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Copyright Protection for Compilations of Fact: Does the Originality Standard Allow Protection on the Basis of Industrious Collection?*

Federal law provides copyright protection for "original works of authorship,"¹ including "compilations and derivative works." Protection "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work."² While courts and commentators³ have discussed the threshold level of originality an author⁴ must contribute to a work in order to receive copyright protection when compiling or arranging factual data,⁵ no clear standards have emerged. As the Supreme Court recently acknowledged, the law is unsettled regarding the ways in which uncopyrightable elements combine with an author's original contributions to form protected expression.⁶

A split of opinion has emerged in the lower courts between those protecting "industrious collection" and those requiring some higher level of originality in compilations of noncopyrightable material. The industrious collection doctrine provides that the amount of labor involved in compiling factual materials entitles a work to copyright protection; an analysis of the level of original authorship involved is not necessary.⁷ The Eighth Circuit, implicitly applying the doctrine, recently gave protection to page numbers taken from materials arranged in a logical, un-

* This Note received first prize in the Notre Dame Law School portion of the Nathan Burkan Memorial Competition.

1 U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 102 (1982).

2 17 U.S.C. § 103(b) (1982).

3 Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981); Dworkin, *Originality in the Law of Copyright*, 39 B.U.L. REV. 426 (1959); Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569 (1963); Patry, *Copyright in Collections of Facts: A Reply*, 6 COM. & L. 11 (October 1984); Note, *Copyrighted Compilations of Public Domain Facts in a Directory: The Criterion of Infringement*, 71 NW. U.L. REV. 833 (1977).

4 The term "author" is used loosely to include the broad spectrum of compilers or arrangers of factual data, some of whom actually produce no original product. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (the constitutional definition of "author" is "he to whom anything owes its origin; originator; maker"); 1 NIMMER ON COPYRIGHT § 1.06[A] (1986) ("[T]he one indispensable element of authorship is originality. One who has slavishly or mechanically copied from others may not claim to be an author."); Patry, *supra* note 3, at 18 (quoting NIMMER, *supra*, § 2.01[A]) ("It was reasoned that since an author is 'the beginner . . . or first mover of anything, . . . creator, originator,' it follows that a work is not the product of an author unless the work is original."). Patry points out, however, that this reasoning is faulty because "it begs the central question of defining originality in works that admittedly are comprised of elements of which the 'author' was not the creator or originator," i.e. compilations of fact. *Id.* at 18 (emphasis in original).

5 Facts themselves are not subject to copyright protection. See *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368-69 (5th Cir. 1981) (and cases cited therein); 17 U.S.C. § 102(b) (1982).

6 *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985).

7 See, e.g., *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 87 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922). See also *infra* notes 59-105 and accompanying text.

original manner.⁸ Courts have thus pushed the originality threshold to its outer limit. This labor theory has been criticized as granting copyright protection to labor *qua* labor, without requiring original creative thought, in violation of the Constitution and the Copyright Act.⁹

Part I of this note describes the constitutional and statutory copyright provisions with an eye toward determining the drafters' intent regarding the level of originality required for copyright protection. Part II provides an overview of how the courts have defined originality. Part III analyzes the industrious collection doctrine. Part IV asserts that the industrious collection doctrine allows courts to lower the originality threshold below the level intended under the Constitution, the Copyright Act, and the case law, thus limiting public use of information and overlooking the principle that the law grants the copyright monopoly only to original works that reflect the author's personality.

I. Basic Concepts of Originality

A. *The Copyright Clause*

The framers of the Constitution provided that Congress shall have the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁰ While on its face the Constitution says nothing about originality as a prerequisite for copyright protection, the words imply such a requirement. By granting an exclusive right to "authors," the clause implies that originality is the essence of the right to protection.¹¹ The reference to "progress" suggests that a work entitled to copyright protection contain more than merely trivial originality.¹² But the clause is so general that, other than implying that some originality must indeed play a role, it offers little help in determining the minimum original contribution necessary to create a protected work from factual data.

Because no extensive history of the copyright clause exists,¹³ difficulties abound in determining exactly what types of works the framers intended copyright protection to cover. They appear to have primarily intended to promote learning followed by a secondary concern for protecting authors and providing them with incentive.¹⁴ These concerns do

8 West Publishing Co. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 962 (1987). See *infra* notes 94-105 and accompanying text.

9 See Patry, *supra* note 3, at 27.

10 U.S. CONST. art. I, § 8, cl. 8.

11 E.g., NIMMER, *supra* note 4, § 1.06[A].

12 Chamberlin v. Uris Sales Corp., 150 F.2d 512 (2d Cir. 1945); NIMMER, *supra* note 4, § 1.93[B]. See *Graham v. John Deere Co.*, 383 U.S. 1 (1966); *United States v. Steffens*, 100 U.S. 82 (1879).

13 See, e.g., STUDIES ON COPYRIGHT, No. 3, THE MEANING OF "WRITINGS" IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION 70 (1963) [hereinafter STUDIES ON COPYRIGHT] (the committee proceedings at the Constitutional Convention were conducted secretly and the final form of the clause was approved without debate). Cf. L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 193 (1968).

14 See, e.g., L. PATTERSON, *supra* note 13, at 193 (proposals submitted by James Madison and Charles Pinckney "manifest an interest in having the federal government promote knowledge" and indicate that copyright was to be statutory protection for a recognized right). Madison made this point clear in THE FEDERALIST No. 43, at 271 (C. Rossiter ed. 1961):

not imply any limitation on the scope of the clause, but rather intimate that the types of works protected will expand when courts see a new type of authorship that needs protecting.¹⁵ It is clear, however, that the framers intended to make some level of originality inherent in any expansion of protected expression. While courts may extend constitutional protection to factual works, they must not extend that protection to works without the requisite level of originality.

