

97-7910

United States Court of Appeals

for the

Second Circuit

MATTHEW BENDER & COMPANY, INC.,

Plaintiff.

HYPERLAW, INC.,

Intervenor-Plaintiff-Appellee.

— against —

WEST PUBLISHING CO. and WEST PUBLISHING CORPORATION,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

SATTERLEE STEPHENS BURKE
& BURKE LLP
Attorneys for Defendants-Appellants
230 Park Avenue
New York, New York 10169
(212) 818-9200

Of Counsel:

ARTHUR R. MILLER
228 Areeda Hall
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4111

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PRELIMINARY STATEMENT

Defendants-appellants ("West" or "appellants") petition this Court to grant rehearing, with a suggestion for rehearing en banc, from the decision of a majority of the panel issued November 4, 1998. The majority opinion departs from the settled law of this Circuit with respect to the showing required to demonstrate "originality" under the Copyright Act. The questions raised on this petition are of central importance to copyright law and of paramount concern to authors, publishers, and users of copyrighted material. It is respectfully submitted that the majority opinion, if allowed to stand, would create confusion within this Circuit, and provide, contrary to statutory intent, underprotection for compilations and derivative works, thereby creating a strong disincentive for the creation of these works.

Appellants request rehearing of the majority's decision that West's selective revision, expansion, and updating of public domain decisions issued by the United States Supreme Court and the United States Court of Appeals never involve sufficient "originality" to entitle West to protection from verbatim wholesale copying of its editorial enhancements. As strongly set forth in the dissent, this decision relies on unsound tests for "originality." Indeed, the majority opinion erects barriers to copyright protection not authorized by - and explicitly warned against - in Feist Publications, Inc. v. Rural Telephone Service,

Inc., 499 U.S. 340, 111 S.Ct. 1282 (1991), and in this Court's post-Feist decisions. Moreover, the majority's decision conflicts with the established law of this Circuit, before and after Feist, that extends protection, in derivative works, to distinguishable, non-trivial additions and revisions.

Important questions, worthy of en banc review, are also raised by (i) the majority's erroneous affirmance of a sweeping declaratory judgment based on speculation and an improper allocation of the burden of proof; and (ii) the majority's erroneous application of the "clearly erroneous" standard of review to a question of statutory interpretation involving undisputed facts.

POINT I

THE MAJORITY DECISION IS IN CLEAR CONFLICT WITH FEIST AND THE WELL-SETTLED LAW OF THIS CIRCUIT

A. UNTIL NOW THE INTERPRETATION OF FEIST IN THIS CIRCUIT HAS BEEN WELL-SETTLED

In assessing the "originality" of West's work for Copyright Act purposes, the majority acknowledges Feist as the primary authority. It adopts the language -- a "modicum of creativity" or "minimal creativity" - used by the Feist Court in denying protection to compilations produced merely by "sweat of the brow," with no exercise of independent choice or judgment.

Yet, unlike other post-Feist decisions of this Court,

notably the unanimous opinion in CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc., 44 F.3d 61 (2d Cir. 1994), cert. denied, 116 S.Ct. 72 (1995), the majority opinion ignores the clear guidance in Feist as to the proper interpretation and application of the "modicum" test.

In CCC, Judge Leval analyzed Feist, emphasizing the dangers of reading the decision as anything more than a rejection of protection based solely on "sweat of the brow." In words equally applicable to this case, he wrote:

The Court repeatedly stressed that the required level of originality is minimal, and that most compilations, merely by exercising some independent choice in the coordination, selection, or arrangement of data, will pass the test. The telephone directory failed because it was found to be *completely* devoid of originality...

The thrust of the Supreme Court's ruling in Feist was not to erect a high barrier of originality requirement. It was rather to specify, rejecting the strain of lower court rulings that sought to base protection on the "sweat of the brow," that *some* originality is essential to protection of authorship, and that the protection afforded extends only to those original elements.¹ Because the protection is so limited, there is no reason under the policies of the copyright law to demand a high degree of originality. To the contrary, such a requirement would be

¹ See also 1 Patry, Copyright Law and Practice (1994) ("The key factor is the exercise of some editorial judgment in the selection of data.") (emphasis added).

counterproductive. The policy embodied into law is to encourage authors to publish innovations for the common good - not to threaten them with loss of their livelihood if their works of authorship are found insufficiently imaginative.

