount of effort the author expends, but rather by the nature of the final result"), *cert. denied*, 108 S. Ct. 79 (1987); *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 810 n.9 (11th Cir. 1985) ("originality is to be tested by the nature of the selection and arrangement of the preexisting material in the compilation"); *Eckes v. Card Prices Update*, 736 F.2d 859, 860 (2d Cir. 1984) (finding plaintiff's price catalog of baseball cards, designating a select group as "premium," or more valuable, qualified as sufficiently original to sustain valid copyright); *Rand McNally & Co. v. Fleet*

proach is referred to as subjective selection because it adheres closely to the language of the second part of the statutory definition of compilations: "selected, coordinated, or arranged."⁸⁵ These courts examine whether the compiler has exercised subjective judgment in the selection or arrangement of material in the compilation and explicitly reject the idea that copyright law protects labor.⁸⁶ Consequently, they ignore evidence of labor, effort and expense.⁸⁷

Instead, these courts emphasize creative skill and judgment in the selection and arrangement process of compiling facts.⁸⁸ For example, under this view, a compilation of all the municipal bond redemptions occurring in a year was denied protection because it involved no editorial skill or judgment.⁸⁹ By contrast, a catalog listing trading prices of baseball cards was held protected because it contained a subset of cards that the compiler had judged to be "premium" cards, commanding a higher trading price.⁹⁰ Under this view, compilations of all the items in a given universe may not receive copyright protection, but a subset of items in that universe may.

The subjective selection view tends to emphasize the dissemination goal of copyright law⁹¹ and seems to overlook that incentives to authors are necessary to accomplish that goal. Courts adhering to this view reason that considering the labor expended would give protection to *research* (as opposed to expression), which is generally regarded as beyond the scope of copyright law protection.⁹² Thus, the subjective selection

Management Sys., 634 F. Supp. 604, 606-07 (N.D. Ill. 1986) (holding that in determining copyrightability of mileage data on map, no reference should have been made to amount of labor involved).

85. 17 U.S.C. § 101 (1982).

86. See, e.g., *Financial Information Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 207 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 79 (1987); *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 810 (11th Cir. 1985); *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2d Cir. 1984); *Rand McNally & Co. v. Fleet Management Sys.*, 634 F. Supp. 604, 607 (N.D. Ill. 1986).

87. See cases cited *supra* note 84.

88. See cases cited *supra* note 84; see also *Denicola*, *supra* note 75, at 527-28.

89. In *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 79 (1987), the plaintiff, a publisher of financial information, claimed that the defendant infringed its "Financial Daily Card Service," which consisted of packets of index cards on which were printed information taken from newspaper "tombstone" advertisements about municipal bonds that were being redeemed. *Id.* at 205. The plaintiff sought to include all United States municipal bond redemptions. *Id.* The defendant, also a publisher of financial news, reported similar information, but rather than attempt to cover all municipal bond redemptions, reported only on those it rated (about 90% of the total). *Id.* at 205-06 (citing a prior disposition of the case, 751 F.2d 501, 503 (2d Cir. 1984)). The defendant's reports also contained a substantial amount of related information on the financial conditions of government entities. *Id.* at 206. The Second Circuit upheld the district court's reasoning, that "[t]he only selectivity involved is principally one of format. . . . With this data, there is no room for selection or choices or judgment." *Id.* at 207.

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

91. See *supra* note 38 and accompanying text.

92. See, e.g., *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204,

view reflects a greater concern for users than creators.

