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## Original Facts: Skill, Judgment, and the Public Domain

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It has long been said that facts cannot be protected by copyright. Copyright jurisprudence has been less than clear, however, about what constitutes a fact, and about the reasons why facts cannot be copyrighted. The Supreme Court of Canada, in its recent decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, restated the principle that facts cannot be copyrighted. At the same time, the Court set a standard for originality that can easily be interpreted so as to offer copyright protection to facts.

In this paper, the author explores the concept of “facts” and the way in which Canada’s standard for originality might be used to extend copyright to facts. She focuses on the problems that face courts in cases involving “original facts”—those facts that owe their existence to the exercise of individual intellectual effort. She identifies and discusses three kinds of original facts: those discovered through skill and judgment, those that are valuable due to the particular selection or arrangement, and those that are not necessarily true. Jurisprudence from Canada is compared with American and Australian cases, revealing different ways of applying the principle that there is no copyright in facts. The author examines the policy reasons why facts should not be copyrightable, and argues for an interpretive approach that leaves facts in the public domain.

Il a été longtemps affirmé que les faits ne pouvaient pas être protégés par le droit d’auteur. La jurisprudence dans le domaine du droit d’auteur est cependant loin d’être précise sur ce qui est de savoir ce que constitue un fait et sur les raisons pour lesquelles les faits ne sauraient être protégés par le droit d’auteur. Dans un récent arrêt, *CCH Canadian Ltd. v. Law Society of Upper Canada*, la Cour Suprême du Canada a réitéré le principe selon lequel les faits ne pouvaient être protégés par le droit d’auteur. Toutefois la Cour a développé une condition d’originalité qui pourrait facilement permettre, par une interprétation extensive, une protection des faits par la loi sur le droit d’auteur.

Dans cet article, l’auteur examine la notion de “faits” et la manière dont il est possible d’interpréter le critère d’originalité au Canada pour étendre aux faits la protection offerte par le droit d’auteur. L’auteur se penche particulièrement sur les problèmes auxquels les tribunaux sont confrontés dans les cas portant sur des “faits originaux”; faits qui doivent leurs existences à un effort de nature individuel et intellectuel. L’auteur identifie et met en lumière trois types de faits originaux : ceux qui sont les produits du talent et du jugement, ceux qui ont acquis de la valeur à la suite d’un effort de sélection ou d’arrangement et ceux qui ne sont pas nécessairement vrais. La jurisprudence canadienne est ensuite comparée à la jurisprudence des États-Unis et à celle de l’Australie afin de mettre en évidence les différentes manières dont le principe selon lequel les faits ne sauraient bénéficier de la protection du droit d’auteur est appliqué. L’auteur examine également les raisons politiques avancées pour fonder la proposition selon laquelle les faits ne devraient pas être protégée par le droit d’auteur et milite pour une approche interprétative qui préconise le maintien des faits dans le domaine public.

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<b>Introduction</b>	255
<b>I. The Originality Threshold</b>	257
<b>II. Original Facts</b>	260
<b>III. An Attempt to Define “Facts”</b>	263
A. <i>Information That Is Knowable Only Through the         Exercise of Considerable Skill and Judgment</i>	264
B. <i>Information That Is Useful or Valuable Only         Because of the Way in Which It Has Been Selected         or Arranged</i>	265
C. <i>Information That Is Not Necessarily “True”</i>	267
<b>IV. Copyright and Facts</b>	269
A. <i>United States</i>	272
B. <i>Canada</i>	274
C. <i>Facts and the Public Domain</i>	276
<b>Conclusion</b>	277

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## Introduction

The recent decision of the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*<sup>1</sup> has, in theory at least, put to rest the debate in Canadian copyright law over the appropriate standard of originality.<sup>2</sup> The unanimous Court defined originality as requiring an exercise of “skill and judgment” on the part of the author of the work. They explicitly rejected labour alone as a basis for copyright protection, and rejected the higher standard of “creativity”. In elaborating on the standard of “skill and judgment”, Chief Justice McLachlin stated that the “exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.”<sup>3</sup>

In the cases that will follow, courts will address the important question of originality, and more specifically consider how to maintain a distinction in the analysis between the application of the standard for originality to the work itself to determine if copyright subsists, and the extent of any infringement of copyright. In other words, as Ginsburg stated in her article on copyright in informational works, “the difficult pragmatic question becomes the appropriate *scope* of protection.”<sup>4</sup> A compilation of facts may be “original” as a result of a selection or arrangement of facts involving skill and judgment. Determining the scope of protection for selections or arrangements of facts remains a thorny problem. It is also an issue that bears directly upon the scope of the public domain in Canada.

In an earlier comment on the *CCH Canadian* decision,<sup>5</sup> I argue that the “skill and judgment” standard for originality is not, in practical terms, much different from the US Supreme Court’s “modicum of creativity” threshold established in *Feist*

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<sup>1</sup> [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395, 2004 SCC 13 [*CCH Canadian* cited to S.C.R.].

<sup>2</sup> The *Copyright Act* (R.S.C. 1985, c. C-42 [*Copyright Act*]) states that copyright subsists “in every *original* literary, dramatic, musical and artistic work” (*ibid.*, s. 5(1) [emphasis added]). Prior to *CCH Canadian*, two camps were in battle over the meaning of the term. On one side were those who argued that originality required nothing more than labour: a work was original if its author had invested labour in its creation. The other side argued for a slightly higher threshold, one that had the work originating from the author through some kind of authorial, if not creative, act. Although the Federal Court of Appeal had already rejected “sweat of the brow” as the standard of originality in Canada (*Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1997), [1998] 2 F.C. 22, 154 D.L.R. (4th) 328 (C.A.) [*Tele-Direct* cited to F.C.], aff’g (1996) 113 F.T.R. 123, 74 C.P.R. (3d) 72 (F.C.T.D.), leave to appeal to S.C.C. refused, [1998] 1 S.C.R. xv), vigorous argument was made before the Supreme Court of Canada that “sweat of the brow” should be the accepted standard of originality.

<sup>3</sup> *CCH Canadian*, *supra* note 1 at para. 25.

<sup>4</sup> Jane C. Ginsburg, “Creation and Commercial Value: Copyright Protection of Works of Information” (1990) 90 Colum. L. Rev. 1865 at 1870 [emphasis in original].

<sup>5</sup> Teresa Scassa, “Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada’s Decision in *CCH Canadian Limited et al. v. Law Society of Upper Canada*” (2004) 3 C.J.L.T. 89. A similar argument is made by Professor Daniel Gervais in “Canadian Copyright Law Post-CCH” (2005) 18 I.P.J. 131 at 139ff.

*Publications Inc. v. Rural Telephone Service Co. Inc.*<sup>6</sup> Both thresholds require some intellectual contribution (however modest) to the creation of the work. But the choice by the Supreme Court of Canada to extract language from the “sweat of the brow” line of cases in setting the standard for originality sends an ambiguous message. In addition, unlike the US Supreme Court, the Canadian Court does not take any particular pains to emphasize the difference between the analysis required to determine if there is sufficient originality for copyright to subsist, and the ensuing analysis of the scope of copyright.<sup>7</sup> While the Canadian Supreme Court accepts that facts are not the subject matter of copyright, the concept of “fact” is given no elaboration, and little direct attention is given to issues of the scope of copyright in fact-based works.

In this paper, I will argue that the “skill and judgment” standard formulated by the Court must be carefully applied so as not to extend copyright protection to what I call “original facts”. I will explain this concept in greater detail later in the paper. For now, it is enough to say that original facts are those that can be said to result from an exercise of skill and judgment on the part of an individual. The term “original facts” recognizes that the concept of a fact is considerably more nuanced than much copyright case law would allow. I will argue that there is an important reason to distinguish between the skill and judgment that gives rise to facts and that which gives rise to a copyright-protected work. In doing so, I will argue that the “skill and judgment” standard embraced by the Court in *CCH Canadian* must be read alongside its concurrent statement that there is no copyright in facts,<sup>8</sup> and the Court’s defence of a vigorous public domain.<sup>9</sup>

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<sup>6</sup> 499 U.S. 340, 111 S. Ct. 1282 (1991) [*Feist* cited to U.S.]. Notwithstanding the view of the Supreme Court of Canada to the contrary, the American and Canadian standards of originality are very similar in that both require some degree of intellectual effort. Viewed in this light, a “modicum of creativity” and an “exercise of skill and judgment” are not wildly dissimilar.

