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COMPILATIONS AS SUBJECTS FOR COPYRIGHT

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I

Article I, Sec. 8, Clause 8 of the United States Constitution gives Congress the power to enact legislation to "promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is under this authority given by the Constitution that Congress has passed various copyright laws for the protection of those works which Congress deemed promotions of the sciences and the useful arts.

When the Constitution was adopted and at the time of the first copyright acts, life in the United States was comparatively simple and many of the writings, pictures and prints which are subjects of copyright today were entirely unknown to their literary and artistic world. When the men who framed the Constitution gave Congress the power to pass copyright laws they were thinking of the literature of their own day, but the grant of power to Congress was broad enough to allow expansion of the scope of copyright protection to care for the needs of the colonial provinces as they grew into a nation.

The interests of the people became more varied and there was a demand for writings which were foreign to the eighteenth century conception of literary works. The commercial growth of the nation was perhaps the largest factor in this change for with the growth of commerce came a corresponding growth of the sciences and the useful arts which reached into every phase of living. There was an increase in learning in all of the sciences and each had its mode of expression. In the business world there developed a "literature of commerce" which was formerly unknown.

To keep abreast of this expansion the courts interpreted existing copyright laws liberally to include as many works as possible and Congress itself frequently expanded the scope of

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the copyright law until it stands at present as embodied in Title 17 of the United States Code Annotated.

It is the purpose of this paper to trace the development of the copyright law in relation to compilations, to point out that compilations first won the recognition of the courts and finally of Congress when, in 1911, they were specifically provided for in the copyright law enacted in that year.

II

While at present one of the most important types of copyrightable material is compilations in commercial use, primarily for the purpose of advertising, such as trade catalogues, mail order books, price lists, etc., there was a time when compilations of this kind were not considered proper subjects for copyright. In *Clayton* v *Stone*,[1] the plaintiff alleged the infringement of his copyright in a daily price-current or review of the market. At that time the copyright law provided that "maps, charts and books engravings and etchings historical and other prints" were copyrightable.[2] In holding that this was not a book and not subject matter which the copyright law was intended to protect, Justice Thompson said

> "I am inclined to think the price-current cannot be considered a book within the sense and meaning of the act of Congress. It would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them."[3]

The court argued that this was not a book but the decision did not rest entirely upon this ground. True, the price-current was not published in the form which we ordinarily think of as a book, but a bound volume is not necessary to bring the work under the classification of a "book." A single page has been held sufficient to constitute a book.[4] The real basis of the decision was that in 1829 the court did not think of a mere compilation of facts as an advancement of the sciences or the useful arts which the Constitution and Congress had intended to protect.

[1] 5 Fed. Cas. No. 2,872 (C. C. S. D. N. Y. 1829).

[2] Act of May 31, 1790 (1 Stat. 124) and Act of April 29, 1802 (2 Stat. 124).

[3] 5 Fed. Cas. No. 2,872 at page 1003.

[4] Drury v. Ewing, 7 Fed. Cas. No. 4095 (C. C. Ohio 1862), Scoville v. Toland, 21 Fed. Cas. No. 12553 (C. C. Ohio 1848), Clayton v. Stone, 5 Fed. Cas. No. 2872 (C. C. N. Y. 1829).

In 1829 the stock market was not the important institution it is today and it was only natural that the court did not think of a list of the transactions of the stock exchange as a work which would add anything to the knowledge of mankind.

In the course of time, however, the courts began to hold that compilations were meritorious works which did advance the sciences and so were within the spirit of the copyright provisons. As the copyright statute did not specifically authorize the copyright of compilations, they were brought within the existing provisions by classifying them as "books" under the then existing laws.

There was another obstacle in the way of the recognition by the courts of the worthiness of compilations for copyright protection. Advertisements, as such, were not then and are not now mentioned in the copyright act, and prior to the early twentieth century they were considered improper subjects for copyright. Large proportions of the compilations the courts were asked to protect had advertising as their primary if not their sole purpose.

The courts refused to recognize that advertisements had any artistic merit or were original works deserving of protection.[5] The courts argued that the Constitution and Congress intended to protect only those useful works which added something to human knowledge and contributed to the enlightenment of man, and therefore, it was illogical for the author of a mere advertisement to seek protection for a work which was intended only to encourage the public to buy a certain product. An advertisement might, in addition to its commercial appeal, carry information which was valuable enough to be copyrighted but if it were a commercial appeal alone it was beneath the dignity of the court's protection. In *Lamb* v. *Grand Rapids School Furniture Co.*,[6] the court denied copyright protection on a catalogue containing engraved illustrations of church furniture along with a price list because it had not independent value other than as an advertisement.

