

THE UNBEARABLE THINNESS OF COPYRIGHT PROTECTION FOR MAPS AND OTHER FACT WORKS

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That copyright law has changed since the time of the Founders is nowhere more apparent than in the current treatment of copyright protection for maps. In the first Copyright Act in 1790, maps and charts were two of the three categories of works for which authors would have “the sole right and liberty of printing, reprinting, publishing and vending.”¹ By such protection Congress provided explorers, cartographers and surveyors with an incentive for applying their labor, skill and resources to creating more accurate and useful maps and charts with which America’s territories and waters might be explored and exploited.

Such protection for mapmakers extended not merely to esthetic decisions as to the size, shape and density of various legends or the color scheme, but to the enterprise involved in compiling factual information concerning boundaries, distances, altitudes and locations.

As Justice Joseph Story explained in an early circuit opinion, “[a] man has a right to the copy-right of a map of a state or country, which he has surveyed or caused to be compiled from existing materials, at his own expense, or skill, or labor, or money. Another man may publish another map of the same state or country, by using the like means or materials, and the like skill, labor and expense. But then he has no right to publish a map taken substantially and designedly from the map of the other person, without any such exercise of skill, or labor, or expense. If he copies substantially from the map of the other, it is

¹ Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790) (repealed 1831).

downright piracy; although it is plain that both maps must, the more accurate they are, approach nearer in design and execution to each other.”²

As copyright law developed in the twentieth century, however, courts divided over whether copyright protection extends to the industry expended in creating such factual works as compilations, databases and maps or merely to the particular selection or arrangement of facts in such works.³ In its 1991 *Feist* decision,⁴ which involved a directory publisher’s wholesale copying of a utility’s local white pages, the Supreme Court resolved this conflict against any such protection for the sort of industry Justice Story described, rejecting protection for what had come to be called “sweat of the brow” or “industrious collection.”

Framing the issue in terms of the requirements of the Constitution,⁵ and not merely the

² *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845) (citing two English common law decisions, *Matthewson v. Stockdale*, 12 Ves. 270; *Wilkins v. Aikin*, 17 Ves. 422, for these statements). See also Robert A. Gorman, “Copyright Protection for the Collection and Representation of Facts,” 76 Harv. L. Rev. 1569, 1572 (1963) (“It is no doubt true that most of the early cases dealing with map copyright referred to the requirement of original effort in exploring, surveying, making inquiries, and drafting the map solely on the basis of one’s own investigations.”) (quoted in *Sparaco v. Lawler, Mutusky, Skelly, Engineers LLP*, 303 F.3d 460, 466 (2d Cir. 2002)). For Story and for other eighteenth- and nineteenth-century figures, such protection for maps, of course, did not bar others from making fair use of those maps in other works; it did, however, bar competitors from simply pirating them. See *Emerson v. Davies*, 8 F. Cas. at 619; *Folsom v. Marsh*, 9 F. Cas. 342, 348 (No. 4,901) (C.C.D. 1841).

³ Notably, in cases involving copyright protection for business or telephone directories, some courts upheld copyright protection for the “sweat of the brow” involved in creating them, e.g., *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977); *Jeweler’s Circular Pbg. Co. v. Keystone Pbg. Co.*, 281 F. 83 (2d Cir.), cert. denied, 259 U.S. 581 (1922), while others rejected such protection, e.g., *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369-70 (5th Cir. 1981).

⁴ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

⁵ Article I, § 8, cl. 8 of the Constitution authorizes Congress to “secur[e] for limited Times to Authors ... the exclusive Right to their respective Writings.” The Court’s holding

terms of the copyright statute, the Court in *Feist* held that copyright protection extends only to “original” authorship; that facts are not copyrightable because they do not owe their origin to an act of authorship; and that, regardless of the effort expended in discovering or compiling them, the publication of facts is therefore not protected by copyright.