<sup>7</sup> O’Connor J., for the unanimous U.S. Supreme Court in *Feist*, stated that the non-copyrightability of facts “inevitably means that the copyright in a factual compilation is thin” (*ibid.* at 349). The American approach clearly mandates a two-stage analysis. In the first stage, the court must determine whether the selection or arrangement of facts is sufficiently original for copyright to subsist. In the second stage, it must consider whether there has been substantial taking from the selection or arrangement, as opposed to the underlying facts themselves. In *CCH Canadian* (*supra* note 1) this two-stage analysis is less evident, since once it was determined that there was copyright in the compilations, the Court found there was infringement because the works were photocopied.

<sup>8</sup> McLachlin C.J. writes that “in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas” (*CCH Canadian Ltd.*, *ibid.* at para. 22).

<sup>9</sup> The Court refers to the importance of a robust public domain in both *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336 at para. 32, 210 D.L.R. (4th) 385, 2002 SCC 34 [*Théberge* cited to S.C.R.], and *CCH Canadian*, *ibid.* at para. 23.

## I. The Originality Threshold

Copyright legislation recognizes and gives legal status to authorial acts. The concept of “originality” is descriptive of the kind of authorial effort that warrants protection through copyright’s significant statutory monopoly. Too low a standard of originality gives rise to potentially excessive legal protection for works; too high a standard might accord too little protection to achieve the objectives of copyright legislation.<sup>10</sup> As Chief Justice McLachlin stated in *CCH Canadian*:

When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author’s or creator’s rights, at the loss of society’s interest in maintaining a robust public domain that could help foster future creative innovation.<sup>11</sup>

Defining originality in such a context is not simply a statement about authorship; it is a ruling on the economic boundaries of various activities.

The relationship between authorship and the economy is a dynamic one. Copyright is arguably intended to provide an incentive to authors to produce new works for the benefit of society.<sup>12</sup> The kinds and categories of authorship are presumably not closed, just as the kinds and categories of economic activity evolve over time. The recent shift towards an information economy has had an impact on the kinds of works for which copyright protection is sought, and on the way in which such works are produced. The paradigm of the individual author striving to create an original work has, in many contexts, been replaced by an investment of capital and labour to produce works that reflect a collective routine effort to generate a compilation for a commercial marketplace. As the centrality of the individual author diminishes, the drive to link the copyright monopoly to the author’s substitute—capital and labour—increases. The “sweat of the brow” threshold for originality in some copyright jurisdictions reflects a recognition of labour and capital as a stand-in for the more traditional author.

Significantly, however, “sweat of the brow” is an older doctrine, having its roots in nineteenth-century English case law. These early cases still largely recognized individual authorial effort. The context in which the works at issue were created can be distinguished from the contemporary context. The role of the individual as an

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<sup>10</sup> These objectives were described in *Théberge* as striking a balance between the rights of creators and the rights of users of copyright works (*ibid.* at para. 30). They are reiterated in *CCH Canadian*, *ibid.*

<sup>11</sup> *CCH Canadian*, *ibid.* at para. 23.

<sup>12</sup> The historical public policy objectives of copyright law are a matter of some academic debate. Certainly, it is a widely held view that copyright law serves as an economic incentive for authors and artists to create works. This view is reflected in the U.S. Constitution’s grant of authority to the federal government to legislate with respect to copyrights “[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” (U.S. Const., art. I, § 8, cl. 8).

author of works can change significantly even within the context of particular kinds of works. For example, where at one time the individual authorial effort might have been palpable in the creation of a compilation of facts, digital technologies have so automated the processes for generating certain types of compilations that the authorial effort in such works is much less evident.<sup>13</sup> If authorial effort is a measure of copyrightability, the fact that some kinds of factual compilations once received copyright protection does not necessarily mean that they deserve the same protection today.<sup>14</sup>

In setting the “skill and judgment” standard for originality in Canada, the Supreme Court of Canada apparently sought to filter out purely or even largely mechanical processes for generating works (most likely compilations) from the realm of copyright law.<sup>15</sup> In doing so, the Court expressly rejected “sweat of the brow” as the measure of originality for copyright purposes.<sup>16</sup> The mere expenditure of effort is not qualitatively sufficient to warrant copyright protection. The Court ruled that works that result from purely mechanical efforts will not acquire copyright protection because their creation does not reflect skill and judgment. Originality, therefore, is a qualitative threshold. Some types of effort expended by humans will clearly not amount to an exercise of skill and judgment.<sup>17</sup> Copyright protection will exist only

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<sup>13</sup> Ginsburg refers to factual compilations as works of “low authorship” in contrast to more creative works of “high authorship” (*supra* note 4). In the modern context, the labour involved in the creation of a directory, for example, might be significantly reduced by the possibility of automated data input, as well as computer software that automatically sorts data according to particular parameters. This technology may significantly diminish the degree of author-centred effort involved in creating the work; at the same time, it may also increase the degree of capital investment required to produce such works.

<sup>14</sup> The thread of unfair competition principles run through the early “directory” cases; there, copyright infringement was often found in circumstances in which competitors copied materials from fact-based works. As I argue elsewhere, copyright law has become intertwined, to some disadvantage, with unfair competition law principles; this intertwining is particularly true for fact-based works. See Teresa Scassa, “Originality and Utilitarian Works: The Uneasy Relationship between Copyright Law and Unfair Competition” (2004) 1 U. Ottawa L. & Tech. J. 51.

<sup>15</sup> McLachlin C.J. writes: “The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise” (*CCH Canadian, supra* note 1 at para. 25).

<sup>16</sup> *CCH Canadian, ibid.* at para. 24. It is interesting that in rejecting “sweat of the brow”, McLachlin C.J. writes: “The ‘sweat of the brow’ approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner’s rights, and fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works” (*ibid.* at para. 24). This is a rather odd statement. The problem with fact-based works is that without protection, there is arguably little incentive to create and disseminate such works. It is not immediately obvious how largely removing such works from the scope of copyright protection achieves any kind of balance between the rights of the creators of such works and the broader public interest. Indeed, Ginsburg argues that while works of low authorship do not fit comfortably within the copyright paradigm, they are deserving of protection (*supra* note 4).

<sup>17</sup> In *CCH Canadian, supra* note 1, McLachlin C.J. gave basic editing as an example of work that failed to meet the necessary threshold of “skill and judgment” (*ibid.* at para. 35). This example is a

where there is a qualitatively sufficient expenditure of authorial effort. Put another way, it will exist where there is authorial effort, and such effort is defined in terms of an exercise either in creativity, or in skill and judgment. Rote or mechanical efforts are not rewarded with a monopoly.

In reaching its decision in *CCH Canadian*, the Supreme Court of Canada did not explicitly distinguish between a standard of originality required for compilations of fact and one required for more general categories of works. Chief Justice McLachlin seems to suggest, however, that there are two categories of works that can qualify as “original” under the *Copyright Act*. Works resulting from an exercise of “skill and judgment” are original, “[w]hile creative works will by definition be ‘original’ and covered by copyright.”<sup>18</sup> If the Court’s decision can thus be read as separating original works into two categories—those inherently “creative” and those requiring “skill and judgment”—the Court seems to recognize two levels of authorship.<sup>19</sup> The common thread is some form of intellectual engagement in the process of creating the work. The opposite of this intellectual engagement would appear to be rote or mechanical effort.<sup>20</sup> The choice of the terms “skill and judgment”, however, extracted as they are from “sweat of the brow” jurisprudence,<sup>21</sup> can lead very easily to an overinclusive standard of originality. The Court claims it is setting a standard at a midpoint between “sweat of the brow” and “creativity”, but given that it engages with very little of the prior case law or literature in the area, it is difficult to grasp what its version of the

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good illustration of the problems inherent in any qualitative measure for originality. See Scassa, *supra* note 5.

<sup>18</sup> *CCH Canadian*, *ibid.* at para. 25.

<sup>19</sup> Ginsburg distinguishes between two levels of authorship when she writes:

We have now, as we have long had, two kinds of copyright: in high authorship works, such as novels and narrative histories, copyright protects the authorial presence within the work; in low authorship works, such as telephone directories and compilations of stock quotations, copyright protects the labor and resources invested in the work’s creation” (*supra* note 4 at 1870).