3. Reasons for the Disagreement

In part, this confusion over the definition of originality arises because the case law on originality developed mainly from cases involving creative or artistic works.⁹³ The general definition of originality, *independent creation*,⁹⁴ better suits artistic or literary works such as novels, where it is easier to distinguish between protectible expression and a nonprotectible element such as plot, which is only an idea.⁹⁵ By contrast, independent creation has proved difficult to apply in analyzing originality in factual compilations because a compiler, by definition, uses material that he copies from existing sources.⁹⁶ What a compiler independently creates is the *collection* of facts.⁹⁷ Moreover, in theory the collection can be protected only to the extent that it represents the compiler's expression of a set of facts.⁹⁸

The difficulty arises because expression—or manner of presentation—in a factual compilation often cannot be separated from the facts presented, calling the merger doctrine⁹⁹ into play. For example, the facts

207 (2d Cir. 1986) ("To grant copyright protection based merely on the 'sweat of the author's brow' would risk putting large areas of factual research material off limits and threaten the public's unrestrained access to information."), *cert. denied*, 108 S. Ct. 79 (1987); see also Note, *Copyright Protection for Compilations of Fact: Does the Originality Standard Allow Protection on the Basis of Industrious Collection?*, 62 Notre Dame L. Rev. 763, 777-78 (1987) (arguing that the "industrious collection" doctrine contravenes policies underlying the statute).

Courts often turn to the cases discussing copyright protection for research. The majority of these cases hold that research is not protectible. See, e.g. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1370 (5th Cir. 1981); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); but see *Toksvig v. Bruce Publications Corp.* 181 F.2d 664, 667 (7th Cir. 1950). The difference is, however, that these works are nonfiction narratives, in which it is easier to separate protectible expression from the unprotectible facts. Thus, copyright doctrine may be applied without raising the theoretical difficulty present in factual compilations of determining what constitutes expression.

93. See, e.g. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104 (2d Cir. 1951) (derivative work, mezzotint engraving reproduction of work in the public domain); *Gerlach-Barklow Co. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927) (painting); *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F.2d 583, 586 (E.D.N.Y. 1929) (lithographs used on shoe box labels).

94. See *supra* note 25 and accompanying text.

95. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir.1930) (no infringement because defendant copied only plot and events), *cert. denied*, 282 U.S. 902 (1931).

96. See 17 U.S.C. § 101 (1982).

97. That is, the collection the compiler creates forms a single source containing the facts, as distinguished from the dispersed, individual facts. Creation of "a compilation of pure fact, entails originality." *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 547 (1985).

98. See *supra* note 32 and accompanying text.

99. See *supra* note 34. The idea-expression and merger doctrines are codified in 17 U.S.C. § 102(b). See H.R. Rep. No. 1476, 94th Cong. 2d Sess. 57, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5670; *supra* note 45 and accompanying text.

presented in a telephone directory are arranged in the only logical way—alphabetical order.¹⁰⁰ Because the phone numbers (facts) cannot be separated from the alphabetical listing (presentation), the merger doctrine, if applied, would bar copyright protection for such a work.¹⁰¹ Courts, however, have not applied the merger principle consistently in compilation cases.¹⁰²

In addition, courts often confuse artistic originality with the legal concept of originality.¹⁰³ Originality in literary or artistic works generally implies a subjective assessment of aesthetic quality.¹⁰⁴ The legal concept of originality, however, is confined to an objective assessment of how the work came into existence, not its qualitative merit.¹⁰⁵

B. *Infringement*

Even given a uniform analysis of originality, confusion would remain as to the *extent* of copyright protection available to factual compilations.¹⁰⁶ Infringement and fair use govern this aspect of copyright analysis.¹⁰⁷ The unauthorized copying of a copyrighted work constitutes infringement,¹⁰⁸ subject to the fair use defense.¹⁰⁹ Copying often is deter-

100. Nevertheless, courts have not invoked the merger doctrine in telephone directory cases. Thus, even a different arrangement of names and numbers in a telephone directory did not escape a court's judgment of infringement. *See Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937) (finding defendant's creation of an inverse directory infringed plaintiff's traditional alphabetical directory).

101. *See Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1984); *supra* note 34.

102. *Compare Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2d Cir. 1984) (rejecting defendant's argument that there is nothing left to protect in a factual compilation when the facts are separated from the arrangement of the work, especially where the format is required by the nature of the subject) *with* *Matthew Bender & Co. v. Kluwer Law Book Publishers Inc.*, 5 U.S.P.Q.2d 1363, 1364-65 (S.D.N.Y. 1987) (applying merger doctrine in holding charts not copyrightable). *See also Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985) (merger doctrine not raised); *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977) (same).