B. *The Copyright Act*

Congress substantially revised copyright law in 1976 for the first time since 1909.¹⁶ Section 102 is the cornerstone of the Copyright Act: "(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression"¹⁷ The originality requirement is explicit, but one looks in vain for its definition. The phrase "original works of authorship" was purposely left undefined for courts to incorporate the necessary standard of originality.¹⁸ Congress recognized that new forms of expression are continually evolving. It did not intend "to freeze the scope of copyrightable subject matter at the present stage of communications technology or to

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.

See also *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); Gorman, *supra* note 3, at 1569 ("the author's interest thus is protected as a means of advancing the interest of society").

15 See STUDIES ON COPYRIGHT, *supra* note 13, at 70.

16 The first Congress enacted the first copyright law in 1790 and comprehensive revisions occurred in 1831, 1870, and 1909. After 1900, numerous technological advances occurred that impacted copyright law such as motion pictures and sound recordings. Between 1924 and 1940 legislators introduced several revision measures which failed to become law. In 1955, the movement for copyright law revision was revived and a period of comprehensive research and study by the copyright office ensued. A draft bill eventually took shape and was introduced in both houses in 1964. Congress promulgated numerous revisions and held hearings over the next decade that saw the rise of the computer revolution and the advent of cable television. The revised bill finally passed both the Senate and the House in 1976. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47-49 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5660-62.

17 17 U.S.C. § 102 (a) (1982). Section 102 goes on to provide that "works of authorship" include the following categories:

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

This list is "illustrative rather than exhaustive." H.R. REP. NO. 1476, *supra* note 16, at 53. It "sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories." *Id.* See also National Conference of Bar Examiners v. Multistate Legal Studies, Inc., 495 F. Supp. 34 (N.D. Ill. 1980), *aff'd*, 692 F.2d 478 (7th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

18 H.R. REP. NO. 1476, *supra* note 16, at 51 ("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.").

allow unlimited expansion into areas completely outside the present congressional intent."¹⁹ It also did not intend to make the subject matter unlimited or to leave new forms of expression within that general area of subject matter unprotected.²⁰

Section 103 of the Copyright Act defines a copyrightable 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."²¹ The legislative history of the 1976 Act makes it clear that the basic criteria of copyrightable subject matter, including original authorship, apply with equal force to works containing preexisting material and those that are purely original.²² Protection extends, however, only to the original contribution of the compiler or arranger, not to any pre-existing facts or data.²³

Like the constitutional provision, the Act thus provides guidance for defining originality only in very general terms. Courts are left to develop a federal common law to recognize and protect original works of authorship.²⁴ That common law has had substantial development.

II. Judicial Formulations of Originality

While neither the Constitution nor the copyright acts prior to 1976 expressly required originality, the courts inferred such a requirement from the language granting protection to "authors." Since an author means beginner, first mover, creator, or originator,²⁵ the Constitution necessarily requires originality, and if it is lacking, the work is not one of an author.²⁶ As Judge Learned Hand stated, the copyright clause's "grants of power to Congress comprise, not only what was then known but what the *ingenuity* of men should devise thereafter."²⁷ The Supreme Court also has used language implying the notion of originality in the copyright clause by pointing out that the framers of the Constitution understood that "the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own *genius or intellect*, existed in England at that time"²⁸

¹⁹ *Id.*

²⁰ *Id.* See also NIMMER, *supra* note 4, § 2.03[A].

²¹ 17 U.S.C. § 101 (1982). The term "compilations" includes "collective work" defined as "a work such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves are assembled into a collective whole." *Id.* See also NIMMER, *supra* note 4, § 3.02.

²² H.R. REP. NO. 1476, *supra* note 16, at 57.

²³ 17 U.S.C. § 103 (1982). See also *American Code Co. v. Bensinger*, 282 F. 829, 834 (2d Cir. 1922) (when one takes material from the public domain, and adds new material to it, and publishes the whole, the copyright is valid only as to the "new and original" material).

²⁴ See L. PATTERSON, *supra* note 13, at 220.

²⁵ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884); *supra* note 4.

²⁶ See NIMMER, *supra* note 4, § 2.01.

²⁷ *Reiss v. National Quotation Bureau, Inc.*, 276 F. 717, 719 (S.D.N.Y. 1921) (emphasis added).

²⁸ *Burrow-Giles*, 111 U.S. at 58 (emphasis added).

In the end, the cases leave no doubt that the pervading prerequisite to copyright protection, regardless of the type of work, is originality.²⁹ Those cases must be examined to move beyond this general standard to an applicable one and to determine whether a threshold exists below which originality cannot be found.