Significantly, Ginsburg’s article shortly predates the U.S. Supreme Court’s decision in *Feist* and is even cited by the court in that case. See *Feist*, *supra* note 6. Although the court in *Feist* recognized the possibility of granting copyright protection to works of low authorship, it also accorded such works a relatively low level of protection.

<sup>20</sup> McLachlin C.J. expressly excludes this type of effort from protection. See *CCH Canadian*, *supra* note 1 at para. 25.

<sup>21</sup> Older “sweat of the brow” cases in Canada referred to “skill, judgment or labour” or various constellations of these qualities as setting the standard for originality in Canada. In *Ascot Jockey Club v. Simons* (1968), 64 W.W.R. 411, 56 C.P.R. 122 (B.C.S.C.) [*Ascot* cited to W.W.R.] the court referred to “sufficient labour, knowledge and judgment” (*ibid.* at 422). In *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 97 F.T.R. 259, 62 C.P.R. (3d) 257 (F.C.T.D.) [cited to F.T.R.], Richard J. referred to “labour, skill and judgment” (*ibid.* at para. 24). In *British Columbia Jockey Club v. Standen* (1985), 22 D.L.R. (4th) 467, [1985] 6 W.W.R. 683, 8 C.P.R. (3d) 283 (B.C.C.A.) [*B.C. Jockey Club* (C.A.) cited to D.L.R.], *aff’d* (1983), 146 D.L.R. (3d) 693, [1983] 4 W.W.R. 537, 73 C.P.R. (2d) 164 (B.C.S.C.) [*B.C. Jockey Club* (S.C.) cited to D.L.R.], the British Columbia Court of Appeal adopted the standard relied upon by the trial judge that referred to “work, skill, judgment and knowledge” (*B.C. Jockey Club* (S.C.), *ibid.* at 703-704).

midpoint might be. If what the Court has done is simply remove works produced by purely mechanical effort from the reach of the standard of originality, then the result is hardly less inclusive than “sweat of the brow”. If it is looking for some qualitative measure of intellectual effort, it is much closer to the American standard, which it misrepresents as “creativity”.<sup>22</sup> The fact that the Canadian Court finds that basic editorial work does not meet the standard suggests it is closer to the American threshold.<sup>23</sup>

Guidance in the application of the Court’s skill and judgment standard must be sought from other elements in the Court’s decision, as well as in other recent cases decided by the Court. In *CCH Canadian*, the Court affirms that there is no copyright in facts. At the same time, it affirms a central role in Canadian copyright law for a vigorous public domain—an approach that is evident in other recent decisions.<sup>24</sup> The standard of originality must therefore be read in conjunction both with the Court’s statement that there is no copyright in facts and a robust understanding of the public domain.

## II. Original Facts

The bar on copyrighting facts may be reconcilable with a standard of originality that requires some “minimal level of creativity.”<sup>25</sup> It is less clear that it can exist comfortably alongside a “skill and judgment” standard of originality. The difference between the two standards is at some level semantic. Yet in law, the choice of words

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<sup>22</sup> O’Connor J. in *Feist*, referred to a “minimal level of creativity” (*supra* note 6 at 358 [emphasis added]). In rejecting what she terms the “creativity” standard from *Feist*, McLachlin C.J. wrote: “A creativity standard implies that something must be novel or non-obvious—concepts more properly associated with patent law than copyright law” (*CCH Canadian*, *supra* note 1 at para. 24). Yet O’Connor J., in *Feist*, specifically states that “novelty is not required” by the standard for originality (*ibid.*).

<sup>23</sup> For example, McLachlin C.J., in referring to the editors’ review of decisions for “minor grammatical errors and spelling mistakes” states: “Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection (*CCH Canadian*, *ibid.* at para. 35). Since it could well be argued that a command of spelling and grammar does reflect skill and judgment, this remark suggests that McLachlin C.J. did indeed have some qualitatively higher threshold in mind. An alternative view is that the amount of editing work was not quantitatively sufficient—but this would reintroduce the consideration of labour. Interestingly, in the American case *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 674 (2d Cir. 1998) [*Matthew Bender*], cert. denied 522 U.S. 3732, 119 S. Ct. 2039, which also dealt with copyright in published case reporters and which was not cited by the Canadian Supreme Court in *CCH Canadian*, the court found no copyright in editorial work contained in the publisher’s law reports on the basis that “creativity in the task of creating a useful case report can only proceed in a narrow groove” (*Matthew Bender*, *ibid.* at 688).

<sup>24</sup> See e.g. *Théberge*, *supra* note 9 at para. 32; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427 at para. 132, 240 D.L.R. (4th) 193, 2004 SCC 45.

<sup>25</sup> *Feist*, *supra* note 6 at 358.

bears significance. “Creativity” places more emphasis on the effort of the author to “create” something new. “Skill and judgment” lacks this emphasis. Rather, it suggests that care and thoughtfulness in working with known or pre-existing elements will suffice. Such a standard of originality will likely present problems for courts faced with complex copyright issues involving “original facts”. I use the term “original facts” to refer to those facts that owe their existence to the exercise of individual intellectual effort. Where authorial effort is described as “skill and judgment” and facts are arrived at through an exercise in skill and judgment, one may question whether the facts themselves have taken on a quality such that the protection of their expression must amount to a protection of the facts themselves.

The problem of original facts can be illustrated through a consideration of two recent Canadian cases. Both *Weetman v. Baldwin*<sup>26</sup> and *B & S Publications Inc. v. Max-Contacts Inc.*<sup>27</sup> are lower-court decisions that predate *CCH Canadian*. In both cases, the judges found that there was copyright infringement, notwithstanding that the infringing act amounted to the copying of factual information. Although the decisions can be dismissed either as being wrongly decided or reversible in light of the recent decision in *CCH Canadian*, it is also possible that they might be decided the same way today. Certainly in both cases, the judges were aware of the *Tele-Direct* decision, which set an ostensibly higher threshold for copyright protection than did *CCH Canadian*.<sup>28</sup>

In *Weetman*, Judge Romilly of the British Columbia Provincial Court dealt with a case of alleged copyright infringement involving maps. The plaintiff, through some significant personal effort, had located and charted a previously uncharted mountain trail. The defendant had copied the trail location from the plaintiff’s map. He argued, *inter alia*, that the copying of the trail features from the plaintiff’s map could not infringe copyright because the features, which represented actual characteristics of the landscape, amounted to facts. Judge Romilly rejected this argument, noting:

The state of Canadian law on the subject is that it is not open for someone to argue that trails, roads and other features detailed with a precision and an accuracy not previously attained by other mapmakers of the region in question, which was facilitated by a particular process pioneered by a mapmaker, become a compilation of facts to which everyone can copy and/or use without the consent of the mapmaker because it has somehow been placed in the “public domain” ...<sup>29</sup>

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<sup>26</sup> 2001 BCPC 292 [*Weetman*].

<sup>27</sup> (2001), 287 A.R. 201 (Q.B.) [*B & S Publications*].

<sup>28</sup> The Federal Court of Appeal in *Tele-Direct*, recast the “skill, judgment or labour” test as one requiring “skill, judgment *and* labour” (*supra* note 2 at para. 28 [emphasis added]). While the Supreme Court of Canada in *CCH Canadian* (*supra* note 1) does not expressly reject the *Tele-Direct* standard, it excises “labour” from the test. It is unclear whether, in practical terms, the two versions are significantly different. See Scassa, *supra* note 5.

<sup>29</sup> *Weetman*, *supra* note 26 at para. 45.

In his view, Canadian law, in contrast to American law, would protect “facts which contain a certain level of creativity.”<sup>30</sup> Following *CCH Canadian*, Judge Romilly’s views could be presented in these terms: the charting of the trail was a reflection of skill and judgment, even though the actual location of the trail was also factual information. The skill and judgment expended by the plaintiff to determine the location of the trail and to arrive at the geographical data incorporated into his map generated the originality necessary for copyright to subsist in the resultant map and its specific features. On this view, the location of the trail is an “original fact”, arrived at through authorial effort.