103. *See Gracen v. Bradford Exchange*, 698 F.2d 300, 304 (7th Cir. 1983) (originality in copyright has legal, rather than aesthetic, function to prevent overlapping claims).

104. *See id.*

105. *See id.*; *see also supra* note 67.

106. *Compare Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 812-13 (7th Cir. 1942) (applying rule that compilers must "start from scratch" to avoid infringing) *with New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221-22 (D.N.J. 1977) (recognizing availability of fair use defense when defendant copied plaintiff's compilation for use in another compilation).

107. *See supra* text accompanying notes 49-61. In factual compilation cases, the right of reproduction (copying) is the right alleged to be infringed.

108. *See Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092-93 (2d Cir. 1977) (copying may be proved by access and "substantial similarity," as determined by the ordinary lay observer). However, this test has been applied in various ways. *See Whelan Assocs. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222, 1233 (3d Cir. 1986) (rejecting ordinary lay observer part of test in works involving "exceptionally difficult" materials, such as computer programs), *cert. denied*, 107 S. Ct. 877 (1987); 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.03[A], at 13-21 to 13-36 (1987) (discussing the

mined by examining whether the works are substantially similar.¹¹⁰ In theory, this analysis applies uniformly to illicit copying of all types of works.¹¹¹ In practice, however, it does not work well for factual compilations.¹¹² Consequently, courts have approached infringement in two basic ways.¹¹³

Some courts have viewed infringement in factual compilation cases as a question of whether the second compiler has used the first compiler's work to produce his own.¹¹⁴ Under this approach, the second compiler must "start from scratch," and compile facts from the original sources in order to avoid infringement.¹¹⁵ The subsequent compiler may use the same facts in producing his own compilation, but only if he obtains them from the original sources.¹¹⁶ This analysis superficially comports with the copyright goal of providing incentives to authors.¹¹⁷ Its application is clear-cut and seems to result in fairness to the first compiler.¹¹⁸ Its practical effect, however, is to give protection to *facts*, at least to the first

various tests of substantial similarity, such as "abstractions," "pattern," "total concept and feel," and "literal similarity").

109. See 17 U.S.C. § 107 (1982).

110. See *supra* note 57 and accompanying text.

111. See 17 U.S.C. § 501(a) (1982).

112. If the alleged infringement only involves copying isolated facts from the plaintiff's work, the defendant is off the hook because facts alone are not copyrightable. If, however, the second compiler copies a portion of the facts, in their arrangement, the case is less clear, and substantial similarity analysis is of little assistance. See, e.g., *Hutchinson v. Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 132 (8th Cir. 1985). Substantial similarity may be more useful when the second compiler copies all the facts as arranged or selected by the first compiler. See, e.g., *Eckes v. Card Prices Update*, 736 F.2d 859, 863-64 (2d Cir. 1984). But in such a case, the second compiler would argue that the arrangement or selection is merely a nonprotectible idea. See *id.* at 862.

113. See *infra* notes 114-124 and accompanying text.

114. See, e.g., *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5-6 (7th Cir. 1977); *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 640 F. Supp. 386, 387 (D. Minn. 1986); see also *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932, 935 (S.D.N.Y. 1921) ("Every one concedes that a second compiler may check back his independent work upon the original compilation, but there has been some dispute whether he may use the original compilation after simply verifying its statements, or whether he must disregard the assistance of the original, except in subsequent verification."), *aff'd*, 281 F. 83 (2d Cir. 1922), *cert. denied*, 259 U.S. 581 (1922).

115. See *supra* note 114.

116. See *Schroeder*, 566 F.2d at 5-6.

117. See U.S. Const. art. I, § 8, cl. 8; *supra* notes 37-38 and accompanying text.

The start-from-scratch rule is theoretically consistent with the principles that 1) facts cannot be copyrighted, leaving the second compiler free to use the same facts if he obtains them from the original sources, and 2) that labor should be rewarded as an incentive to create, preventing the second compiler from reaping where he has not sown. See, e.g., *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 132-33 (8th Cir. 1985); *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 812-13 (7th Cir. 1942).