Justice Holmes' opinion in *Bleistein v. Donaldson Lithographing Co.*³⁰ is an appropriate starting place to determine how the courts have construed originality. In finding some crude lettering and portraits of performers in a circus advertisement copyrightable, Holmes gave a classic portrayal of what he considered the minimum level of expression a copyright ought to protect. He found that minimum level in personality—a medium necessarily containing something unique.³¹ “It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone.”³² That something is copyrightable.³³ While this description of originality brings the concept down to a minimal level,³⁴ Holmes seems to have rested his opinion of originality on the idea that the author's personality is its key. In doing so he may have identified a practical truth; pure originality can only emanate from within a person, outside stimulus is unoriginal by definition.³⁵ This concept of personality has been overlooked in the factual works decisions.³⁶

Holmes' position built upon an early Supreme Court interpretation of originality. In *United States v. Steffens*³⁷ the Court, concluding that the Trade-Mark Act was unconstitutional, found that trademarks resulted from periods of use rather than from spontaneous creativity or design.³⁸ Because the copyright clause protects writings, “only such as are *original*, and are founded in creative powers of the mind, . . . the fruits of intellectual labor,”³⁹ the trademarks did not meet the originality requirement. The

29 L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 489-90 (2d Cir.), cert. denied, 429 U.S. 857 (1976); NIMMER, *supra* note 4, § 2.01.

30 188 U.S. 239 (1903).

31 *Id.* at 250.

32 *Id.*

33 *Id.* The basic rationale of Holmes' opinion is that any minimal expression of originality will suffice once that originality is found. He articulated the concern that led him to this conclusion:

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. At the one extreme some works of genius would be sure to miss appreciation At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of the public, they have a commercial value . . . and the taste of any public is not to be treated with contempt.

Id. at 251-52.

34 See, e.g., NIMMER, *supra* note 4, § 2.01[B] (the *Bleistein* doctrine provides that any “distinguishable variation” from a prior work is sufficient originality for copyright protection “if such variation is the product of the author's independent efforts, and is more than merely trivial”). See also *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

35 The dictionary definition of originality supports the idea: “relating to or constituting an origin or beginning . . . not secondary, derivative, or imitative . . . independent and creative in thought or action”; “the power of independent thought or constructive imagination.” WEBSTER'S NEW COLLEGIATE DICTIONARY 803 (1979).

36 See *infra* notes 59-105 and accompanying text.

37 100 U.S. 82 (1879).

38 *Id.* at 94.

39 *Id.* (emphasis in original).

Court found that first appropriation rather than original intellectual labor creates the right to use a trademark, requiring "no fancy or imagination, no genius, no laborious thought."⁴⁰ In *Steffens*, as in *Bleistein*, a key criterion to originality is the personality or creative thoughts emanating from an individual. While the symbol was unique as used, it arose merely by practical use—marking the product for sale—and not from original creativity.

Originality does not call for novelty, but rather only independent creation.⁴¹ As the Supreme Court stated in *Baker v. Seldon*,⁴² the "novelty of the art or thing described or explained has nothing to do with the validity of the copyright."⁴³ A work must originate with an author, meaning a person must independently create it.⁴⁴ Material in the public domain will support a copyright if put together as a "distinguishable" or "substantial" variation of preexisting material.⁴⁵ Put another way, "[a]ll that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"⁴⁶ Originality in this context means not much more than a prohibition of copying.⁴⁷ This formulation gives the test of originality sufficient for copyright protection the appearance of having a low threshold. But while the quantum of originality seems modest, that quantum cannot be abandoned.⁴⁸ Indeed, courts have construed the requirement that a variation on preexisting material contain more than merely trivial changes to mean that the variation—or originality—involved in a work must be substantial.⁴⁹ The foundation cases

40 *Id.*

41 See NIMMER, *supra* note 4, § 2.01[A].

42 101 U.S. 99 (1879).

43 *Id.* at 102.

44 *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); *Wihl v. Wells*, 231 F.2d 550 (7th Cir. 1956); *Alfred Bell*, 191 F.2d at 102; *Merritt Forbes & Co. v. Newman Inv. Sec., Inc.*, 604 F. Supp. 943 (S.D.N.Y. 1985); *Leeds Music, Ltd. v. Robin*, 358 F. Supp. 650 (S.D. Ohio 1973). See NIMMER, *supra* note 4, § 2.01[A].

45 *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927).

46 *Alfred Bell*, 191 F.2d at 103 (citing *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)).

47 *Id.* at 103; *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F.2d 583, 586 (D.C.N.Y. 1929). Judge Learned Hand provided a classic explanation of originality as distinguished from novelty:

[I]f by some magic a man who had never known it were to compose a new Keats' Ode on a Grecian Urn, he would be an 'author', and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats'.

Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936). See also *Alfred Bell*, 191 F.2d at 103 ("the 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before; similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his"). Cf. *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131 (8th Cir. 1985).

48 See, e.g., *L. Batlin*, 536 F.2d at 490. See also *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945) (to be protected the work must "contain some substantial, not merely trivial originality").

49 See *L. Batlin*, 536 F.2d at 490. See also *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983) (derivative work of art "must be substantially different from the underlying work to be copyrightable"); *Donald v. Zack Meyer's T.V. Sales & Serv.*, 426 F.2d 1027, 1030 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) ("something more than merely refraining from outright copying is required before a new variation on an old work has sufficient originality to be copyrightable"). Professor Denicola finds that it is possible to interpret such results "as establishing the necessity for at least some minimal degree of creativity as a prerequisite to copyright protection." Denicola, *supra* note 3,

make it clear that originality is found in the creative powers of the mind; it is the fruit of intellectual labor. To determine the copyrightability of contributions to preexisting factual material, courts often overlook this creative foundation, and focus instead on the labor portion of the process rather than the original fruits of such labor.