*B & S Publications*<sup>31</sup> presents a slightly different situation. The case involved alleged copying from the plaintiff’s publication, the *Oil and Gas Index*. The *Index* contained listings of explorers and producers in the oil and gas industry in Alberta, along with additional factual information. Justice Hutchison held that the defendant’s copying of the data violated the plaintiff’s copyright, not in the selection and arrangement of the data, but in the data itself. He noted:

I am of the opinion that the data relating to the exploration and production companies as researched and presented by the plaintiff is capable of and by itself of being copyrighted, owing in part to the criteria used to select the names by the plaintiff, the research done on its currency and accuracy, and its categorization.<sup>32</sup>

To put it in other words, Justice Hutchison seems to be saying that the original selection of the data by the plaintiff was infringed by the copying of that original selection, even though what was ultimately copied was factual information. It would be difficult to say that the selection of facts was not copied, when the facts in that format existed by virtue of the exercise of skill and judgment of the creator of the work. If facts about these companies had not previously been selected to fit together, or had not been previously organized in that constellation, one can understand the view of Justice Hutchison. The copying of these facts from the plaintiff’s work would amount to a substantial taking of the original selection of the plaintiff, giving rise to copyright infringement.

The key may lie in understanding what an original selection of facts is. Copyright law protects an “original selection” of facts, independent of any original arrangement.<sup>33</sup> In the case of the *Oil and Gas Index*, it is possible to argue that the court found it to be an original selection of facts. The copyright extended to the facts themselves since independent creation would necessarily involve copying the core protectable expression in the work: the selection. Indeed, in “sweat of the brow”

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<sup>30</sup> *Ibid.* at para. 46.

<sup>31</sup> *Supra* note 27.

<sup>32</sup> *Ibid.* at para. 44. Hutchison J. found that the design layout and format of the work was also independently “original and unique,” and thus copyrightable.

<sup>33</sup> The definition of “compilation” in the *Copyright Act* includes “a work resulting from the selection or arrangement of data” (*supra* note 2, s. 2 [emphasis added]).

jurisdictions, a competitor is not free to reproduce facts contained in a compilation without recreating and expending the efforts used to collect the facts. In such a context, it is difficult to see the boundary between fact and expression. In some ways, this approach is merely a statement of the doctrine of independent creation: as long as the second “author” independently creates the same work without copying, there will be no infringement.

The effect of such an approach is a monopoly over the facts themselves. In economic terms, the competitor is faced with the choice of either recreating the original efforts to collect the data (and thus the original expense), or paying a rent for use of the information. One can question the efficiency of such an arrangement or its benefit to society. Indeed, in *Feist* the US Supreme Court raised just that question. The defendant’s refusal to licence the information to its competitor would have stifled competition by causing the competitor to be faced with the inability to fully recreate the data set and the expense of attempting to do so. It is also worth noting that the term of monopoly for compilations of fact is the same as for any copyright-protected work. Many commercial compilations of fact must be updated regularly to remain current. Each update is arguably separately copyrightable, thus extending the monopoly term either to perpetuity or at the very least, to a point past the useful life of the compilation.

### III. An Attempt to Define “Facts”

Part of the tension in the case law may be attributable to the use of the term “fact” to refer to different kinds of information. A fact is defined as: “a thing done,” “the quality of being actual,” “something that has actual existence,” “an actual occurrence,” and “a piece of information presented as having objective reality.”<sup>34</sup> The array of definitions is interesting and demonstrates some nuance in the meaning of the term. Some of the definitions point to actual (defined in turn as “existing in fact or reality”),<sup>35</sup> verifiable events. A trail through a mountain pass is a fact in this sense: it exists in reality. The mapping of the trail is a description of that fact, and it would be difficult to accurately describe it in map form in any other manner without misrepresenting the fact of the trail and its precise parameters. A “piece of information presented as having objective reality” is a whole other kind of fact, however. A good lie amounts to a piece of information convincingly presented as having objective reality, but lies are generally not regarded as facts. One could argue that the dictionary definition should read “a piece of information having objective reality.” This definition, however, may be underinclusive of things that might be considered to be facts.

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<sup>34</sup> *Webster’s Ninth New Collegiate Dictionary* (Springfield, Mass.: Merriam-Webster, 1985) s.v. “fact”.

<sup>35</sup> *Ibid.*, s.v. “actual”.

One of the problems with any discussion of copyright in facts lies in assumptions about the meaning of the term “fact” and the impact of these assumptions on the resultant analysis. Facts often do not exist in as plain and obvious a manner as, for example, “water flows downhill.” Many facts do not need to be copied from anywhere. They are widely or generally known, or they have been known for so long that statutory monopoly terms are simply not relevant. Many so-called facts are actually better described as “information”. In the discussion below, I will discuss three categories of “facts” or information: information that is knowable only through the exercise of significant skill and judgment; information that is interesting or valuable only because of the way in which it has been selected or arranged; and information that is not necessarily true. I will consider each of these categories in turn.

It is worth reasserting that in my typology of facts, the term “fact” has been replaced with “information”. Information is a more nuanced term that does not embody the same bold claim to truth as the word “fact”.<sup>36</sup> As I will argue, the term “fact” is loaded and misleading. It suggests a certainty and permanence that can lead to assumptions both that facts are distinct and recognizable and that they are excluded from copyrightability because of some inherent characteristic of truth. The real debate is about ownership in relation to the much more nuanced concept of “information”.

#### **A. Information That Is Knowable Only Through the Exercise of Considerable Skill and Judgment**

Much scientific information falls into the category of information that is knowable only through the exercise of considerable skill and judgment. Such information, when it gains a certain level of acceptance, may be referred to as fact. Scientific “facts” are sometimes challenged and disproved, however, even if they have been accepted as facts for a significant period of time.<sup>37</sup> Scientific facts are essentially nothing more than “information that is put forth as having objective reality.” Latour and Woolgar have characterized scientific endeavour in these terms: “the set of statements considered too costly to modify constitute what is referred to as reality. Scientific activity is not ‘about nature,’ it is a fierce fight to *construct* reality.”<sup>38</sup> Scientific facts are essentially original facts. They are the product of labour,

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<sup>36</sup> In writing about “fact” in the context of journalism, one author asserts: “There is no real distinction between facts, information, and knowledge. They are all a result of interpretation through communication practices that give them meaning in the contexts of their use” (Richard V. Ericson, “The Future of Fact: How Journalists Visualize Fact” (1998) 560 *Annals* 83 at 84).

<sup>37</sup> For example, Gould recounts the sloppy science that resulted in the names *Apatosaurus* and *Brontosaurus* being given to the same dinosaur. This anecdote is but one example—albeit a notorious one—of the displacement of scientific “fact” by later research and investigation. See Stephen Jay Gould, *Bully for Brontosaurus: Reflections in Natural History* (New York: W.W. Norton, 1991) at 86-90.

<sup>38</sup> Bruno Latour & Steve Woolgar, *Laboratory Life: The Construction of Scientific Facts* (Princeton, N.J.: Princeton University Press, 1986) at 243 [emphasis in original].

capital investment, and considerable skill and judgment. They are expressive and constitutive of reality, but they are not reality.

It is well accepted that there is no copyright in scientific fact; the results of research are shared in scientific publications, and others are free to examine, discuss, and test the data or theories presented. Scientists who wish to “own” the fruits of their research must arrive at “facts” with industrial application, and must seek a patent. Patent law is very clear that a patent must be for a new, nonobvious, and useful invention;<sup>39</sup> it is equally clear that an invention cannot include scientific principles, abstract theorems, or discoveries.<sup>40</sup> It is in the realm of scientific fact that we are most closely wedded to the idea that “facts” are descriptors of the world around us. Scientists may uncover facts, but they do not create them.

It is perhaps worth distinguishing here between raw data, which may represent recorded observations, and the theories that flow from conjecture about the meaning of an aggregate of recorded observations. The theory is an abstract idea, which is also not protectable under copyright law. Theories are not necessarily facts, although some theories are treated as fact.<sup>41</sup> Raw data is arguably a collection of fact, although even here the sands shift; different scientists studying the same questions may generate different data depending upon their methodology and resources. Suffice it to say that patent law regards neither raw data nor abstract theories as protectable. Copyright law, at least ostensibly, similarly rejects the protection of facts or ideas.

### ***B. Information That Is Useful or Valuable Only Because of the Way in Which It Has Been Selected or Arranged***

Scientific facts, discussed above, are often “original” in the sense of being the product of a significant expenditure of skill and judgment. There is another category of “facts”, however, which in and of themselves are not particularly original, but which take on value because of the effort put into their selection or arrangement. The facts in *B & S Publications*<sup>42</sup> are an example of this kind of “fact”. Information about players in the Alberta oil patch is not original to the recorders of this information, but the selection and arrangement of the information into a directory gives the information a particular value. It is valuable because it has been mined or extracted from a range of available information to serve a specific purpose.