118. Applying the start-from-scratch rule requires a factual determination whether the alleged infringer copied from the first compilation. The additional inquiries of traditional infringement analysis—whether the two works were substantially similar, see *supra* note 57, and whether the use was fair, see 17 U.S.C. § 107 (1982)—are given less weight.

In addition, under this approach the first compiler would be assured of reaping the

compiler.¹¹⁹ Thus, the start-from-scratch rule thwarts copyright's dissemination goal.¹²⁰

A second view, ultimately more consistent with copyright doctrine, recognizes the impracticalities of the start-from-scratch approach, which requires subsequent compilers to reinvent the compilation.¹²¹ This second approach allows the subsequent compiler to build on the work of the first.¹²² Thus, he may take facts from the prior compilation as long as he uses the information in another form or arrangement.¹²³ This approach proves superior to the start-from-scratch rule because it distinguishes more accurately between the protectible and nonprotectible elements of a copyrighted work.¹²⁴

The confusion over infringement of compilations stems partly from the statute, which provides that 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."¹²⁵ Whether the term "material" applies to the data collected by the compiler, or whether it refers only to the compiler's manner of arranging and otherwise presenting the material remains unclear.¹²⁶

rewards of his efforts because it prevents a subsequent compiler from taking advantage of the work done by the first compiler at little or no expense to himself.

119. In theory, the facts contained in the compilations may be used by anyone and may not be claimed for exclusive use by the initial compiler. However, the subsequent compiler is barred from taking them from the first compilation. Thus, the practical effect of this rule actually protects facts. *See, e.g., Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131-32 (8th Cir. 1985); *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 6 (7th Cir. 1977).

120. *See supra* note 38 and accompanying text.

121. *See New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977) In *Roxbury*, the defendant compiled a "Personal/Name Index/to the 'New York Times Index'/1851-1974" using the New York Times Index. The court held that this was fair use because defendant's index only listed names and citations to the pages on which they appear in the Times Index, not the actual location in the paper, which was available only by going to the Times Index. *Id.* at 219; *see also Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573 (9th Cir. 1987) (use of trivia facts taken verbatim from the plaintiff's book and used in a board game did not infringe expression because it constituted "mere indispensable expression" [merged expression]) (emphasis omitted), *cert. denied*, 108 S. Ct. 1271 (1988); *Rand McNally & Co. v. Fleet Management Sys.*, 634 F. Supp. 604, 607 (N.D. Ill. 1986) (dictum suggesting that copying data from the first compilation and using it to compute information in second compilation would not constitute infringement).

122. *See cases cited supra* note 121.

123. *See, e.g., Worth*, 827 F.2d at 573; *Rand McNally & Co.*, 634 F. Supp. at 607; *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221-22 (D.N.J. 1977).

124. *See, e.g., Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573-74 (9th Cir. 1987) (finding arrangement and selection were the protectible elements), *cert. denied*, 108 S. Ct. 1271 (1988); *Rand McNally & Co. v. Fleet Management Sys.*, 634 F. Supp. 604, 607 (N.D. Ill. 1986) (observing that data copied from one compilation and recalculated for use in second compilation "might not involve the same appropriation of selection and arrangement").

125. 17 U.S.C. § 103(b) (1982).

126. 17 U.S.C. § 103(b) (1982). One court has interpreted this clause to cover the contribution of the effort by a compiler needed in translating information from its origi-

Copyright law governs an important national interest—creation of works that promote the progress of useful arts.¹²⁷ The copyright clause of the Constitution itself sprang from the need to replace inconsistent state laws with a single federal law.¹²⁸ Therefore, consistent application of the copyright law remains imperative.