Accordingly, the copyright in a factual compilation is “thin,”⁶ extending only to original choices as to “which facts to include, in what order to place them, how to arrange the collected data so that they may be used effectively by readers.”⁷ That “much of the fruit of the compiler’s labor may be used by others without compensation” is “neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”⁸

For many fact works, their value consists in their completeness and the principles of selection and arrangement are obvious. Directories contain names, addresses, and phone numbers. Baseball encyclopedias contain lists of standings, at bats, runs, hits, batting

in *Feist* rests on a doctrine of “creativity” that is two steps removed from the language of the Constitution itself. As explained below, the requirement of “creativity” is derived from the requirement of “originality” that earlier decisions had found implicit in the Constitution’s use of the words “Authors” and “Writings.” *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

⁶ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. at 349.

⁷ *Id.*, 499 U.S. at 348.

⁸ *Id.*, 499 U.S. at 349, 350. “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

average, slugging percentage, home runs, and so on. Given the obviousness of such categories and the dictates of the merger doctrine, which bars copyright protection for one way of doing something if there are very few alternatives, there is no meaningful copyright protection for such works in the wake of *Feist*. Following *Feist*, purveyors of databases and business directories who wish to protect themselves against wholesale copying by competitors must instead rely on contracts and licenses to restrict nonconsensual access to their products (thus defeating, to the extent such means are effective, the Supreme Court's ostensible goal of widespread dissemination of such information).

Courts have drawn the same implications with regard to maps. As Circuit Judge Pierre N. Leval holds, in a recent opinion involving the uncompensated use by one surveyor of the site plan of another, "To the extent that [a] site plan sets forth the existing physical characteristics of the site, including its shape and dimensions, the grade contours, and the location of existing elements, it sets forth facts; copyright does not bar the copying of such facts."⁹ The principal virtue of site plans and of most maps generally is, of course, their accuracy, *i.e.*, their reliability as to such factual information as where certain places are located, boundary lines, distances between locations, altitudes and depths, and so on. The effect of *Feist* is to confine copyright protection for maps to essentially esthetic matters. As Judge Leval gamely offers, "Without doubt, considerable skill and originality can be exercised by a mapmaker in the setting forth of unprotected information--in the selection

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." *Id.*, 499 U.S. at 349-50.

⁹ *Sparaco v. Lawler, Mutusky, Skelly, Engineers LLP*, 303 F.3d 460, 467 (2d Cir. 2002).

or elimination of detail, the size, shape, and density of informative legends, the establishment of conventions relating to color or design to represent topographical or other features, and many other details of presentation.”¹⁰ Apart from the apparent requirement that a copier add or eliminate certain details, maps are protected only the same way pictorial, graphic and sculptural works are protected, *i.e.*, as nonutilitarian works.

As with purveyors of directories, explorers, cartographers and surveyors who apply their labor, skill and resources to create more accurate and useful maps and charts, like Judge Leval’s surveyor, must now rely instead on contractual or quasi-contractual grounds to prevent competitors and potential customers from committing what Justice Story called “piracy” but what the Supreme Court now calls “the means by which copyright advances the progress of science and art.”

Thus, copyright law on this subject has moved 180 degrees from its starting point. One possible explanation for this transformation is the ascendancy of what may be called an esthetic view of copyright.¹¹ Holding that “creativity” as well as “independent creation” is required for a work to have the requisite “originality,” the Court draws a critical distinction between “creation” and “discovery.”¹² One who discovers a fact is not a “maker” or

¹⁰ *Id.*

¹¹ An esthetic view of copyright is also reflected in such developments as the ascendancy of the Berne Convention doctrine of the moral rights of authors, the thin protection that exists for useful articles and computer programs, and the Berne-driven vast extension of the term of copyright, now to the life of the author plus 70 years (or to 95 years in the case of most works-made-for-hire), which corresponds to the increase in the esteem in which artists and writers are held at the expense of everyone else.