In *Mott Iron Works* v. *Clow*,[7] a circular contained illustrations and descriptions of plumbing fixtures. The court expressed the opinion that such compilation might be of value at some

[5] Collender v. Griffith, 6 Fed. Cas. No. 3000 (C. C. N. Y. 1873)
[6] 39 Fed. 316 (D. C. Mich. 1889).
[7] 83 Fed. 316 (C. C. A. 1897).

time and in some places but refused to hold that it served any useful purpose in the capacity in which it was being employed in this instance. The court said.

"So far as the decisions of the supreme court have gone, we think they hold to the proposition that mere advertisements whether by letterpress or by picture, are not within the protection of the copyright law. It is possibly not beyond comprehension that pictures of slop sinks, washbowls, and bath tubs, with or without letterpress statement of dimensions and prices though intended mainly for advertisement, may, in localities where such conveniences are not in common use, be the means of instruction and of advancement in knowledge of the arts and, when they are the product of original intellectual thought, may possibly come within the scope of the constitutional provision."[8]

When the great commercial expansion this country experienced in the nineteenth century began to make itself felt, attention was directed toward effective methods of salesmanship and the demand grew to have individual resourcefulness expressed in clever and appealing advertisements protected in order that the author might reap the exclusive benefits from their use.

In *Bleistein* v. *Donaldson Lithographic Co.*,[9] the court recognized for the first time that ordinary advertisements might be copyrighted, that they were works of merit not essentially divorced from original and artistic endeavor. Although this case involved a picture poster, the general principle in regard to advertising is applicable to our subject of compilations. The court said.

"A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement."[10]

Since this decision the Copyright Act of 1911 has specifically provided for the copyright of compilations. Title 17, Section 6 of the United States Code Annotated provides

"Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title."

[8] 83 Fed. 316, 321 (1897).

[9] 188 U. S. 239, 23 S. Ct. 298, 47 L. Ed. 460 (1903), but dissent at page 252 to effect that where a picture has no other object and no value aside from advertisement it could not promote the useful arts within the meaning of Article I, Sec. 8 of the Constitution.

[10] 188 U. S. 239, at 251 (1903).

And Section 5 provides for the specification of the class into which the work falls. Sub-section (a) lists:

"Books, including composite and cyclopedic works, directories, gazeteers, and other compilations."

The field is now open for the protection of all manner of compilations regardless of the fact that their primary object is that of advertising.

Copyrights are now freely granted on catalogues which contain illustrations and descriptions of articles for sale,[11] directories,[12] collections of facts from voluminous public records,[13] telegraphic codes of coined words,[14] text books and various printed instructions,[15] additions to or new editions of old works,[16] maps compiled from other maps,[17] etc.

Compilations may be of other things than literary works, for we see that a map compiled from other maps is properly

[11] Campbell v. Wireback, 269 Fed. 372 (C. C. A. 1920); White Mfg. Co. v. Shapiro, 227 Fed. 957 (S. D. N. Y. 1915); National Cloak & Suit Co., v. Kaufman, 189 Fed. 215 (D. C. Pa. 1911), Da Prato Statuary Co. v. Giuliani Statuary Co., 189 Fed. 90 (D. C. Minn. 1911).

[12] Leon v. Pacific Telephone & Telegraph Co., 91 F (2d) 484 (C. C. A. 1937) (telephone directory), American Travel & Hotel Directory Co. v. Gehring Publishing Co., 4 F (2d) 415 (D. C. S. D. N. Y. 1925) (hotel directory), Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 281 Fed. 83 (C. C. A. N. Y. 1922) (jeweler's trade marks); Egbert v. Greenberg, 100 Fed. 447 (C. C. N. D. Calif. 1900) (racing form); Lawrence v. Cupples, 15 Fed. Cas. No. 8135 (C. C. S. D. N. Y. 1829) (list of creditors and debtors).

[13] Slover v. Lathrop, 33 Fed. 348 (C. C. D. Colo. 1888); Hanson v. Jaccard Jewelry Co., 32 Fed. 202 (C. C. Mo. 1887); Banker v. Caldwell, 3 Minn. 94 (1859).

[14] Hartfield v. Peterson, 91 F. (2d) 998 (C. C. N. Y. 1937); American Code Co. v. Bansinger, 282 Fed. 829 (C. C. A. 1922); Reiss v. National Quotation Bureau, 276 Fed. 717 (D. C. N. Y. 1921).