III. PROPOSED RESOLUTION

Frustrated by the conceptual difficulties described above, some courts and commentators note that copyright law may not provide the ideal form of protection for factual compilations.¹²⁹ They suggest state misappropriation law, modelled on the doctrine of misappropriation recognized by the Supreme Court in *International News Service v. Associated Press*, as a replacement.¹³⁰ The *International News Service* form of misappropriation bases protection on a limited property right arising from the investment of labor and expense.¹³¹ The basic elements of this partic-

nal source into a pictorial presentation. See *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145, 149 (7th Cir. 1985) ("Here Rockford Map made a contribution. Its employees dug through the records and turned the metes and bounds of the legal descriptions into a pictorial presentation. Teasing pictures from the debris left by conveyancers is a substantial change in the form of the information."), *cert. denied*, 474 U.S. 1061 (1986). See also Patry *supra* note 34, at 16 n.30 (if read literally, the "term 'material contributed by author' . . . might result in no protection").

127. See U.S. Const. art. I, § 8, cl. 8; see also 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 1.03[A], at 1-31 to 1-32.2 (1987); *supra* note 5 and accompanying text.

128. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 129-30, *reprinted in* 1976 U.S. Code Cong. Admin. News, 5659, 5745:

One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.

Id. at 5745. See also Crawford, *Pre-Constitutional Copyright Statutes*, 23 Bull. Copyright Soc'y 11, 12 (1976) ("By the time the Revolutionary War broke out, Jeremy Belknap, . . . Tom Paine, Joel Barlow, and Noah Webster were agitating for comprehensive copyright laws."). By 1786, 12 of the states had laws governing copyright. *Id.* at 13.

129. See, e.g., *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 809 n.9 (11th Cir. 1985); *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 95 (N.D. Ill. 1982); see also Gorman, *supra* note 15, at 1571 ("Where it is clear that it is labor, effort, and expense that is sought to be protected, the most apt body of protective principles might be found in that branch of the law of unfair competition dealing with misappropriation.").

130. 248 U.S. 215 (1918). In *International News Service*, the court affirmed the injunction granted plaintiff news wire service to prevent competitor wire service from copying its news reports and selling them as its own. *Id.* at 246.

131. The court noted that:

[A]lthough . . . neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered

ular form of misappropriation are creation of a product through extensive labor and skill or money, unauthorized use of the intangible elements of the product in competition with its author at minimal expense to user (a "free ride"), and resulting commercial damage.¹³²

Misappropriation, however, relies on state law,¹³³ which raises the problems of nonuniformity and federal preemption under section 301 of the Copyright Act.¹³⁴ Nevertheless, the rationale underlying the doctrine is a sound one in the context of factual compilations: preventing misappropriation of the valuable intangible elements in works created through labor and expense.¹³⁵ This Note proposes a statutory interpretation of the copyright law that incorporates a misappropriation analysis akin to that of *International News Service*¹³⁶ in the context of factual compilations.¹³⁷

A. Copyrightability of Compilations: Interpreting the Definition

The statutory definition of compilations suggests that Congress viewed

at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise.

Id. at 236.

132. *See id.* at 240. *International News Service* was litigated in federal court because of diversity jurisdiction, not as a copyright case. *See id.* at 232-33.

133. Following the Supreme Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), misappropriation became a question of state law. *United States Golf Ass'n v. St. Andrews Sys.*, 749 F.2d 1028, 1036 (3d Cir. 1984). *See, e.g., Schuchart & Associates v. Solo Serve Corp.*, 540 F. Supp. 928, 944 (W.D. Tex. 1982).

134. 17 U.S.C. § 301(a) (1982) provides in relevant part:

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title. . . . [N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Id.; *see* *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 208-09 (2d Cir. 1986) (misappropriation preempted), *cert. denied*, 108 S. Ct. 79 (1987). Some confusion surrounds the question whether misappropriation is preempted, *see* *Abrams, supra* note 41, at 539-48. The ambiguity seems to stem from varying uses of the term, rather than a lack of congressional intention. *See* H.R. Rep. No. 1476, 94th Cong. 2d Sess. 130, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5746 (§ 301 is intended "to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and must extend to works coming within the scope of the Federal copyright law"). The House Report later explains that "[m]isappropriation" is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as "misappropriation" is not preempted if it is in fact based neither on a right within the general scope of copyright." *Id.* at 5748.