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<sup>39</sup> See e.g. the definition of “invention” in the *Patent Act*, R.S.C. 1985, c. P-4, s. 2 [*Patent Act*]. See also *Patent Act*, *ibid.* ss. 28.2, 28.3.

<sup>40</sup> The *Patent Act* expressly excludes scientific principles and abstract theorems from patentability (*ibid.*, s. 27(8)). Discoveries are excluded by virtue of jurisprudential principles. See e.g. *Pioneer Hi-Bred Ltd. v. Canada (Commissioner of Patents)*, [1989] 1 S.C.R. 1623 at 1634, 60 D.L.R. (4th) 223.

<sup>41</sup> For example, many consider evolution to be a fact, while it is actually a theory.

<sup>42</sup> *Supra* note 27.

The telephone directory information at issue in *Feist*<sup>43</sup> and *Tele-Direct*<sup>44</sup> in some ways falls into this category. In these cases, the respective courts made it clear that only an original selection or arrangement of facts would give rise to copyright in the compilation of data, and the copyright would not extend beyond the particular selection or arrangement. Because *Feist* and *Tele-Direct* dealt with alphabetical telephone directory information in which the selection of facts was dictated either by legislation or by custom, the cases presented the lowest possible level of authorial effort. In fact, no copyright was found to subsist in the listings in either case. These cases, however, are not typical of the scenarios that will likely arise for works in this category. *B & S Publications* is just one example of a case where the selection of facts for a directory can be considered original; there are others.<sup>45</sup> The challenge in such cases will be to maintain a distinction between the originality in the selection of the data and the underlying data itself.<sup>46</sup>

It is interesting to compare the tension over the originality of selection or arrangement of facts in this category of facts. In theory, a scientist, through the development of an empirical methodology, selects not only the subject of her study, but also plays a role in defining the boundaries of her results. The data that result from the experiment are therefore the result of an original selection of facts. Yet it is generally not considered even arguable that a scientist might hold a copyright in the empirical data she generates. In the commercial context, however, the protection to be afforded to a selection of data is a matter of great debate.

The significance of this category is that the value of a work truly does lie in the selection and arrangement of the information, or its aggregation, rather than in the underlying pieces of information. In such a context, the author's contribution to the work is external to the underlying facts or information contained in the work. It is this category of works that has provided the most significant challenge to copyright law. The statute seeks to protect the author's original contribution by describing it as a "selection or arrangement,"<sup>47</sup> and extends copyright protection to that contribution. As will be argued, however, it is crucial to maintain a distinction between the authorial effort involved in selecting or arranging data and the data itself. Once

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<sup>43</sup> *Supra* note 6.

<sup>44</sup> *Supra* note 2.

<sup>45</sup> In *Key Publications Inc. v. Chinatown Today Publishing Enterprises Inc.*, 945 F.2d 509 (2d Cir. 1991) [*Key Publications*], a selection of directory listings for Chinese-American businesses was considered to be sufficiently original to give rise to copyright protection.

<sup>46</sup> In *Key Publications (ibid.)*, the court found that the listings were sufficiently original to attract copyright protection, but also ruled that the copyright was not infringed by the competitor's product because of a lack of sufficient overlap. On the facts, there was little similarity between the two directories. The court in this case struggled with the application of the principles in *Feist (supra* note 6). While accepting that copyright in a compilation of facts is "thin", the court noted that "we do not believe it is anorexic" (*Key Publications, ibid.* at 514). Further, the court stated: "What must be shown is substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation" (*ibid.*)— in other words, the selection or arrangement of facts.

<sup>47</sup> See the definition of "compilation" in the *Copyright Act (supra* note 2, s. 2).

protection is effectively extended to facts contained in a compilation (as in *B & S Publications*), the rationale for withholding copyright protection from other kinds of facts, such as the location of mountain trails, disappears.

### **C. Information That Is Not Necessarily “True”**

Information that is not necessarily “true” is my third category of “fact”. This category could be described as representing filtered or mediated fact. These are the facts that make up our accounts of the world around us: they are present in news reports, anecdotes, biographies, histories, and so on. Filtered or mediated facts are woven into a tale told about the world around us. They are put forth as truth but are coloured by perspective.

The classic case *International News Service v. Associated Press*<sup>48</sup> provides a good illustration. In that case, the US Supreme Court stated that there was no copyright in information. It also concluded that the plaintiff’s news reports from the front lines of World War I could not be protected from the copying of the substance of the reports, on the basis that the facts contained in the reports were not part of the copyright in the underlying news articles. Justice Pitney, writing for the majority of the court, seemed to accept, however, that there was a certain authorial effort involved in generating the information contained in news reports. He wrote: “news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money ...”<sup>49</sup> He also recognized that part of the exchange value of news lay in “its novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs.”<sup>50</sup> In this statement, Justice Pitney seems to accept that it is not essential that the information excluded from copyright protection be objectively true. Objective truth is not the basis for excluding the information from copyright protection. It is certainly the case that some information reported from the front lines would be verifiable and true, but it is also likely that some information might actually be erroneous, some might be presented in a highly selective manner, which gives a less than accurate overall picture of events, and some might be downright false—produced as part of the inevitable propaganda machinery of war. Yet it fits the definition of “information presented as having objective reality,” regardless of whether it actually has objective reality. This approach to facts is pragmatic, as it would likely be too difficult to engage in an analysis of what bits of information are fact, which are fiction, and which aggregates of fact amount to fiction or partial fiction because they are so selective.

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<sup>48</sup> 248 U.S. 215, 39 S. Ct. 68 (1918) [*INS* cited to U.S.].

<sup>49</sup> *Ibid.* at 236.

<sup>50</sup> *Ibid.* at 238.

Gordon has argued that some information has a hybrid quality,<sup>51</sup> placing it on the boundary of fact and creative work. She notes that creative works can be used factually—as illustrations of history, culture, or as threads in the argument of a subsequent author’s work. If an author’s statements in personal correspondence are treated as creative works rather than facts when used by a subsequent biographer, then copyright law can be used by the first author to restrain or constrain the biographer’s works.<sup>52</sup> Significantly, courts in the United States have been hesitant to extend copyright protection to even highly speculative “fact”. In *Nash v. CBS Inc.*,<sup>53</sup> the court ruled that a movie that embraced the plaintiff’s theory that John Dillinger was not actually dead, but living on the west coast, did not violate the copyright in the plaintiff’s book that developed this theory. The court referred to *Hoehling v. Universal City Studios Inc.*, to the effect that “[t]o avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots.”<sup>54</sup> This American case law recognizes that “facts” do not have to be true or even verifiable to be excluded from copyright protection.

In the above typology of facts, it is clear that the middle category—compilations of fact—is the category that has proven most difficult for the courts to deal with. It is often accepted that the information in the compilation is true, and that it is useful because of the way in which it is organized or because it has been gathered in one place for the first time. The other categories—involving scientific fact or filtered or mediated information—have proven less difficult for the courts, perhaps because it is easier to recognize the real public value in any debate, discussion, or critique of the information presented, or in the presentation of alternate versions or interpretations of the same information. The expressions of both scientific and mediated facts are protected by copyright law, while the underlying facts themselves are in the public domain. With compilations of fact, courts are willing to protect the expression of the facts, in terms of their selection and arrangement, but they have struggled with the separation of the facts from the expression. Protecting the expression only gives limited protection to the work as a whole, in part because the expression is more mechanical or function driven than in the other categories of information I have discussed. Yet this is precisely why, as the US Supreme Court stated in *Feist*, “copyright in a factual compilation is thin.”<sup>55</sup> Attempts to broaden the scope of protection for such works ultimately will protect the facts along with their expression.

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<sup>51</sup> Wendy J. Gordon, “Reality as Artifact: From *Feist* to Fair Use” (1992) 55 *Law & Contemp. Probs.* 93.

<sup>52</sup> *Ibid.* at 100. She strongly criticizes the appellate court decision in *Salinger v. Random House*, 650 F. Supp. 413 (S.D. N.Y. 1986), rev’d, 811 F. 2d 90 (2d Cir. 1987).

<sup>53</sup> 899 F.2d 1537 (7th Cir. 1990) [*Nash*].

<sup>54</sup> 618 F.2d 972 at 978 (2d Cir. 1980) [*Hoehling*].

<sup>55</sup> *Feist*, *supra* note 6 at 349.