44 F.3d at 65, 66 (emphasis in original).²

Until now, the interpretation of Feist set forth in CCC has reflected this Court's consistent view. In Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc., 945 F.2d 509 (2d Cir. 1991), the Court described the minimal level of editorial judgment required by Feist as "de minimis thought." Id. at 514. In Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991), the Court emphasized that the Supreme Court defined the "narrow category" of insufficiently original works as those in which the "'selection and arrangement of facts [is] so mechanical or routine as to require no creativity whatsoever." Id. at 704 (emphasis added), quoting Feist, 111 S.Ct. at 1296.

Indeed, this Court has only once before interpreted

²To reinforce this point, Judge Leval provided extended excerpts, including the following, from the Feist opinion:

To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be.

111 S.Ct. at 1287 (citations omitted), quoted at 44 F.3d at 65.

Feist to deny copyright protection to a textual work of any kind, and that case, Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc., 936 F.2d 671 (2d Cir. 1991), exemplifies the rare situation in which "the creative spark is so utterly lacking as to be 'virtually nonexistent.'" CCC, 44 F.3d at 67, citing Feist, 111 S.Ct. at 1295. In Victor Lalli, the plaintiff chart publisher was found to have made no independent selection or arrangement at all, since he adopted "the exact same format" as every other publisher and arranged data according to "purely functional grids that offer no opportunity for variation." Id. at 672-73.³

B. THE MAJORITY IMPOSED AN "ORIGINALITY" STANDARD THAT DEMANDS FAR MORE THAN FEIST OR ANY PRIOR DECISION OF THIS COURT

The majority does not hold that West, like the publishers in Feist or Victor Lalli, exercises no independent choice at all, or makes exactly the same choices made by virtually all other publishers, or makes only "mechanical" choices. No such finding is conceivable in this case, given the undisputed evidence that (i) West's case reports differ in numerous substantive ways from public domain opinions and reports of other publishers; and (ii) the expression in West's case

³ See also Financial Information, Inc. v. Moody's Investors Service, Inc., 808 F.2d 204 (2d Cir. 1986), cert. denied, 484 U.S. 820 (1987) (no protection for selection of five categories of bond call facts when precisely the same grouping was already used almost universally throughout the industry).

reports is the result of dozens of different, independent editorial choices.⁴

Instead, the majority subjects West's independent editorial judgments to a series of tests, all of which are inconsistent with Feist and prior decisions of this Court and undermine Congress' longstanding decision to extend copyright protection to compilations and derivative works. Moreover, the majority's analysis errs in focusing on editorial choices as ideas rather than on the protectible expression that is the product of editorial choice.

1. The Majority's Two-Part Threshold Test Must Be Rejected

The majority opinion's analysis is premised on its general ruling that independent choices are insufficiently "original" unless they both (i) involve more than three options, and (ii) are "non-obvious."⁵ Each of these tests, particularly as applied by the majority, imposes a more demanding standard than that found in Feist and CCC. To require that editorial choices meet both tests is to erect a high hurdle -- one that is

⁴As Judge Sweet emphasizes throughout his dissent, West's editorial additions and revisions in the case reports at issue involve "substantive, editorial choices" that "express thought and are not inevitable." Dissent at 4-5.

⁵See, e.g., Maj. Op. at 18-19 (requiring "non-obvious choices from among more than a few options" and stating, "Selection from among two or three options" is "insufficient") (emphasis added).

a complete barrier to even extremely thin copyright protection -- that is dramatically at odds with Feist's "extremely low" threshold.

The provenance of this test is difficult to discern from the opinion. Feist and Victor Lalli, the cited authorities, provide no basis for the requirement that each choice made in a compilation or derivative work must involve more than three options. On the contrary, those cases involved no independent selection -- i.e., no options at all.⁶

Nor do Feist or Victor Lalli support the use of the term "obvious" - which the majority gives a broad, elastic interpretation - to negate originality. Indeed, Feist cautions that even "crude, humble or obvious" expressions of independent thought will "make the grade quite easily." 111 S.Ct. at 1287 (emphasis added). Feist and Victor Lalli stand for the narrow proposition that choices do not show the "slightest trace of

⁶The majority also refers to Kregos, in which the choice of nine factors from "scores of available statistics" was held to involve sufficient originality. Nothing in Kregos, however, remotely suggests that a decision involving less than four options is necessarily devoid of originality. Moreover, unlike Kregos, in which the originality of the entire work consisted of a single decision, West's original expression in any one case report may reflect dozens of different decisions, each involving several options. Overall, then, there are hundreds of different combinations of choices -- innumerable options, in fact -- that can be made in publishing a case report. See infra at 12-13.

creativity" (which is all that is required) when they are so "garden variety" and "entirely typical" -- i.e., virtually identical to those dictated by some essentially universal practice - as to be "practically inevitable." Id. at 1296-97 (emphasis added).