[15] Yale University Press v. Row Peterson Co., 40 F. (2d) 290 (C. C. S. D. N. Y. 1930) (pictorial history); Edwards & Deutsch Lithographing Co. v. Boorman, 15 F (2d) 35 (C. C. A. 7th 1930) (Discount Time Teller); Guthrie v. Curlett, 36 F (2d) 694 (C. C. A. 2d 1929) (freight tariff index), National Institute for Improvement of Memory v. Nutt, 28 F (2d) 132 (C. C. Conn. 1928) (methods to improve memory), Meccano, Ltd. v. Wagner, 234 F 912 (C. C. Ohio 1916) (instructions on use of mechanical toy), Stone and McCarrick, Inc. v. Dugan Piano Co., 220 Fed. 837 (C. C. A. 1915) (instructions in a method of salesmanship. The court held that such a compilation was copyrightable but in this case caused the public to be deceived and hence was not protected.); Green v. Bishop, 10 Fed. Cas. No. 5763 (C. C. D. Mass. 1858) (grammar), Emerson v Davies, 8 Fed. Cas. No. 4436 (C. C. D. Mass. 1846) (arithmetic text).

[16] Gray v. Russell, 10 Fed. Cas. No. 5728 (C. C. D. Mass. 1829); Lawrence v. Dana, 14 Fed. Cas. No. 8136 (C. C. D. Mass. 1869).

[17] Freedman v. Milnag Leasing Corp., 20 F Supp. 802 (D. C. S. D. N. Y. 1927); General Drafting Co. v. Andrews, 37 F. (2d) 54 (C. C. A. 2d 1930).

classified as a compilation.[18] Section 6 of Title 17 of the United States Code Annotated provides for "compilations" but does not specify what materials may be collected to form such compilations. To "compile" means to bring together and it would follow that collections of music, paintings, etchings, etc., when collected, arranged and printed in book, pamphlet or circular form would be copyrightable compilations.

There have been only a very few cases denying protection to new and original collections of information. Market quotations and news items when communicated by ticker or telegraph service were considered improper subjects for copyright because they were merely a means of conveying news at the time it was happening and had no value as a book.[19] It is to be remembered, however, that at the time this question was decided, namely before 1911, compilations were brought within the pale of the court's protection by classifying them as "books." Since the enactment of the 1911 copyright law providing for compilations there seems to be no requirement that the compilation also be a book and it is entirely possible that today ticker quotations and news could be copyrighted.

III

To be a proper subject for copyright protection a compilation must be original. The decisions are unanimous in requiring that the compilation be original, but it is difficult to determine just what is meant by "original" The language of the decisions gives no satisfactory definition and adds to the difficulty of the problem by requiring that the "work must be original and a product of the author's skill, labor and judgment."

The requirement that the compilation be original and the requirement that it be the product of the author's skill, labor and judgment are closely related but they are not entirely identical. A work may be original in that it is the first such work of its kind or it may be original with the author in as much as he has gathered the materials from the sources and compiled them and has not merely copied from another work. A work may be original and be the product of the author's labor or expense or

[18] General Drafting Co. v. Andrews, 37 F (2d) 54 (C. C. A. 2d 1930).

[19] National Telegraph News Co. v. Western Union, 119 F. 294 (7th C. C. A. 1902)

it may be the product of his skill, labor, judgment, and artistry Conversely, a compilation which is copied from another work may show some skill and artistry employed in evasive devices to make the work appear different in some respect.

In the *National Telegraph News Co.* v. *Western Union*,[20] we see the confusion in the court's language when we examine a long quotation.

"It would be difficult to define, comprehensively, what character of writing is copyrightable, and what is not. But, for the purpose of this case we may fix the confines at the point where authorship proper ends, and mere annals begin. Nor is this line easily drawn. Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind; that the product embodies the thought of the author as well as the thought of others; and would not have found existence in the form presented, but for the distinctive individuality of mind from which it sprang. A mere annal, on the contrary, is the reduction to copy of an event that others, in a like situation would have observed; and its statement in the substantial form that people generally would have adopted. A catalogue, or a table of statistics, or business publications generally may thus belong to either one or the other of these classes. If in their makeup, there is evinced some peculiar mental endowment—the grasp of mind, say in a table of statistics, that can gather in all that is needful, the discrimination that adjusts their proportions —there may be authorship within the meaning of the copyright grant as interpreted by the courts. But if, on the contrary, such writings are a mere notation of figures at which stocks or cereals have sold, or of the result of a horse race, or base-ball game, they cannot be said to bear the impress of individuality, and fail, therefore, to rise to the plane of authorship. In authorship, the product has some likeness to the mind underneath it; in a work of mere notations, the mind is guide only to the fingers that make the notation. One is the product of originality; the other the product of opportunity."[21]

The emphasis here was upon that part of his own personality the author imparted to his work. The court seems to say that although no work such as this had ever before been created, still because the facts were recorded exactly as any other person would have recorded them, the compilation was not original.