#### IV. Copyright and Facts

The widely stated principle that there is no copyright in facts has reached the status of an axiom across most comparable jurisdictions. In Australia,<sup>56</sup> Canada,<sup>57</sup> and the United States,<sup>58</sup> for example, the principle is wholeheartedly embraced, even though each jurisdiction has arrived at a different standard for “originality” in copyright.<sup>59</sup> It is significant that in all three jurisdictions, the principle that facts are not copyrightable has been linked to the originality requirement.<sup>60</sup> As the theory goes, facts inherently do not owe their existence to any authorial effort. A fact, so it is said, exists independently of the authors who may express the fact, but who can only obtain rights over their particular expression of the fact.<sup>61</sup>

Even accepting this simplistic view of facts, the situation becomes more complex when considering the status of fact-based works, such as compilations of fact. The definition of “compilation” in section 2 of the *Copyright Act* includes “a work resulting from the selection or arrangement of data.”<sup>62</sup> This definition has been interpreted to mean that copyright law does not protect the facts in a compilation, but only the original selection or arrangement of those facts.<sup>63</sup> The work that is protected is that which results from the authorial effort of selecting and/or arranging the facts.

It is much easier to see how an original arrangement of facts can be protected separately from the underlying facts. The arrangement of the facts is patent and

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<sup>56</sup> *Telstra Corporation Ltd. v. Desktop Marketing Systems Pty Ltd.* (2001), 181 A.L.R. 134 at para 46 (F.C.A.) [*Telstra*].

<sup>57</sup> *CCH Canadian*, *supra* note 1 at para. 22.

<sup>58</sup> In the U.S., “[t]hat there can be no valid copyright in facts is universally understood” (*Feist*, *supra* note 6 at 344, O’Connor J.).

<sup>59</sup> The United States requires a “minimal degree of creativity” (*Feist*, *ibid.* at 345); Australia recognizes industriousness or “sweat of the brow” (*Telstra*, *supra* note 56 at paras. 85-88). The Supreme Court of Canada, in setting a standard of “skill and judgment” (*CCH Canadian*, *supra* note 1 at para. 16) has claimed what it believes to be the middle ground between these positions.

<sup>60</sup> This link is most explicit in *Feist* where O’Connor J. states that the reason why facts are not copyrightable “is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence” (*supra* note 6 at 347). In *CCH Canadian*, McLachlin C.J. notes: “O’Connor J.’s concerns about the ‘sweat of the brow’ doctrine’s improper extension of copyright over facts also resonate in Canada” (*supra* note 1 at para. 22). In *Telstra*, the court notes that the requisite originality cannot be found in the facts themselves, only in an original selection or arrangement of the facts (*supra* note 56 at paras. 46-47).

<sup>61</sup> O’Connor J. explains it thus: “[I]f the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them” (*Feist*, *ibid.* at 348).

<sup>62</sup> *Supra* note 2, s. 2.

<sup>63</sup> *Tele-Direct*, *supra* note 2 at para. 17. See also *Feist*, *supra* note 6 at 349.

obvious in the work itself.<sup>64</sup> Facts might be arranged according to particular categories developed by the creator of the work. For example, assume an author decides to create a list of all Supreme Court of Canada decisions ever rendered. She might choose to organize these chronologically or alphabetically. Either of these modes would be an arrangement of the facts: the cases decided by the Court. In both instances, there would likely be issues as to the originality of her arrangement. In other words, following *CCH Canadian*, it seems difficult to argue that the author could prevent anyone else from copying her alphabetical list of cases decided by the Supreme Court of Canada. She might, however, decide to list them in order of importance. It would involve some intellectual effort on her part to decide which cases, viewed in their social and historical context, were most important. Someone who copied the ordering of this list would be copying the author's original arrangement. In either case, the arrangement of the facts is obvious on the face of things; the issue is whether the arrangement reflects an exercise of skill and judgment.

An original selection is more problematic. The character, usefulness, reliability, or value of the work may turn on the quality of effort made in selecting the facts that are presented. As a result, in some cases the act of selecting facts may appear to amount to an authorial effort by virtue of the skill and judgment exercised in selecting the facts to include. For example, as long as the author decides to include in her list all decisions of the Supreme Court of Canada, it is unlikely that she will be able to argue she has made an original selection. If, however, she were to decide to select the one hundred most important decisions, there would presumably be a degree of skill and judgment involved in making this selection. Although copyright law only protects the "selection or arrangement" of facts in a compilation of facts, where the selection of facts is considered to be sufficiently original to attract copyright protection, the reproduction of the selection and the reproduction of the facts themselves can effectively merge.<sup>65</sup> Anyone who copied the author's list of the one

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<sup>64</sup> In *Feist*, the arrangement of facts in the telephone directory was alphabetical. The court found this arrangement to be insufficiently original, and described it as "garden-variety" (*ibid.* at 362).

<sup>65</sup> In the recent Ontario Court of Appeal decision in *Robertson v. Thomson Corp.* (2004) 72 O.R. (3d) 481, 243 D.L.R. (4th) 257 (C.A.), a key issue was whether the collective work that was each issue of the *Globe and Mail* was reproduced in the defendant's electronic database of articles. The majority found that the collective work was not reproduced in the database, in part because the bulk of value-added material in the newspapers, such as "advertisements, photos, photo captions, stock market and financial tables, birth and death notices, illustrations, cross references, 'what's inside', teasers and weather forecasts" were not included in the database, and "[t]he masthead, size of the headline, fonts, column width and number columns are not visible" (*ibid.* at para. 12). Blair J.A., in dissent, would have characterized the contribution of the editors differently. Rather than place such an emphasis on quantifiable content, he emphasized a more qualitative approach to assessing contribution: "[T]he electronic version found in the database retains the heart of the newspaper—the portion that gives it its essence as a newspaper—namely, its editorial vision, as expressed through the editors' selection and editing of its news stories, its articles, and its editorial content" (*ibid.* at para. 138). The difference between the two views is arguably that Blair J.A. placed more emphasis on "selection" as a form of authorship, and selection is inherently represented in the contents themselves.

hundred most important Supreme Court of Canada decisions would be copying her original selection; it becomes difficult to separate the protection of her original selection from the protection of the actual contents of the list.<sup>66</sup>

In *Telstra*,<sup>67</sup> the Australian Federal Court, while accepting that there was no copyright in facts, nonetheless extended a copyright-type protection to facts within a compilation. It found copyright in the compilation using a “sweat of the brow” standard of originality. For the court, the logical extension of finding copyright in a compilation of facts that owed its existence to the expenditure of labour on the part of the creator of the compilation was to protect the underlying facts against reproduction in other works.<sup>68</sup>

Translating this approach into the context of a “skill and judgment” standard for originality gives rise to a similar set of problems. While the telephone directory at issue in *Telstra* may fall below the standard set by the Supreme Court of Canada because the labour involved would not meet the necessary level of skill and judgment, other factual compilations will pose challenges. With some compilations, the selection of facts, through an exercise in skill and judgment, may be the essence of the work. A reproduction of that selection of facts would be copyright infringement; a substantial reproduction of that selection of facts would also be copyright infringement. At a certain point, it becomes difficult to separate the facts from the “original selection” that is the subject matter of copyright. In other words, while in theory one does not have copyright in an atomistic, individualized fact, one’s copyright in an original selection of facts may substantially protect those facts from copying.

As discussed above, courts in Canada, the United States, and elsewhere have taken the view that copyright law does not protect facts. In this section, I will explore the reasons put forward by various courts in support of this proposition. I will argue that it is of fundamental importance to properly understand the reason for the exclusion of facts from copyright law, and that courts have not been consistent in their articulation of the reason for the exclusion.

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<sup>66</sup> Ginsburg argues, similarly, that works of “selection” are even more deserving of copyright protection than works of “arrangement” in the context of electronic databases (*supra* note 4).

<sup>67</sup> *Supra* note 56.

<sup>68</sup> For example, even though the selection and arrangement of the facts was different in many respects, the court found infringement:

As regards the directories, the significant recorded facts (name, address, telephone number and the relevant type of business) are the same, or substantially the same, as they appear in *Telstra*’s works. While there are differences, they are in the detail. For example, when displayed on a screen, the information from the CD-ROM does not appear as columns on a page. But the information can be retrieved in alphabetical order (by postcode rather than region) and can be examined in much the same way as one would read a column on a page. The fact that the alphabetical listings are by postcode and not region, is not a material difference. Nor is the fact that portions of the advertisements are not reproduced (*Telstra, ibid.* at para. 109).