The majority, on the other hand, loosely uses the terms "garden variety," "typical," and "obvious" to negate the originality of the expression that results from numerous decisions that are simply (i) consistent with general principles of legal reference⁷ (but undeniably subjective in their particulars), or (ii) logically responsive to the preferences, as evaluated by West, of its readers.⁸ In CCC, this Court warned that originality is not negated by logical choices that respond to the "needs of the market."⁹ Some of the majority's improper

⁷ The majority certainly does not suggest that other publishers make the same citation-revision choices as West. Nor does the Court find that the Bluebook prescribes West's revision choices. At the most the majority merely finds that a few of West's choices seem somewhat common or familiar. As the dissent notes (at 9-10), this impression may well be the result of West's longtime success and the familiarity of its works to legal researchers - neither of which is a basis for evisceration of copyright.

⁸ One indicator of the majority's loosely expansive approach is its use of the term "typical," rather than Feist's term, "entirely typical." See, e.g., Maj. Op. at 4, 19, 23, 28, 32, 33.

⁹ "To the contrary, the use of logic to solve the problems of how best to present the information being compiled is independent

extrapolations from Feist go even further, finding an absence of originality merely because the Court shares West's subjective opinion of what constitutes the best choice.¹⁰

In sum, the majority negates the clear originality of West's work by misreading Feist and ignoring, in relevant part, CCC. Indeed, as the dissent notes, "all of West's basic choices involve subjective judgment," and many of them - particularly those involving the evaluation of the relative usefulness of dozens of citation sources - plainly display as much originality as the decisions in Key Publications. See Dissent at 4-5, 7-8.¹¹

creation." 44 F.3d at 67.

¹⁰ For example, the majority finds that West's selective updating of citations is devoid of originality because "West's decision to insert a citation to the denial of certiorari only when the denial pre-dated the opinion is necessary to avoid anachronism..." Maj. Op. at 30-31. In fact, of course, the decision is only "necessary" if one shares the highly subjective opinion that it is more important to avoid anachronism than to provide the most up-to-date information. Moreover, other publishers provide no updating at all, a third option which is also completely viable. Nothing "dictates" West's choice among these options; the choice is plainly anything but "inevitable."

¹¹ For example, West subjectively evaluates 30 specific publications as being either (i) not useful enough to be retained if a West bound-volume citation can be substituted, or (ii) so useful that they are always retained, even if a West bound-volume citation is available. The majority acknowledges that some but not all of the citations replaced by West are from daily or weekly journals. The majority suggests no reason, other than highly subjective evaluation, why West would delete certain permanent-book citations and not delete others. Maj. Op. at 28.

Furthermore, it is plain -- and the majority does not find otherwise -- that West could make dozens of different choices, in a single case report, without departing from some "industry standard," breaking the law, or even looking foolish, leading to entirely different expressive content. As Judge Sweet concludes, "there is no evidence that any of West's choices are commonplace, 'practically inevitable,' dictated by law, or that they follow any external guidelines." Dissent at 4.

2. The Majority's De Facto Application of the Merger Doctrine Misconstrues the Law of this Circuit and Conflicts with CCC

The majority also holds that West's independent selection, revision, and arrangement of citations should be denied protection because "a competitor would have difficulty creating a useful case report without using many of the same citations." Maj. Op. at 33.¹² The majority's concern has no factual basis in the record.¹³ More important, the majority's

¹² Similarly, the majority asserts that affording protection to West's selection and arrangement of attorney data in *Supreme Court Reporter* -- which is different from the selection and arrangement in at least two other Supreme Court reporters -- might prevent competitors from publishing a "substantially similar" arrangement. Maj. Op. at 23-24.