III. Factual Compilations

A. *Originality*

Section 103 of the Copyright Act recognizes protection for compilations of noncopyrightable material.⁵⁰ The basic approach to copyright protection of such compilations finds originality in the arrangement or combination put together by the compiler. When the contribution is the arrangement of facts, courts grant copyright protection to the arrangement provided that the work bears the requisite originality.⁵¹ The product must reflect the thought of the compiler and the form must result from the distinctive individuality of the compiler's mind.⁵² Indeed, the compiler must be capable of being defined as "author", *i.e.*, originator.⁵³ The difference between a copyrightable compilation and an unprotected gathering of facts is that with authorship, "the product has some likeness to the mind underneath it; in a work of mere notation, the mind is a guide only to the fingers that make the notation."⁵⁴

For example, the Fifth Circuit found a conditional sales contract or chattel mortgage agreement pieced together from various legal rules and forms uncopyrightable because it contained "nothing of substance which resulted from [the compiler's] creative work."⁵⁵ Although the compiler used time and effort to produce the contract, he essentially put all the material into a commonly used order, and the court found no original thought which resulted in a significant addition to the standard contract.⁵⁶ In contrast, the Seventh Circuit found a compilation of choice restaurants in a guide copyrightable because the compiler was an author who started from scratch, and did his own collecting, appraising, writing,

at 522. But he sees a danger in so subjective a standard and suggests that "[o]ne must ask whether the work reflects sufficient intellectual effort to justify copyright, or whether, instead, the quantum of authorship is too small to merit notice," thus avoiding use of the concept of creativity. *Id.* See Patry, *supra* note 3, at 19 (citing *Alfred Bell*, 191 F.2d at 102-03) (despite coupling the terms "creative" and "original" in some decisions, case law firmly establishes that the requirement of originality does not refer to a desired modicum of artistic merit, but rather to the consideration that the work has been "independently produced").

50 17 U.S.C. § 103 (1982). See *supra* notes 21-23 and accompanying text.

51 The fact that the component parts of a collective work are not original does not prevent a finding of originality in the combination. See, e.g., *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 388 (5th Cir. 1984) (citing *NIMMER*, *supra* note 4, §§ 3.02, 3.03).

52 *National Tel. News Co. v. Western Union Tel. Co.*, 119 F. 294, 298 (7th Cir. 1902).

53 See *supra* note 4.

54 *National Tel. News Co.*, 119 F. at 298 (a compilation of news facts presented over a ticker tape held not copyrightable).

55 *Donald v. Zack Meyer's T.V. Sales & Serv.*, 426 F.2d 1027, 1030 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

56 *Id.* at 1029-30.

and editing.⁵⁷ The compiler not only collected data, but also engaged in creative thought to appraise, describe, and edit the work.

A problem arises when, in cases such as this, the court also looks to the amount of labor involved in the compilation to find originality rather than only to the creative merit of the fruits of that labor.⁵⁸ These courts tend to protect factual data despite its complete lack of originality. This result has led to confusion over the extent that labor alone can produce copyright protection. Some courts protect industry as an original work of authorship, rather than only the product of such industry when it is original.

B. *The Industrious Collection Doctrine*

The industrious collection doctrine can be traced back to *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*,⁵⁹ where the Second Circuit upheld the copyright granted to a book containing a compilation of trademark illustrations that were themselves not original or copyrightable. The court stated that where labor is expended, the right to copyright a book does not depend on whether the collected materials consist of matters which show literary skill or originality, "either in thought or in language, or anything more than industrious collection."⁶⁰ According to the court, by going through the streets of a town and collecting the names of the inhabitants, their occupations and street numbers, a person acquires material for which he is the author. The labor produces a meritorious composition which the author may obtain the exclusive right to publish.⁶¹

While the court used the term "author," the book contained a noticeable lack of original thought or creativity. The mechanical process of collecting the factual information was original, but the product itself took no insight to produce and evidenced no original form. The concept of originality as a prerequisite for copyright protection was seemingly diminished. A new emphasis was put on labor rather than on creative processes emanating from a person.

The doctrine was seized upon in later opinions as courts struggled with the fact that a compiler could make a substantial contribution of labor in collecting factual data, only to have someone else freely reap the benefit of such a collection in their similar work.⁶² Originality was thus found in the process of collection, in the effort and skill of the com-

57 *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 812 (7th Cir. 1942). See also *Baldwin Cooke Co. v. Keith Clark, Inc.*, 383 F. Supp. 650 (N.D. Ill.), *aff'd*, 505 F.2d 1250 (7th Cir. 1974) (a calendar arrangement was found copyrightable because the arrangement was unique and its style, layout, and special features were completely different from any other similar product).

58 See, e.g., *NIMMER*, *supra* note 4, § 2.01[A] ("It is not any skill, training, knowledge and judgment that will support a copyright, but only those qualities when exercised as acts of authorship.").

59 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922).

60 *Id.* at 88.

61 *Id.*

62 Professor Denicola argues that:

The effort of authorship can be effectively encouraged and rewarded only by linking the existence and extent of protection to the total labor of production. To focus on the superficial form of the final product to the exclusion of the effort expended in collecting the data presented in the work is to ignore the central contribution of the compiler.

piller.⁶³ A more recent example of the doctrine at work is *Schroeder v. William Morrow & Co.*,⁶⁴ where the Seventh Circuit found a compilation of names and addresses in a garden directory copyrightable. The court, citing *Jeweler's Circular*, concluded that "only industrious collection . . . is required . . . [and] copyright protects not the individual names and addresses but the compilation, the product of the compiler's industry."⁶⁵ The court did not seem concerned with originality; the names and addresses were arranged alphabetically, requiring no original insight on the part of the compiler. It gave protection to the results of substantial and independent effort,⁶⁶ rather than to the fruits of original intellect.