¹² *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. at 346. A central principle enshrined in the copyright law is that copyright protection does not extend to any “idea,

“originator” of that fact, and “[c]opyright protection may extend only to those components of a work that are original to the author.” Thus, factual compilations possess “originality” only to the extent of an author’s selection and arrangement of those facts, but not to the extent the facts simply “speak for themselves.”¹³

Questions that are begged by the Court’s analysis are why one should treat the report of a single fact and the compilation of many facts as the same thing,¹⁴ and why compilations and other prodigious fact works should not be understood as “creative” in the first place.¹⁵

Although telephone numbers, distances, altitudes and depths exist in nature and are not “created” by the compiler or surveyor, mammoth collections of such facts in directories

procedure, process, system, method of operation, concept, principle, *or discovery*, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b) (emphasis added).

¹³ *Id.*, 499 U.S. at 347, 348.

¹⁴ The Supreme Court disposes of this problem with a rhetorical question and answer: “On what basis may one claim a copyright in such a work [*i.e.*, wholly factual information not accompanied by any original written expression]? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place.” *Id.*, 499 U.S. at 345. Of course, “common sense” would tell us something else entirely if the number “100,000” or “1 million” were used instead of “100.”

¹⁵ Indeed, the activities of a surveyor in measuring the world or a compiler engaged in mathematical calculations involve labors of the mind to the same extent as the activities of a photographer or composer. The nineteenth-century Supreme Court decisions that are deemed to have devised a constitutional requirement of “originality” simply required for works to be protected that they be “the fruits of intellectual labor,” *The Trade-Mark Cases*, 100 U.S. at 94, or “intellectual production, of thought, and conception.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. at 59-60. The terms “sweat of the brow” or “industrious collection” were therefore misleading to the extent their connotation was that the fruit of intellectual labor was not involved in those activities. Maps and compilations involve intellectual labor, although not the sort of esthetic intellectual labor involved in paintings and novels.

and maps do not exist in nature any more than copies of “Gone with the Wind” grow on trees. In this respect, compilations and maps are “created” even if they are comprised of elements that are not, in themselves, subjects of copyright under 17 U.S.C. §102(b) because they are “discovered.”¹⁶

A second possible explanation for this transformation is the extraordinary extension of the term of copyright since the original renewable term of 14 years in the Copyright Act of 1790. Copyright protection for the information contained in maps and directories seems outlandish when the term of such protection is as long as it is today, *i.e.*, 95 years (or the life of the author plus 70 years), well beyond the useful life of such works and much more than is needed to afford surveyors and compilers a legal incentive.

A final explanation for this transformation is the capacity of the Supreme Court during the ongoing lively-ball era of judicial power to frame questions as constitutional issues that can be decided ultimately only by the Supreme Court itself. Perhaps the most significant thing about *Feist* is not that the Court engaged in its own cost-benefit analysis

¹⁶ See Note 12. Indeed, as a general matter, the law protects both discoveries and facts, on the one hand, and creativity, on the other. Certain discoveries are protected by the law on patents and the law on salvage and prizes, for example, just as certain facts or collections of facts are protected by the law concerning trade secrets. The question of whether or not such protection should extend to the fruits of exploration and surveying is no different in principle from the cost-benefit analysis involved in these other areas. Whether “copyright” or some other rubric might serve as the vehicle for such protection is not a question of first principles and becomes a question of constitutional law only when the words of Article I, Section 8 are asked to carry more weight than they can properly bear. Since maps and compilations involve creativity as well as discovery copyright protection for them should not run afoul of 17 U.S.C. § 102(b). But even if it would, there should be no constitutional barrier to Congress either tinkering with the statutory boundaries of copyright law or, under

or that it resolved a statutory issue that Congress can plausibly be said to have left open, but that it framed its decision as a constitutional requirement, thus barring Congress from striking a different balance in the future. That – even more than the transformation of “piracy” into “the means by which copyright advances the progress of science and art” – would surely have shocked Justice Story.

its other legislative powers, contriving some other form of protection that is denominated neither “copyright” nor “patent.”