¹³ Indeed, the record amply demonstrates that the citation choices in other "useful" publications are consistently different. As the dissent notes, "opinions can be, and are written, with a variety of citation combinations and other facts either included or not." Dissent at 9.

reasoning is in clear conflict with CCC, which explained that, under Feist, the way to prevent the monopolization of factual data is not to create barriers to copyrightability but to limit the extent of protection strictly. 44 F.3d at 66.¹⁴ See also Continental Casualty Company v. Beardsley, 253 F.2d 702 (2d Cir. 1958), in which this Court found insurance forms (whose content was largely dictated by statute) copyrightable but, to ensure free use of ideas, declined to find infringement in the absence of verbatim or near-verbatim copying.

This case concerns only the verbatim, wholesale copying of West's case reports, through computer scanning.¹⁵ West seeks protection in this case against nothing except the aggregate, verbatim copying of West's cumulative original expression in case reports. West does not contend, and no court will ever be asked to find, that West's copyright is infringed by the publication of

¹⁴ The majority holds that, in accordance with CCC, the merger doctrine is inapplicable because of the nature of West's expression (Maj. Op. at 35-36). Yet the denial of protection based on unfounded fears of "monopolization" constitutes a de facto misapplication of the merger doctrine and a serious misapprehension of the idea/expression dichotomy. See dissent at 9. One does not give West a monopoly in any ideas by protecting the highly specific, subjectively determined expression in West's case reports.

¹⁵ HyperLaw asserts that, prior to scanning, it will redact West's synopses, headnotes, and keynotes, none of which is at issue in this case.

independently created, substantially similar case reports.¹⁶

"The copyright granted West is thin, but it is sufficient to protect against the verbatim digital copying proposed by Hyperlaw." Dissent at 8.¹⁷

3. The Majority Mistakenly Adopts an "Atomizing" Approach That Is Inconsistent with the Law of this Circuit

Although HyperLaw seeks to copy, verbatim, all of the different kinds of expression (selected and revised citations, subsequent case history, selected and arranged attorney information, revised captions) in each case report, the majority declines to assess the overall or cumulative originality contained in a single case report. Instead, the majority scrutinizes many of West's individual choices on an isolated basis; finds most of them to be insufficiently original (when reviewed under the faulty standards discussed above); and

¹⁶The warning in Key Publications cited by the majority (Maj. Op. at 33) does not refer to any risk of exposure faced by independent creators of substantially similar works. The warning is clearly limited to verbatim copiers who attempt to conceal their verbatim copying (and can be proven to have done so).

¹⁷Indeed, the majority itself, in its companion decision, approvingly cites the observation that "under Feist, nothing 'short of extensive verbatim copying' will amount to infringement of a compilation." Maj. Op. in 97-7430 at 27, citing J. Ginsburg, No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone, 92 Colum. L. Rev. 338, 349 (1992).

apparently concludes, without further analysis, that no combination of choices in a case report conceivably could involve sufficient originality.¹⁸

As justification for this "atomizing" approach, the majority states that since "each editorial choice is independent of the others," the "whole does not disclose or express an overall creative insight or purpose...." Maj. Op. at 34. Thus, the majority erects yet another barrier to copyrightability that is inconsistent with the law of this Circuit.¹⁹ In Key Publications (as to compilations) and in Weissmann v. Freeman, 868 F.2d 1313 (2d Cir.), cert. denied, 493 U.S. 883 (1989) (as to derivative works), this Court confirmed that the analysis of originality requires consideration of selection, arrangement, and annotation in the aggregate.²⁰ No prior decision of this Court has suggested that the aggregate should be ignored because the

¹⁸ See Maj. Op. at 34. In fact, the majority opinion's ruling as to the absence of cumulative originality refers only to citation decisions. The majority never explicitly addresses the cumulative originality of all the editorial decisions expressed in a West report but would presumably reach, as the dissent suggests, the same dismissive conclusion. Dissent at 5.

¹⁹ The barrier is surely a high one, since it is apparently not satisfied by West's overall purpose: providing revisions and annotations suited to the needs and preferences of its readers.

²⁰ See also dissent at 5-6, citing 17 U.S.C. § 101 and Softel, Inc. v. Dragon Medical & Scientific Communications, Inc., 118 F.3d 955, 964 (2d Cir. 1997).

court discerns no "overall creative insight or purpose."²¹

C. THE MAJORITY SERIOUSLY MISCONSTRUES THE STANDARD FOR ORIGINALITY APPLICABLE TO TEXTUAL DERIVATIVE WORKS

Although the majority bases its decision primarily on its interpretation of Feist, it also rules that West's case reports do not meet the originality standard in this Circuit for derivative works. This erroneous ruling seriously misconstrues this Circuit's standard and is certain to create significant confusion in an already unsettled area of the law.²²

The majority states that this Court found alterations to an existing work original in Weissmann, supra, because the revisions "resulted in substantial changes to the substance and flow of the piece." The majority then denies protection to West, since "[n]o such substantial variations characterize West's case reports." Maj. Op. at 38 (emphasis added).