### A. *United States*

In *INS*,<sup>69</sup> the US Supreme Court ruled that copyright law could not protect the information set out in newspaper accounts of front line battles. Justice Pitney, for the majority, emphasized the importance of “distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.”<sup>70</sup> He went on to note that “the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.”<sup>71</sup> This statement is an extremely important articulation of the reason for excluding facts from copyright protection. First, the facts at issue in the case are characterized as “information”. The majority of the court views this information as falling into the public domain: it is the “history of the day,” not capable of private ownership.

The principle underlying the *INS* decision is also apparent in the more modern *Miller v. Universal City Studios Inc.*<sup>72</sup> In that case, it was argued that the research into the facts of a particular event was, by virtue of the skill and effort expended to gather and compile the research, copyrightable. The US Court of Appeals for the Fifth Circuit rejected this argument on public policy grounds. After stating the somewhat problematic proposition that authors merely discover facts, and do not “author” them, the court emphasized:

The line drawn between uncopyrightable facts and copyrightable expression of facts serves an important purpose in copyright law. It provides a means of balancing the public’s interest in stimulating creative activity ... against the public’s need for unrestrained access to information. It allows a subsequent author to build upon and add to prior accomplishments without unnecessary duplication of effort.<sup>73</sup>

The statement regarding the public domain and public policy underlying the exclusion of facts from copyright protection is significant, and builds on cases such as *INS*. In *Hoehling*,<sup>74</sup> dating just shortly before the *Miller* decision, the US Court of Appeals for the Second Circuit also expressed the view that

the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past.<sup>75</sup>

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<sup>69</sup> *Supra* note 48.

<sup>70</sup> *Ibid.* at 234.

<sup>71</sup> *Ibid.*

<sup>72</sup> 650 F.2d 1365 (5th Cir. 1981) [*Miller*].

<sup>73</sup> *Ibid.* at 1371-72.

<sup>74</sup> *Supra* note 54.

<sup>75</sup> *Ibid.* at 974.

The court in *Hoehling* limited copyright protection to “the author’s original expression of particular facts and theories already in the public domain.”<sup>76</sup>

*Hoehling* and *Miller* are important cases in that both express the underlying public policy for excluding facts from copyright protection. They also both clearly recognize a complex understanding of the term “fact”. Rather than describe facts as some form of observable truth, both courts recognize that facts may include theories, hypotheses, or even particular accounts of facts. The cases must also be understood, however, in light of the kind of facts that were at issue. In both cases, the facts would have fallen into my third category: information that is not necessarily true. Within this category, it is clear that courts are reluctant to render decisions which may seal off such facts from open discussion, criticism, and challenge. Ginsburg notes that, ironically, courts have (at least prior to *Feist*) often afforded greater protection to mere compilations of fact:

In the realm of high authorship, some decisions express fear of monopolization of historical or other facts, and therefore exclude from copyright’s ambit all but the author’s choice and ordering of words. On the other hand, some courts acknowledge the low authorship of compilations such as address lists, yet extend copyright protection not merely to the information in the particular form presented in plaintiff’s work, but to other formats that might be imposed upon the collected data.<sup>77</sup>

In this context, the US Supreme Court decision in *Feist* is particularly significant: it attempts to place all categories of fact on the same footing.

Although *Feist* expressly follows *INS* and cites *Miller* with approval, and although the US Supreme Court in *Feist* forcefully restates the principle that there can be no copyright in facts, Justice O’Connor appears to put forward a rationale that places more emphasis on the concept of “originality” and less on the public domain. Writing for a unanimous court, she begins by stating the basic principle in fairly absolute terms: “That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that ‘[n]o author may copyright his ideas or the facts he narrates.’”<sup>78</sup> She does not, however, explain this principle in terms of the public domain. Rather, she notes: “The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality.”<sup>79</sup> The US Supreme Court thus explains the fact/expression dichotomy in terms of the concept of originality. Facts are not copyrightable, because they are not original to the author:

“No one may claim originality as to facts.” ... This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created

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<sup>76</sup> *Ibid.*

<sup>77</sup> Ginsburg, *supra* note 4 at 1894 [footnotes omitted].

<sup>78</sup> *Feist*, *supra* note 6 at 344-45.

<sup>79</sup> *Ibid.* at 345.

the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its “maker” or “originator.” ... “The discoverer merely finds and records.” ... Census takers, for example, do not “create” the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them.<sup>80</sup>

This view is supported by Nimmer, who writes:

No one may claim originality as to facts. Facts may be discovered, but they are not created by an act of authorship. One who discovers an otherwise unknown fact may well have performed a socially useful function, but the discovery as such does not render him an “author” in either the constitutional or statutory sense.<sup>81</sup>

The rationale set out both by Nimmer and in *Feist* shifts the focus of the analysis to the link between the concept of originality and the uncopyrightability of facts. Facts are thus assumed to be inherently true statements or representations of objective reality, although Nimmer goes on to state that “an interpretation of fact is itself a fact, or purported fact, deduced from other facts.”<sup>82</sup> While it is significant that Justice O’Connor would place all facts in the public domain, the rationale for doing so is no less important. A fact that is in the public domain because it represents a truth available to all who make the effort to discover it is in the public domain for a different reason than facts that are in the public domain because it is better for society to have free and open access to that information than not.<sup>83</sup> Further, the alignment of “facts” with “objective truth” leaves room for the argument that some information is capable of ownership because of the authorial effort invested in arriving at it.<sup>84</sup>

## B. Canada

Canadian copyright law has struggled with “original facts”. In *Ascot*,<sup>85</sup> the British Columbia Supreme Court dealt with an argument of copyright infringement in relation to rival horse-racing publications. The substance of what had been taken from the plaintiff’s publication was factual material about the races. Its arrangement in the

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<sup>80</sup> *Ibid.* at 347 [references omitted].

<sup>81</sup> Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, looseleaf (New York: Matthew Bender, 1963) vol. 2 at 2-178.2(3) [footnotes omitted].

<sup>82</sup> *Ibid.* [footnotes omitted].

<sup>83</sup> Drassinower makes the following assertions about the public domain: “One might say that the public domain is not only a space containing freely available materials. It is also a fundamental condition of free and equal interaction between persons in their capacity as authors. The public’s domain is the domain of fair interaction” (Abraham Drassinower, “A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law” (2003) 16 Can. J. L. & Jur. 3 at 10).

<sup>84</sup> Nimmer is adamant that a fact cannot be authored: “The discovery of a fact, regardless of the *quantum* of labor and expense, is simply not the work of an author” (*supra* note 81 at 2-178.2(15) [emphasis in original, footnotes omitted]). The view of facts as “discoverable”, however, is an oversimplification of the concept.

<sup>85</sup> *Supra* note 21.

plaintiff's work was considered by the court to be of a kind universally used at North American race tracks. Nevertheless, the court ruled that the plaintiff had copyright in the material. Justice Macdonald found that the plaintiff's efforts in preparing the publication warranted copyright protection. His reasons were not based on an expenditure of effort alone, however. He wrote: "In settling the conditions of the races some knowledge, experience and exercise of judgment were required."<sup>86</sup> Justice Macdonald concluded: "there is material, originated by the plaintiff, and involving sufficient labour, knowledge and judgment to support copyright."<sup>87</sup>

On a similar set of facts, the British Columbia Court of Appeal reached a similar result in *B.C. Jockey Club*.<sup>88</sup> As in *Ascot*, the plaintiff published factual information relating to the particular races to be run, including their dates and times, the purses, horses, jockeys, weather and track conditions, and so on. In his rival publication, the defendant had reproduced a great deal of this information. It was provided in a substantially different format, however, alongside additional original content. The Court of Appeal affirmed the decision of the trial judge, who found copyright infringement on the basis that "the defendant has made a substantial use of all the essential facts compiled by the Club."<sup>89</sup> In particular, the trial judge ruled:

Although he adopted that information to his own style and added information of his own, the defendant nevertheless appropriated a substantial amount of the work, skill, judgment and knowledge of the Club. *The copyright of the Club does not reside solely in the order of the information which it has compiled.* Although the defendant has rearranged and republished that information in a different style, *he nevertheless continued to appropriate a substantial part of the Club's original work.*<sup>90</sup>

Although *B.C. Jockey Club* is often cited as an example of the "sweat of the brow" line of cases in Canada, it is clear from this quoted passage that the facts in the plaintiff's publication were not protected solely because of the effort required to compile them. The compilation as a whole reflected "the work, skill, judgment and knowledge of the Club."<sup>91</sup> As with *Ascot*, this compilation would fall into my second category of "original facts": facts that are interesting or valuable only because of the way in which they have been selected or arranged. In the Court of Appeal's view, the act of selection gives the facts value; thus, selecting from the selection amounts to infringement of that which is original in the work. It is interesting to note that neither the Federal Court of Appeal in *Tele-Direct*,<sup>92</sup> nor the Supreme Court of Canada in *CCH*

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<sup>86</sup> *Ibid.* at 421.