On the other hand, in *No-Leak-O Piston Ring Co.* v. *Norris*,[22] we find that the compilation was just an ordinary list of facts relating to piston rings, sizes, dimensions, etc., it was a list that might have been made by anyone collecting facts about piston rings. However, the court called this an original work because a compilation such as this had never before been available. Little if any of the author's "individuality of mind"

[20] *Supra* Note 19.
[21] *Supra* note 19 at 297.
[22] 277 Fed. 951 (C. C. A. 4th 1903).

could go into such a compilation. It was original, however, in that it was first in order of existence.

The question of infringement is closely connected with the question of originality, for an original work cannot be an infringement of another work, however similar. If the facts to be compiled are the same and there is but one logical way to arrange them, resulting compilations must of necessity be similar. Each compilation may be copyrighted if the author has gathered the material from the original sources and has not merely copied another work, or has not attempted, by evasive devices, to conceal the fact that his work is nothing more than a copy [23]

It is undisputably necessary that the compilation be original in that it has been erected by the author himself and is not merely a slavish copy of another work.[24] Beyond this the courts have not gone to define and give us a workable standard of "originality"

Conceding that the compilation must be original and not a mere copy of another work, the question still remains as to whether it must be a product of the author's skill, judgment, and artistry or whether mere labor in bringing together the information is sufficient to entitle it to copyright protection.

In the field of compilation the author is engaged in collecting and recording the writings of another; he does not create the materials with which he works but he selects, arranges and records. The very nature of a compilation minimizes the opportunity for skill and artistry and the author's claim to originality must of necessity be confined largely to arrangement and selection. The cases are not in agreement as to how much of the author's skill must enter into the arrangement.

From *Jeweler's Circular Co.* v. *Keystone Publishing Co.*,[25] the conclusion of the court seems to be that mere industry and labor expended in the compilation of information is sufficient to justify the copyright. The court said

"The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials

[23] American Travel and Hotel Directory Co. v. Gehring Publishing Co., 4 F (2d) 415 (D. C. S. D. N. Y. 1925).

[24] Deutsch v. Arnold, 22 F. Supp. 101 (D. C. E. D. N. Y. 1938); Hartfield v. Peterson, 91 F. (2d) 998 (C. C. A. 2nd 1937); Andrews v. Guenther Publishing Co., 60 F. (2d) 555 (D. C. S. D. N. Y. 1932); Green v. Bishop, 10 Fed. Cas. No. 5763 (C. C. D. Mass. 1858), Emerson v. Davis, 8 Fed. Cas. 5728 (C. C. D. Mass. 1839).

[25] 281 Fed. 83 (C. C. A. 1922).

which he has collected consist of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or language or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain the exclusive right of multiplying copies of his work."[26]

This quotation is embodied in *Yale University Press* v. *Row, Peterson, & Co.*,[27] and *American Travel & Hotel Directory Co.* v. *Gehring Publishing Co.*[28] The court's language in *American Trotting Register Association* v. *Gocher*[29] and *No-Leak-O Piston Ring Co.* v. *Norris*[30] is not specific upon this point but it indicates that the author's labor and expense in making the compilation are sufficient to warrant copyright protection.

There is a strong dissent to this view and in *Clayton* v *Stone*[31] the court expressed the opinion that mere industry was insufficient to justify a copyright

"The title of the Act of Congress is for the encouragement of learning and was not intended for the encouragement of mere industry unconnected with learning and the sciences."[32]

And in *Hartford Printing Co.* v. *Hartford Directory & Publishing Co.*,[33] although a copyright was allowed upon a directory, District Judge Platt seriously questioned the grounds for granting it and said.