²¹ This refusal to consider the possibility of a showing of "cumulative" originality seems particularly overbearing, and inconsistent with this Court's prior teachings, given the fact that the majority - like the district court - concedes that not all of West's individual decisions lack a "modicum" of creativity. See Maj. Op. at 27, n. 10 ("undeniably creative" listing of popular cases); Matthew Bender & Co. v. West, 1997 WL 266972, at *3, *4 (district court finding of no originality limited to "most instances").

²² "[T]he Second Circuit has had problems articulating a single standard of originality for derivative works..." 1 Patry, Copyright Law and Practice 161-62 (1994) (discussing apparent conflict between "non-trivial" and "substantial" variation standards in Alfred Bell and Batlin).

On the contrary, however, the Weissmann decision conspicuously avoided use of the term, "substantial variation," explicitly confirming that this Circuit's test remains the more clearly minimal one, consistent with Feist, in Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102-03 (2d Cir. 1951); i.e., sufficient originality is shown by a "distinguishable variation" that is anything more than "merely trivial."²³

Indeed, the majority opinion vividly demonstrates the hazards of applying "substantial variation" to textual derivative works. According to the majority, a derivative work author's alterations must result in "substantial changes to the substance and flow" of an existing work. Yet if that were so, there would be no protection for myriad derivative works -- including, for example, the annotations of Shakespeare scholars, which leave intact the "substance and flow" of the existing work. West's work, too, involves patently non-trivial contributions that change or add substance - e.g., adding and updating citations, adding a summary of attorney data, as well as other changes - without altering the "substance and flow" of the judicial opinion

²³ The use of the word "substantial" in L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir.), cert. denied, 429 U.S. 857 (1976), a visual artwork case, has been given a limited interpretation in light of the facts of that case. See 1 Nimmer on Copyright § 3.03, 3-16, n. 6.

itself.²⁴

In this respect as well, en banc review is urgently needed to avoid inconsistent interpretations of precedent and clarify the law of the Circuit.

POINT II

THE MAJORITY OPINION DEPARTS FROM THE LAW OF THIS CIRCUIT AS TO THE PROPER SCOPE, AND BURDEN OF PROOF, IN DECLARATORY JUDGMENT ACTIONS

The majority opinion affirms an order that permits verbatim copying of hundreds of thousands of unspecified, individual *Supreme Court Reporter* and *Federal Reporter* case reports. The finding that none of these reports could contain protectible expression is based not only on a misinterpretation of the "originality" standard, but also on impermissible speculation and an improper allocation of the burden of proof.

HyperLaw, after the close of evidence at trial, offered testimony that it "intended to copy most older cases [pre-1990 or 1993] cited in recent Supreme Court and court of appeals decisions...." Maj. Op. at 6, 9. Yet, despite comprehensive discovery of West's archives, HyperLaw never even attempted to offer any purported analysis of West's work based on a review of

²⁴ Indeed, Weissmann emphasizes that the copyist's interest in unauthorized appropriation of a derivative work amply demonstrates the non-trivial worth of what has been added. 868 F.2d at 1313. See also dissent at 6-7 and 9, n.3.

a representative, statistically significant sampling of the case reports for all Circuits. On the contrary, HyperLaw limited its *Federal Reporter* evidence to a partial one-volume sampling reflecting West's adaptation of opinions from only three of the thirteen Circuits -- despite the undisputed fact that the extent of West's work varies significantly from Circuit to Circuit.

This evidence could not even theoretically support a finding that strips West of protection for all *Federal Reporter* reports. Thus, the district court erred when it refused to dismiss the action after HyperLaw had put on its case. In affirming this error, the majority throws into question the well-settled principle that the party seeking relief bears the burden of proof in declaratory actions. 22A American Jurisprudence 2d Section 232 (1988); 10B Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d Section 2770(1998).