Subsequent to *Schroeder* some confusion has emerged in the Seventh Circuit as to whether it was abandoning the industrious collection doctrine as a basis for copyright protection. In *Rand McNally & Co. v. Fleet Management Systems, Inc.*⁶⁷ (*Rand McNally I*), the District Court for the Northern District of Illinois found that Rand McNally's roadway mileage guide had not been proven copyrightable as a compilation work.⁶⁸ In denying each parties' motion for summary judgment, the court stated that factual compilations may be protected by copyright "if a result of some level of compiler effort and industry."⁶⁹ In *Rand McNally & Co. v. Fleet Management Systems, Inc.*⁷⁰ (*Rand McNally II*), the district court granted part of Rand McNally's renewed motion for summary judgment finding that mileage table data, and certain mileage segment data contained on maps in the guide but not in the mileage tables, were copyrightable.⁷¹

Denicola, *supra* note 3, at 530. This argument fails to consider that a work that does not meet the originality threshold is not entitled to protection regardless of how much labor was imputed. The value of that labor can be protected by market forces because people will expend labor only on what others will purchase. The law can thus foster efficiency by not granting unwarranted monopolies. See Patry, *supra* note 3, at 27. Justice Brennan reinforced this point in his dissent in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985) (Brennan, J. dissenting):

It is the labor of collecting, sifting, organizing, and reflecting that predominates in the creation of works of history such as this one. The value this labor produces lies primarily in the information and ideas revealed and not in the particular collocation of words through which the information and ideas are expressed. Copyright thus does not protect that which is often the most value in a work of history, and courts must resist the tendency to reject the fair use defense on the basis of their feeling that an author of history has been deprived of the full value of his or her labor.

63 See, e.g., *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (2d Cir. 1903); Denicola, *supra* note 3, at 530. See also Gorman, *supra* note 3, at 1570 ("What the copyright monopoly here protects is not a product whose social value is its mark of personality or individuality, but the effort, time, expense, and, in certain cases, the skill employed in performing a task which does not require special intellectual competence.").

64 566 F.2d 3 (7th Cir. 1977).

65 *Id.* at 5.

66 *Id.* at 6. While the court stated that copyright protected the selection, ordering, and arrangement of the data, the arrangement was alphabetical and thus not original.

67 591 F. Supp. 726 (N.D. Ill. 1983).

68 Rand McNally alleged that the defendant infringed on the copyright it held for its mileage guides. Since the court did not find that Rand McNally held a valid copyright for its mileage data, it did not reach the issue of whether the defendant was licensed to use some of the mileage data. *Id.* at 734 n.7.

69 *Id.* at 733 ("It may be that Rand McNally's efforts with respect to the latter component [mileage tables] of the *Mileage Guide* were small, not reaching the level of 'industrious collection' required for protection.").

70 600 F. Supp. 933 (N.D. Ill. 1984).

71 *Id.* at 934-35, 946.

Soon after, holding the arrangement of plots on a map copyrightable, the Seventh Circuit in *Rockford Map Publishers, Inc. v. Directory Service Company of Colorado, Inc.*⁷² declared that the "copyright laws protect the work, not the amount of effort expended."⁷³ Directory Service, relying on *Schroeder*, argued that since Rockford Map spent little time preparing the maps, its efforts were "not very 'industrious'" and its product was thus not copyrightable.⁷⁴ The court, rejecting this argument, emphasized that the amount of time inputted is irrelevant to copyright protection.⁷⁵ After all, a Bach cantata, a chapter of Dickens, products of a few hours, or even the Laffer Curve, a graph illustrating an economic principle scribbled on a napkin in a few minutes, are all copyrightable.⁷⁶ While seeming to reject industrious collection as a basis for protection, the court actually made no explicit judgement on whether industry or labor, in and of themselves, could be protected as original work. Rather, it interpreted the decisions in *Jeweler's Circular* and *Schroeder* as depending on whether the compiler produced a "new" or original arrangement or presentation of facts—whether the author added something of himself—and not on the amount of time the work consumed.⁷⁷ Nevertheless, the court's language on the irrelevancy of time or labor input created confusion in the circuit.⁷⁸

The industrious collection doctrine was in full force after *Rand McNally I and II*. In *Rockford Map*, however, the Seventh Circuit deemphasized labor and found originality only in creative arrangement. On a motion for reconsideration, the Illinois district court was forced to reconsider its earlier holdings in *Rand McNally I and II* in light of *Rockford Map*.

In *Rand McNally & Co. v. Fleet Management Systems, Inc.*⁷⁹ (*Rand McNally III*), the defendant argued that the district court judge erroneously relied on "industrious effort" in *Rand McNally I and II* as the most important factor to determine the copyrightability of Rand's mileage tables and segment data and improperly extended copyright protection to the underlying facts themselves.⁸⁰ Judge Getzendanner admitted that she relied on a labor theory of copyright protection in the earlier proceedings.⁸¹ She stated that under *Rockford Map*, the district court's assumption that the level of effort involved in a compiling the data is the most important question, which put an extra burden on Rand McNally to

72 768 F.2d 145 (7th Cir. 1985), cert. denied, 106 S. Ct. 806 (1986).

73 *Id.* at 148.

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.* The court found that the work was "a new arrangement of facts." *Id.* at 149. "New" is assumed to mean "original."

78 It remains unclear whether the *Rockford Map* court actually doubted the validity of the industrious collection doctrine.