<sup>87</sup> *Ibid.* at 422.

<sup>88</sup> *Supra* note 21.

<sup>89</sup> *B.C. Jockey Club* (S.C.), *ibid.* at 703.

<sup>90</sup> *Ibid.* at 703-704 [emphasis added].

<sup>91</sup> *Ibid.*

<sup>92</sup> *Supra* note 2.

*Canadian*<sup>93</sup> address or engage with the problem presented in this case. As noted earlier, the same reasoning resurfaces in a post-*Tele-Direct* context in *B & S Publications*.<sup>94</sup>

The category of “facts that are not really facts” is clearly treated differently by the courts, perhaps because it is an instance where facts are more obviously akin to ideas. Judges seem to find it easier to keep ideas safely in the public domain. *Deeks v. Wells*,<sup>95</sup> an Ontario case from the 1930s, dealt with an accusation by the plaintiff that copyright in her historical work had been infringed by the defendant in a competing work. Justice Orde of the Court of Appeal noted that:

There can be no copyright in the facts of history or in their chronological sequence. Had “The Web” been published, the defendant Wells was as free to consult and use it in the preparation of his work as the plaintiff was to consult and use “The Encyclopaedia Britannica” or any other publication as a source of information. Infringement of copyright in such cases must, as a general rule, consist of the copying of the words of another in the order in which he has used them. The use of the same historical facts or of the same ideas is not enough.<sup>96</sup>

The decision of the Court was later affirmed by the Judicial Committee of the Privy Council. Lord Atkin observed:

neither Miss Deeks nor Mr. Wells was present at the beginning of the world or until a very considerable time later, and they have had to rely upon the accumulation of information which has been made by many authors before them and to which they have had to have recourse in writing such a work as this.<sup>97</sup>

These decisions take the position that in fact-based works of writing, copyright infringement can arise only through the copying of the writing, but not the underlying facts.

### **C. Facts and the Public Domain**

Facts that meet the definition of “information presented as having objective reality” are often the product of an exercise of skill and judgment. These facts are the kind that might tempt a court to protect the underlying factual information from copying. Yet we know from the same cases that set the standard for originality that facts are not copyrightable. There is tension between these propositions.

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<sup>93</sup> *Supra* note 1.

<sup>94</sup> *Supra* note 27.

<sup>95</sup> (1932), [1933] 1 D.L.R. 353 (P.C.) [*Deeks* (P.C.)], aff’g [1931] O.R. 831, [1931] 4 D.L.R. 533 (C.A.) [*Deeks* (C.A.) cited to O.R.], aff’g (1930), [1931] O.R. 818, [1930] 4 D.L.R. 513 (H.C.).

<sup>96</sup> *Deeks* (C.A.), *ibid.* at 847. Ginsburg argues that the facts in works of high authorship such as the one at issue in *Deeks* deserve less protection since “limiting copyright’s reach to the first author’s subjective contributions to the facts not only frees second authors from having to account for all the sources, but it also leaves the first author with extensive protectable material” (*supra* note 4 at 1915).

<sup>97</sup> *Deeks* (P.C.), *supra* note 95 at 358.

The tension can be resolved by reference to the concept of the public domain and the public policy underlying copyright law. If facts are excluded from copyright monopolies, it is either because they are not considered to be the product of someone's authorial effort, or because some efforts are made for the common good and not for reward through copyright monopolies.<sup>98</sup> It is difficult to see how one can say that many so-called facts are not the product of someone's authorial effort. The gathering of facts of a battle from the front lines during wartime involves a certain authorial effort on the part of the reporter. Not only do they go to great lengths in difficult circumstances to gather the information, they presumably observe, question, attempt to verify information, rely on confidential sources, and so on. If this authorial effort is not to be recognized as giving rights in the "facts" as reported, it must be because there is some public good that is seen as being served by having certain kinds or categories of information in the public domain. If this is the case, then when information is put forward as "having objective reality," it should fall into the public domain so that it can be tested, challenged, critiqued, verified, or disproved. The same is true of scientific facts.

## Conclusion

The category of facts that are useful or valuable because of the way in which they have been selected or arranged poses unique difficulties. The underlying facts themselves are simply facts, and there is no basis on which they should receive copyright protection. But the author of the compilation, through her selection and arrangement of these facts, has created a work. The *Copyright Act*<sup>99</sup> specifically accepts this type of work as a compilation. As noted above, it can be difficult to separate what is original in a selection of facts from the facts themselves. Certainly using the Supreme Court of Canada's standard of "skill and judgment" as a test for originality does little to help in this analysis.

The public policy motivation for excluding facts from copyright monopolies has nothing to do with whatever authorial effort might go into their generation or creation.<sup>100</sup> It is important to keep this idea in mind when working with the Supreme Court of Canada's "skill and judgment" standard, as it would be relatively easy to use

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<sup>98</sup> Drassinower argues that "the law of copyright protects the author's expression, but not her ideas, even where the latter are assumed to be as much a product of the author's labour as the former. Hence, the point is not that labour is irrelevant to the constitution of copyright but rather that the legal meaning of the author's labour cannot ... be derived from the category of labour itself" (Drassinower, *supra* note 83 at 9 [footnotes omitted]). This same point can be made with respect to fact-based works: the author's original expression of the facts are protected, not the underlying facts—notwithstanding that the facts may have been arrived at through an exercise of skill and judgment.

<sup>99</sup> *Supra* note 2, s. 2.

<sup>100</sup> In writing about copyright and facts, Gordon notes: "In a civilized nation, much of reality is artifact. Too broad a set of intellectual property rights can give one set of persons control over how that reality is viewed, perceived, interpreted—control over what the world *means*" (*supra* note 51 at 101 [emphasis in original]).

this standard to find copyright in a variety of information that has been generated, not simply through labour or the investment of capital, but also through the exercise of skill and judgment. That the Supreme Court recognized that facts are not copyrightable *and* that “skill and judgment” is the threshold standard for originality suggests that any assessment of “skill and judgment” as the authorial effort needed to give rise to copyright should exclude the putting forth of information as having objective reality. Facts, like ideas, are in the public domain. The public is better served by being allowed to reproduce these facts, to argue about them, write about them, challenge them, replicate them.

If this approach is to be considered part of the copyright bargain with society, one might wonder how whole categories of “creators” of works that are facts are not just limited in their copyright protection, but excluded in terms of the most valuable dimension of their work. A scientist can have copyright in the paper in which he or she expresses the results of research, but has no copyright in the facts or data generated from the experiments. Similarly, in another context, the compiler of facts in a directory has copyright in the selection and arrangement of those facts, but not in the factual content, which is the most valuable aspect of the directory. In the scientific realm, the answer may be in part that most researchers work in salaried or grant-paid positions, and the continued receipt of their salary or the possibility to generate new grants is sufficient incentive for continued “creative” production. In the context of the generation of commercial fact-based works such as directories, the answer is less clear. Presumably, even absent copyright protection there is still some incentive to produce these works; the works may feature as only one aspect of a company’s business model, for example, as a value-added element of a broader package of services. Most directory-type works are only of value for a very limited period of time in any event. Without frequent revisions and updates they become marginally useful quite quickly. The value of such products, particularly in an information age, may come from the reliability and frequency of update services provided, as well as from ease of accessibility and various modes of accessibility.

The new “skill and judgment” standard of protection thus leaves judges faced with copyright claims over fact-based works with two options. The standard is open-ended enough to be used to extend copyright protection to the data in compilations of fact: the Court’s “middle ground” is actually a swamp. Yet it is also possible to read the decision so as to exclude copyright protection for the underlying facts. While the first option may allow a judge to satisfy his or her inclination towards an equitable result in a case of perceived unfair competition, the second must prevail if we are to be serious about fostering a robust public domain and the corresponding free flow of information and ideas in the broader public interest.

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