135. *See* *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 95 ("Diligent application has, through copyright, been accorded a measure of protection because that is the only protection which is meaningful.")

136. *See supra* note 131 and accompanying text.

137. One commentator advocates that copyright should evolve under misappropriation principles. *See* Davidson, *Common Law, Uncommon Software*, 47 U. Pitt. L. Rev. 1037, 1117 (1986). This Note does not advocate that trend as a general matter. It recognizes that the requirements for protection under copyright law are distinct from those under misappropriation. In the case of factual compilations, however, the statute itself appears to encompass a misappropriation-like analysis.

both labor and arrangement as relevant in determining originality.¹³⁸ The first prong, "*collection and assembling* of preexisting materials or of data" refers to the physical process of gathering the material.¹³⁹ The second prong, "*selected, coordinated, or arranged*,"¹⁴⁰ encompasses the mental process of deciding how the material should be presented. The third prong, "*in such a way that the resulting work as a whole* constitutes an original work of authorship,"¹⁴¹ requires an overall assessment of work.

Thus, the statutory definition first indicates that labor should be considered as evidence of independent creation, not that it alone fulfills the originality requirement.¹⁴² Second, the selection, arrangement or coordination of the material should be examined.¹⁴³ This prong of the definition should not be construed to impose a standard of qualitative merit.¹⁴⁴ Because factual compilations contain material that can be arranged or selected in only a limited number of ways, they logically cannot be protected under copyright and yet be subject to a strict application of the merger doctrine. Therefore, the compilation should also be considered as a whole, taking into account both the labor and arrangement elements, in order to ensure that the work has been independently created.¹⁴⁵ This interpretation favors a broad grant of copyrightability. While a number of judicial decisions have followed a similar approach, they have not articulated a coherent rationale.¹⁴⁶

138. See 17 U.S.C. § 101 (1982).

139. See *id.* (emphasis added).

140. See *id.* (emphasis added).

141. See *id.* (emphasis added).

142. See *C.S. Hammond & Co. v. International College Globe, Inc.*, 210 F. Supp. 206, 216 (S.D.N.Y. 1962) (finding labor evidence of independent creation); see also *Hutchinson Tel. Co. v. Frontier Directory Co.*, 770 F.2d 128, 131-32 (8th Cir. 1985); *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5 (7th Cir. 1977); *Denicola, supra* note 75, at 530 (distinguishing "process of culling and assembling" the facts from the "discovery of the facts themselves"); *Patry supra* note 34, at 25-26 (reading first prong of the definition to mean "collection and assembling of preexisting materials or data").

143. For cases emphasizing the arrangement/selection prong, see cases cited *supra* note 84. The proposed analysis retains this factor, with the qualification that courts should not require "subjectivity" in selecting items.

144. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

145. See, e.g., *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109-10 (9th Cir. 1970). See also *Patry, supra* note 34, at 26 (third prong of the definition of compilations is that the work, "by virtue of that selection, coordination, or arrangement may be said to be as a whole 'an original work of authorship'").

146. See, e.g., *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145, 148 (7th Cir. 1985) (noting that plaintiff's contribution was effort, even though copyright does not depend on amount of time required), *cert. denied*, 474 U.S. 1061 (1986); *United States v. Hamilton*, 583 F.2d 448, 450-51 (9th Cir. 1978) (noting map was result of creative efforts, and that selection, design and synthesis are elements of originality); *Dow Jones & Co. v. Board of Trade*, 546 F. Supp. 113, 116 (S.D.N.Y. 1982) (holding stock index copyrightable because it involved effort and judgment).