79 634 F. Supp. 604 (N.D. Ill. 1986). The defendant filed a motion to reconsider the court's July 1984 motion for summary judgement, 600 F. Supp. 933 (N.D. Ill. 1984) (*Rand McNally II*), which the court granted in part and denied in part. *Rand McNally III*, 634 F. Supp. at 604. The defendant argued that *Rockford Map* rendered the court's analysis in *Rand McNally I and II* incorrect. *Id.* at 605.

80 *Id.* at 605.

81 *Id.* at 606.

show industriousness, was unnecessary.⁸² Rather, the court should have questioned whether the compilation as a whole was a copyrightable arrangement "without reference to the amount of labor involved on Rand McNally's part."⁸³

She then denied the motion to reconsider, finding the guides copyrightable under *Rockford Map* because the collection of numerous maps and the arrangement of data involved a "new arrangement or presentation of facts."⁸⁴ While the court did not expressly reject the industrious collection doctrine, it seemed to rely on the originality of the work produced as the basic test of copyrightability. It still concluded, however, that *Schroeder*⁸⁵ remains good law in the Seventh Circuit.⁸⁶ The court disagreed that in *Rockford Map*, by using the term "arrangement," it was moving away from concentrating on industriousness of the efforts to develop information to concentrating on the originality of the selection or arrangement.⁸⁷

A later district court case in the Seventh Circuit expressly denied that *Rockford Map* overruled the industrious collection doctrine, and found instead that it affirmed the doctrine's viability. In *Clark Equipment Co. v. Lift Parts Manufacturing Co.*,⁸⁸ the District Court for the Northern District of Illinois denied an alleged infringer's motion for partial summary judgment, finding a catalog of Clark's inventory copyrightable. Lift Parts wanted a previous denial overturned in light of the new authority of *Rockford Map* and *Rand McNally III*, which it found to have implicitly rejected industrious collection as a basis for protection.⁸⁹

While Lift Parts characterized Clark's catalog as similar to a mere "list of ingredients,"⁹⁰ the court appeared unconcerned about the lack of originality in the catalog. Instead, it found that the Copyright Act expressly protects compilations and "this circuit recognizes and protects such industrious collections as well."⁹¹ It ignored the fact that the Act also expressly requires that such a compilation constitute an original work of authorship.⁹² While the court found that Clark's work was "an original compilation and correlation" of illustrations, names, and numbers,⁹³ it never examined whether the compiler of the catalog engaged in

82 *Id.*

83 *Id.* at 606-07.

84 *Id.* at 607. The court denied defendant's motion to reconsider but indicated that it was without prejudice to a motion that certain uses of Rand McNally's mileage data did not constitute copyright infringement based on its opinion. *Id.* at 608.

85 566 F.2d 3 (7th Cir. 1977).

86 *Rand McNally III*, 634 F. Supp. at 608.

87 *Id.*

88 32 Copyright L. Rep. (CCH) ¶ 20,528 (N.D. Ill. 1986).

89 *Id.* ¶ 20,530.

90 *Id.* ¶ 20,531. "[M]ere listing of ingredients or contents" are excluded from copyright protection. 37 C.F.R. § 202.1(a) (1986).

91 32 Copyright L. Rep. (CCH) ¶ 20,531. The court essentially agreed with *Rand McNally III*, holding that industrious collection remains valid in the circuit, while not making the move toward originality that the earlier court had implicitly made. See *supra* notes 79-87 and accompanying text.

92 See, e.g., Patry, *supra* note 3, at 31 (by protecting the mere collection, assembling, selection, coordination and arrangement of such material, the *Rand McNally I* court "directly contravened" the Copyright Act and the Constitution).

93 32 Copyright L. Rep. (CCH) ¶ 20,531.

original thought, rather than in a mere logical and mechanical process. Relying completely on industrious collection as a basis for protecting the catalog, the court overlooked the fundamental principle that copyright protection extends only to works of an author who is an original and creative thinker.

While purporting to rely on the basic concept of originality as a prerequisite for copyright protection, the Eighth Circuit in *West Publishing Co. v. Mead Data Central, Inc.*,⁹⁴ actually based its finding of originality on the amount of industry put into an arrangement. The case is an example of how protection based upon industrious collection can go too far in creating a copyright monopoly for factual, public domain material. It involved Mead's proposed citation of page numbers from West's legal reporters in its computerized LEXIS reports of the same opinions, thus providing "jump" or "pinpoint" citations to the location in the West reporter of the particular portion of an opinion viewed on LEXIS.⁹⁵ In response to Mead's announcement of its plans to add such jump cites to its program, West Publishing brought suit claiming copyright infringement of its arrangement of case reports.⁹⁶ The court upheld a preliminary injunction prohibiting Mead's use of the page numbers. It affirmed the district court's finding of a "substantial likelihood that West's arrangements of case reports are protected by copyright law."⁹⁷

The court first correctly pointed out that an arrangement of preexisting materials may receive copyright protection, noting that "in each case the arrangement must be evaluated in light of the originality and intellectual-creation standards" of prior case law.⁹⁸ These standards seemed lost, however, when the court examined West's arrangement to see if they were met. Essentially, the cases in West's volumes are arranged in a mechanical order that took no original insight or creativity to formulate.⁹⁹ The court found that the arrangement resulted from "considerable labor, talent, and judgment,"¹⁰⁰ but did not dwell on the standard of independent creation reflecting the mind of the "author" or even on originality itself. Rather, it was unable to move beyond labor. In re-

94 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 962 (1987).

95 *Id.* at 1222.