"The plaintiff invokes the law because he was the owner, proprietor and compiler of a book. In so far as he may have used his brains to get up an artistic book in the way of grouping, classifying, and setting forth the facts which it contains, there would be reason in his claim; but in so far as he merely recorded accurately the names of residents with their occupations, and where to find them at home and in business, it is impossible to discover wherein the useful arts and sciences are promoted. The labor involved therein is purely mechanical and to protect the copyright affords a certain measure of monopoly in the right to make such a use of labor and money."[34]

At least the numerical weight of authority requires the author to have created something by his skill, labor and judg-

[26] *Supra* note 25 at page 88.
[27] 40 F (2d) 290 (C. C. S. D. N. Y. 1930).
[28] *Supra* note 23.
[29] 70 Fed. 237 (C. C. N. D. Ohio 1895)
[30] 277 Fed. 951 at 953.
[31] *Supra* note 1.
[32] *Supra* note 1 at page 1003. A digest of the market was printed in a newspaper.
[33] 146 Fed. 332 (C. C. D. Conn. 1906).
[34] *Supra* note 33 at page 333

ment,[35] and this in cases decided after the 1911 copyright act as well as those decided before that date. It would seem that any useful, original compilation should be copyrighted and that any distinction between an original work produced by the author's labor and one produced by his judgment, skill and labor is highly superficial.

IV

A compilation must not only be original but it must also serve some useful purpose.[36] However, "usefulness" and the "useful arts" are not narrow terms for they are almost as broad as the whole field of human experience. It is difficult to conceive of a compilation of facts which would be utterly useless to everyone.

The question of whether a compilation promotes a useful art must be decided when it is alleged that the sole purpose of the work is to serve some illegal purpose. This was the contention in *Egbert* v. *Greenberg*,[37] that a racing form was exclusively and expressly designed to facilitate gambling. The court held that the collection of facts and statistics relating to the ancestry and performance records of various horses was of great "use and value to persons engaged in the breeding, training and racing of horses." This was a legitimate occupation or in other words one of the "sciences or useful arts" under the meaning of the Constitution.

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[35] Deutsch v. Arnold, 22 F. Supp. 101 (D. C. E. D. N. Y. 1938) (skill, labor and judgment); General Drafting Co. v. Andrews, 37 F. (2d) 54 (C. C. A. 2nd 1930) (skill, labor, and expense); National Inst. for Improvement of Memory v. Nutt, 38 F (2d) 132 (D. C. Conn. 1928) (skill and labor); Leon v. Pacific Telephone and Telegraph Co., 91 F. (2d) 484 (C. C. A. 9th 1927) (skill, ingenuity and original research); Edwards & Deutsch Lith. Co. v. Boorman, 15 F (2d) 35 (C. C. A. 7th 1926) (skill and discretion in selection, arrangement and combination); American Code Co. v. Bensinger, 282 Fed. 829 (C. C. A. 2nd 1922) (skill, labor and judgment), Campbell v. Wireback, 269 Fed. 372 (C. C. A. 4th 1920) (skill and artistry); Hanson v. Jaccard Jewelry Co., 32 Fed. 202 (C. C. E. D. Me. 1887) (labor, care and some skill); Lawrence v. Cupples, 15 Fed. Cas. No. 8135 (C. C. D. Mass. 1875) (labor and skill); Lawrence v. Dana, 15 Fed. Cas. No. 8136 (C. C. D. Mass. 1869) (skill and discretion), Banker v. Caldwell, 3 Minn. 94 (1859) (Skill in methodizing abstracts into a harmonious whole).

[36] Deutsch v. Arnold, 22 F Supp. 101 (C. D. E. D. N. Y. 1938), No-Leak-O Piston Ring Co. v. Norris, 277 Fed. 951 (C. C. A. 4th 1903); Egbert v. Greenberg, 100 Fed. 447 (C. C. N. D. Calif. 1900).

[37] 100 Fed. 447 (C. C. N. D. Calif. 1900).

Excepting those purposes which could only promote some illegal or immoral end, it would seem that any compilation which could be employed in some way by even the smallest number of people would serve a useful purpose. The demand for information is as varied as our complex society itself and compilations which satisfy this demand serve to advance society

SUMMARY

Before compilations were specifically provided for by law they were recognized as proper subjects of copyright. The courts have, in their interpretations of the various copyright acts, been very liberal in allowing protection to new and useful works which came within the spirit of the Constitutional grant of power and Congress' exercise of it, although not strictly within the classifications provided. New subject matter which resulted primarily from commercial necessity, was thus granted copyright protection under laws which provided only for "books." The need for copyright protection was finally recognized by Congress when it passed the copyright act of 1911 and made specific provisions for copyrights on compilations.

A compilation must be original, at least in that it is not a copy of another work. The author must have gathered the information from its original source and collected and arranged it to form the compilation. It is not clear from the decisions whether the compilation must be the product of the author's skill, judgment and labor, or whether labor alone is sufficient. However, it is the opinion of this writer that a compilation which is useful and original should be copyrighted regardless of the fact that the author's efforts extended only to industrious collection.