This combined approach appears in a number of early cases. See, e.g., *General Drafting Co. v. Andrews*, 37 F.2d 54, 55 (2d Cir. 1930) (stating that elements of copyright are "selection, arrangement, and presentation of the component parts"); *Baldwin Cooke Co.*

B. *Comparison of Misappropriation Principles and Copyright Analysis of Compilations*

A liberal policy of copyrightability must be tempered by greater scrutiny in the analysis of infringement and fair use.¹⁴⁷ This aspect of copyright analysis dovetails with misappropriation analysis¹⁴⁸ in that the fair use and misappropriation doctrines share the aim of preventing a subsequent compiler from pirating the work of the earlier compiler and using it in direct competition with that compiler, resulting in commercial damage.¹⁴⁹

Courts applying the sweat-of-the-brow standard of originality¹⁵⁰ and courts enforcing the start-from-scratch rule of infringement¹⁵¹ implicitly rely on the misappropriation rationale¹⁵² because they emphasize the initial compiler's investment of labor and protect it from piracy by subsequent compilers. This approach, however, is only partially satisfactory, because labor, on its own, is an insufficient basis for finding originality. The proposed originality standard requires examining *both* labor and arrangement elements. Because a compiler's labor offers evidence of independent creation, a compiler ultimately would receive protection for his labor under the fair use analysis,¹⁵³ but only as to other, directly competing compilers. Noncompeting compilers of the same facts would be permitted free use of the facts contained in the compilation.¹⁵⁴ Applying such an analysis not only preserves incentives to compilers, but ensures access to information.

v. Keith Clark, Inc., 383 F. Supp. 650, 654 (N.D. Ill. 1974) (requiring work *and* a new arrangement for copyrightability); C.S. Hammond & Co. v. International College Globe Inc., 210 F. Supp. 206, 216 (S.D.N.Y. 1962) (stating that elements of copyright "'consist in the selection, arrangement and presentation of the component parts,'" yet viewing labor involved in map making as evidence of independent creation) (quoting General Drafting Co. v. Andrews, 37 F.2d 54, 55 (2d Cir. 1930)).

147. See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 494 (2d Cir.) (Meskill, J., dissenting) ("The objective is to progress first and, if necessary, litigate the question of infringement later."), *cert. denied*, 429 U.S. 857 (1976); Gorman, *supra* note 38, at 561-62 (calling fair use doctrine flexible enough to sustain borrowing of material in fact works).

148. See *supra* notes 130-132 and accompanying text.

149. See 17 U.S.C. § 107 (1982); *supra* notes 130-132 and accompanying text.

150. See, e.g., *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1226-27 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 962 (1987); *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131-32 (8th Cir. 1985).

151. See *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5-6 (7th Cir. 1977); *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 812-13 (7th Cir. 1942).

152. See *supra* notes 130-132 and accompanying text.

153. See 17 U.S.C. § 107 (1982).

154. See *id.* In *Worth v. Selchow & Righter Co.*, 827 F.2d 569 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1271 (1988), the court affirmed the district court's finding of no infringement, even though the defendant had copied portions verbatim from plaintiff's trivia book, because there was no substantial similarity between the works. *Id.* at 573. The public interest thus is enhanced by a greater variety of sources for knowledge and information.

CONCLUSION

Copyright law is designed to promote the public good by encouraging the creation and dissemination of works embodying knowledge and information, including compilations of facts. The law advances this goal by balancing the interests of the individual who creates against the interests of the public, setting limits on what can be protected and how it may be used. The doctrines that define these limits, are, however, not easily applied to compilations of facts.

The suggestion that state misappropriation law, based on the doctrine recognized in *International News Service v. Associated Press*,¹⁵⁵ should be adopted to protect factual compilations initially is appealing because misappropriation principles provide a sound rationale for protecting factual compilations. Unfortunately, this solution is flawed because it would leave protection to state law, inviting greater potential for inconsistencies in an already confused area of law.

Fortunately, however, similar protection can be achieved through copyright law by shifting the emphasis of the analysis. For compilations to be protected under copyright, the test of originality must be independent creation, as it is for all works. This should be determined by examining both effort and arrangement/selection factors. Infringement analysis must distinguish between protectible and nonprotectible elements, which are often difficult to separate in factual compilations. Courts thus should focus on whether the copying, assuming *arguendo* it infringes, can be excused as a fair use. Using this approach, copyright law may provide meaningful protection to factual compilations, yet ensure that subsequent compilers will have free access to build on prior works.

Sarah Lum

155. 248 U.S. 215 (1918).