96 *Id.*

97 *Id.*

98 *Id.* at 1225. The court cited *Goldstein v. California*, 412 U.S. 546, 561 (1973), where the Supreme Court stated that an original work of authorship is the product of some "creative intellectual or aesthetic labor." 799 F.2d at 1223.

99 The court described West's process:

West separates the decisions of state courts from federal court decisions. . . . State court decisions are divided by geographic region and assigned to West's corresponding regional reporter. Federal decisions are first divided by the level of court they come from . . . [then] subdivided according to subject matter . . . [and finally] assigned to a volume of the reporter and . . . arranged within the volume . . . for example . . . according to circuit [in numerical order].

799 F.2d at 1226.

100 *Id.* The court stated that to meet intellectual-creation requirements "a work need only be the product of a modicum of intellectual labor," and it found that West's case arrangements easily met this test. *Id.* at 1227. The court also found no allegation that West copies its case arrangement from any other source and thus concluded that the requirement of originality posed no obstacle to copyright protection. *Id.*

sponse to Mead's argument that in essence the court was giving page numbers copyright protection, the court concluded that "protection for the numbers is not sought for their own sake. It is sought, rather, because access to these particular numbers . . . would give users of LEXIS a large part of what West has spent so much labor and industry in compiling" ¹⁰¹ In the end, the court found that the arrangement constituted an original work of authorship, ¹⁰² but overlooked the inherent lack of originality in the arrangement and page numbers. ¹⁰³

West Publishing and the Seventh Circuit cases preceding it reflect the extent to which protection of the labor involved in compiling or arranging noncopyrightable factual material confuses and obscures the fundamental originality that copyright law was designed to protect. Originality comes from within the mind of the author or creator. ¹⁰⁴ It is difficult to see how the scope of the Copyright Act can protect a case arrangement "which may, on the facts, be no more than the sequential publication of court opinions in the chronological order in which the cases are handed down." ¹⁰⁵

IV. Requiring a Minimum Level of Originality as a Prerequisite for Copyright Protection of Factual Compilations

Admittedly, the line between "intellectual labor" producing original fruits evidencing a new creation and mere mechanical labor producing a collection of material having little or no connection to original thought or insight can be a fine line to draw. But the basic problem with the industrious collection doctrine is that in attempting to protect the industriousness of a compiler or arranger of facts, courts relying on the doctrine fail to apply the concept of originality as it is understood in copyright law. ¹⁰⁶ Courts rejecting the validity of the industrious collec-

¹⁰¹ *Id.* at 1227.

¹⁰² *Id.*

¹⁰³ This holding seems somewhat contrary to an earlier Eighth Circuit case where the court found that a random numbering system was unoriginal. In *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208 (8th Cir. 1986), the court stated that because the "expression itself is nothing more than public domain numbers" it does not meet even a low threshold of originality. *Id.* at 1213. Rather, the system constituted "the accidental marriage of a part and a number" and not an original work of authorship. *Id.* Foreshadowing *West Publishing*, however, the court added that if some meaningful pattern or judgement in the assignment of numbers could be discerned the system would be an original work. *Id.* The fact remains that even with some distinguishable effort, a compilation of numbers does not meet the creative authorship requirement.

¹⁰⁴ See *supra* notes 10-49 and accompanying text.

¹⁰⁵ 787 F.2d at 1248 (Oliver, J., dissenting). Judge Oliver also does not believe that "the scope of West's copyright is broad enough to protect the placement of arabic numbers on the pages of the volumes in which those opinions are published." *Id.* Two other cases expressly deny copyright protection to the pagination of a public domain work. *Eggers v. Sun Sales Corp.*, 263 F. 373 (2d Cir. 1920); *Banks Law Publishing Co. v. Lawyers' Co-op. Publishing Co.*, 169 F. 386 (2d Cir. 1909), *appeal dismissed*, 233 U.S. 738 (1911).

¹⁰⁶ See, e.g., NIMMER, *supra* note 4, § 3.04. Speaking specifically of a researcher, he points out that:

One who explores obscure archives and who finds and brings to the light of public knowledge little known facts or other public domain materials has undoubtedly performed a socially useful service, but such service in itself does not render the finder an "author."

Id. The person who puts together facts in the order found or some other order not requiring creative thought also remains outside the definition of author.

tion doctrine have come closer to succeeding in drawing the line between intellectual labor and mechanical labor while remaining faithful to the fundamental principles upon which copyright law was built.

Even some of the early Supreme Court cases formulating those principles reflect a rejection of the industrious collection doctrine. For example, the Supreme Court's opinion in *Baker v. Seldon*,¹⁰⁷ where the Court denied copyright protection to a book providing an arrangement and explanation of a bookkeeping system, implicitly rejects the doctrine. The Court stated that the plaintiffs deserved great praise for their industry and enterprise in publishing the paper, but the law does not contemplate rewarding them for that. After all, "[t]he title of the Act of Congress is, 'for the encouragement of learning,' and was not intended for the encouragement of mere industry, unconnected with learning and the sciences."¹⁰⁸ In addition, *United States v. Steffens* indicates that while a form of expression may arise by mere practical necessity, the expression must derive from creative intellect, an original thought from a unique mind, in order to meet the minimum level of originality necessary for copyright protection.¹⁰⁹ Such cases, while not factual compilation cases, make it clear that labor alone does not create a copyrightable work.