Moreover, HyperLaw has never specifically identified which, or how many, case-reports it intends to copy. Yet the majority, having found that West meets the originality standard in its expression of which 300-odd cases are "popular" enough for informal citation, negates this originality because "West offered no evidence as to how often these cases are cited without a full citation in the judicial opinions that HyperLaw seeks to copy...." Maj. Op. at 32, n. 10 (emphasis added). This astonishing reversal of the proper burden of proof rewards HyperLaw for failing to describe its hypothetical product with

specificity and punishes West for failing to do the impossible -- i.e., conduct a statistical analysis of an undefined body of material.²⁵ Indeed, the majority simply speculates when it find that the proposed verbatim copying of West's "undeniably creative" expression "seems to be de minimis copying." Id. (emphasis added).

The sweeping declaratory judgment affirmed by the majority is, in fact, unprecedented in its speculative and imprecise nature. Both Judge Martin and the majority found that some of West's work involves originality. It must be remembered that only a minuscule fraction of the case reports were before the Court. Yet this action has somehow resulted in a judicial determination -- ineluctably based on guesswork and approximation -- that not one of the hundreds of thousands of case reports at issue contains enough original expression to be protectible.

POINT III

THE MAJORITY APPLIED THE WRONG STANDARD OF REVIEW

Appellants also request rehearing of the majority's application of the "clearly erroneous" standard.²⁶ Although this Court has stated before that findings as to copyright originality are reviewed for clear error, this rule -- if applied to all

²⁵ In fact, it was not until after the close of evidence that HyperLaw offered vague testimony (inconsistent with its testimony at a justiciability hearing) that it intended to copy roughly 50-75% of West's pre-1990 case reports.

²⁶ Reversal, as the dissent notes, is compelled under either standard. Dissent at 1, n.1.

cases -- conflicts with principles enunciated by the Supreme Court (and reflected in Feist); with other, related standards of review; and with the rule in other Circuits.

The Supreme Court has provided clear guidance for resolving the question of the proper standard of review for an application of law to fact. If the inquiry is founded on the lower court's "experience with the mainsprings of human conduct" (e.g., questions of intent or reasonableness), the clearly erroneous standard is appropriate. C.I.R. v. Duberstein, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198 (1960); see also Pullman-Standard v. Swint, 456 U.S. 273, 289-90, 102 S. Ct. 1781, 1790-91 (1982). In most cases of law applied to fact, however, the inquiry focuses on "judgment about the values that animate legal principles," and de novo review is indicated. United States v. McConney, 728 F.2d 1195 (9th Cir. 1984), citing Pullman-Standard, supra; United States v. General Motors Corp., 384 U.S. 127, 141, n. 16, 86 S. Ct. 1321, 1328, n. 16 (1966) ("the question here is not one of 'fact,' but rather of the legal standard required to be applied to the undisputed facts").

Applying the Copyright Act's originality standard to undisputed facts is unquestionably an inquiry of the latter kind. As the First Circuit recently noted, Feist itself -- deciding originality as a matter of law -- makes it clear that originality is essentially a legal inquiry when the facts are undisputed. CMM Cable Rep. Inc. v. Ocean Coast Properties, Inc., 97 F.3d 1504, 1417 (1st Cir. 1996). See also Los Angeles News Service v.

Tullo, 973 F.2d 791, 793 (9th Cir. 1992) ("Whether the raw tapes are sufficiently original to merit copyright protection is a mixed question of law and fact that we examine de novo."). Furthermore, as the dissent notes (at 1, fn. 1), the "clear error" standard in this case is inconsistent with the Court's approach to analogous questions arising under the Act.²⁷

CONCLUSION

For the foregoing reasons, the majority opinion is erroneous and departs in significant ways from this Circuit's law, and the questions involved are of exceptional importance, thus warranting en banc review pursuant to Fed. R. App. 35(a).

Dated: November 17, 1998

Respectfully submitted,

SATTERLEE STEPHENS BURKE & BURKE LLP

By: _____

James F. Rittinger (JR-0556)

Joshua M. Rubins (JR-8338)

Attorneys for Appellants

230 Park Avenue

New York, New York 10169

(212) 818-9200

Of Counsel:

Arthur R. Miller

228 Areeda Hall

1545 Massachusetts Avenue

Cambridge, Massachusetts 02138

(617) 495-4111

²⁷ In fact, the analogous Weissmann decision suggests a de facto application of the de novo standard. The Court thoroughly reviewed the record; took note of materials not referenced below; and effectively substituted its own assessment for that of the trial judge, who, the facts being undisputed, "cannot insulate his findings on originality from appellate review." 868 F.2d at 1322-23.