A minimum threshold of originality, with an emphasis on minimum, seems to have been established by those courts rejecting or criticizing the industrious collection doctrine. Facts compiled, but not put together in a subjective arrangement evidencing thoughtful selection or creativity, fall outside the scope of copyright protection. Without such an arrangement—a completed work of authorship—a grant of copyright protects facts themselves, preexisting information that was never intended to receive such protection.

In *Miller v. Universal City Studios, Inc.*,¹¹⁰ the Fifth Circuit explicitly rejected the industrious collection doctrine, finding research, a form of factual compiling, not copyrightable. A lower court found that copyright law protects not only the ingenuity involved in giving expression to facts, but also the effort involved in discovering and exposing facts.¹¹¹ Comparing the collection of facts to the compilation of names and addresses in a directory, the circuit court concluded that copyrightability for such a work rests "on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information."¹¹² Protecting the industry involved in gathering

107 101 U.S. 99 (1879).

108 *Id.* at 105. In his book, Professor Kaplan summarized the dilemma reflected in the *Baker* opinion and its resolution:

It is pointed out that the man who originated a workable system for producing and marketing paperbacks was more deserving than the authors or publishers of many sorry books put out in paperback which rest comfortably in copyright. Considering, however, the difficulties in demarking the limits of such copyrights of methods and the pervasive intrusion on competition which would be threatened, I daresay most of us would prefer to stay with the *Baker* case.

B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 64 (1967).

109 100 U.S. 82, 94 (1879).

110 650 F.2d 1365 (5th Cir. 1985).

111 *Id.* at 1369.

112 *Id.*

facts or other noncopyrightable material essentially provides copyright protection to that material itself in violation of a fundamental principle of copyright law.¹¹³

Likewise, the Second Circuit finds no merit in the contention that the labor involved in compiling factual material leads to copyright protection. In *Eckes v. Card Prices Update*,¹¹⁴ the court gave copyright protection to a compilation of baseball cards in a guide. It ignored the industry involved in such a collection, and instead, rested its holding squarely on the "selection, creativity, and judgement" reflected in the list of cards.¹¹⁵ While the Second Circuit finds a "surface illogic" in the proposition that facts alone are not copyrightable while a collection of them is,¹¹⁶ it solves the dilemma by protecting only the product of original selection or creative arrangement—an original work of authorship, rather than facts themselves.

While courts may recognize that originality in general is required in order to protect factual compilations, they must not ignore the requirement that at least a minimum level of originality is necessary to support such protection. In *Southern Bell Telephone & Telegraph Co. v. Associated Telephone Directory Publishers*,¹¹⁷ the Eleventh Circuit held a telephone directory copyrightable without resort to the industrious collection doctrine, but in doing so it misinterpreted the originality standard. The court found that the "Atlanta Yellow Pages" was copyrightable as an original work of authorship because it is the product of *subjective* selection, organization, and arrangement of preexisting materials.¹¹⁸ The copyright was not valid due to the labor involved in compiling the directory; the court cited with approval cases discounting the substantial line of cases beginning with *Jeweler's Circular*¹¹⁹ that protect the results of industrious collection rather than the product of original thought and judgement.¹²⁰ The court, however, manipulated the originality requirement in reaching this result. While a compilation of names and numbers in alphabetical order reflects considerable effort, it is not a reflection of the compiler's personality. This selection of material may have been subjective, but it did not rise to the minimum level of original thought necessary for copyright protection.

If an arrangement can pass the original work of authorship threshold, then courts can grant copyright protection on legitimate grounds faithful to copyright principles. It is when the prerequisites to this origi-

113 *Id.* at 1372.

114 736 F.2d 859 (2d Cir. 1984).

115 *Id.* at 863.

116 *Financial Information, Inc. v. Moody's Investors Serv. Inc.*, 751 F.2d 501, 507 (2d Cir. 1984).
See also *id.* at 510 (Newman, J., concurring):

The fact that some language in early cases [citing *Jeweler's Circular*] and, perhaps, even some results reached in those cases . . . have supported a view that copyright protection should be extended solely because of laborious effort is no reason for us to disregard the statutory criteria that Congress articulated in 1976 when it enacted the current statute. The "sweat of the brow" rationale is no substitute for meeting one of those statutory criteria.

117 756 F.2d 801 (11th Cir. 1985).

118 *Id.* at 809-10 (emphasis added).

119 See *supra* note 59.

120 756 F.2d at 809.

nality standard are found lacking that courts grasp to find a basis for protection in industry. While the industrious collection approach seems fair in view of the large amount of time and effort a compiler may contribute to a work, the concern for free dissemination of information to the public should outweigh the need for such protection. A compiler not meeting the originality threshold can find protection in the marketplace. The public will purchase the most useful and economical presentation of information.

V. Conclusion

Copyright law is intended to protect only original works of authorship. Originality at a minimum involves independent creation. While it is difficult to define when a compiler contributes enough original expression to a collection of noncopyrightable data so that the compiler becomes an "author," a minimum threshold of originality is necessary to prevent courts from granting protection to unoriginal works, thus limiting distribution of the underlying information. That threshold of originality can be found in reflections of the author's personality. Whether it is in a novel or an arrangement of preexisting facts, copyright essentially protects original expression from the mind of the author.

Finding copyrightability to turn upon the amount of labor expended in assembling data inappropriately protects facts themselves when such industrious collection is merely mechanical rather than intellectual. To determine whether a compilation of facts is copyrightable, courts should look exclusively at the arrangement of material and determine whether it is a new work of independent creation. Since the fundamental concept of originality views it as a reflection of personality, this approach is consistent with the purpose and scope of copyright law.

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