

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: FEIST PUBLICATIONS, INC., Petitioner  
v. RURAL TELEPHONE SERVICE COMPANY, INC.  
CASE NO: 89-1909  
PLACE: Washington, D.C.  
DATE: January 9, 1991  
PAGES: 1 - 57

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SUPREME COURT, U.S.  
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1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   FEIST PUBLICATIONS, INC.                   :

4                   Petitioner                   :

5                   v.                               :   No. 89-1909

6   RURAL TELEPHONE SERVICE                   :

7   COMPANY, INC.                               :

8   - - - - -X

9   Washington, D.C.

10    Wednesday, January 9, 1991

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   11:00 a.m.

14   APPEARANCES:

15   KYLER KNOBBE, ESQ., Cimarron, Kansas; on behalf of the  
16   Petitioner.

17   JAMES M. CAPLINGER, JR., ESQ., Topeka, Kansas; on behalf  
18   of the Respondent.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1909, Feist Publications, Inc., v. Rural Telephone Service Company, Inc.

Mr. Knobbe?

MR. KNOBBE: Knobbe, Your Honor.

CHIEF JUSTICE REHNQUIST: Knobbe, excuse me.

ORAL ARGUMENT OF KYLER KNOBBE

ON BEHALF OF THE PETITIONER,

MR. KNOBBE: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves the copyrightability of a phone subscriber's name, address, and telephone number as published by the phone company in its directory. The effect of the decisions below, which came from the district of Kansas in the Tenth Circuit, is to hold that a private company cannot publish these facts in its own directory without first doing a canvas to obtain the facts from the phone subscriber.

Our position is that while the telephone company's directory may be copyrightable as a whole, the phone company's alphabetical list of names, address, and telephone numbers of its subscribers is not a work of authorship under the statute, Section 101 of the copyright



1 act. And that even if the alphabetical list of  
2 subscribers was somehow copyrightable as a whole, that  
3 copyright doesn't extend any protection to the preexisting  
4 facts in the list -- the name, address, and telephone  
5 number.

6 To briefly explain the facts, the easiest way to  
7 understand them is, if you look at the joint appendix,  
8 about five pages from the back, on page 93, there's a  
9 colored map.

10 QUESTION: (Inaudible.)

11 MR. KNOBBE: Page 93 of the joint appendix, Your  
12 Honor.

13 That's a map of the northwest corner of the  
14 State of Kansas. There are 15 counties, 16,000 square  
15 miles in northwest Kansas. What each of the colors on the  
16 map represent is a different telephone directory.

17 Where Feist started out -- the petitioner in  
18 this case -- Feist started out in southwest Kansas which  
19 is just to the south of here. Basically the scenario was  
20 the same. There was a patchwork. Each of these colors  
21 was a different phone directory. And if you were in  
22 Spearville, Kansas --

23 QUESTION: Which one is yours again? I'm sorry.  
24 Which color is your company?

25 MR. KNOBBE: Our -- Feist Publications publishes

1 an area-wide directory for all of those colors. What we  
2 do is put all of the colors together. The problem was  
3 when Feist started out. This is rural -- I mean, rural  
4 not in the sense of rural telephone -- but rural in the  
5 sense of non-urban.

6 QUESTION: You didn't get my question. Which  
7 one is rural?

8 MR. KNOBBE: Yellow.

9 QUESTION: The yellow.

10 MR. KNOBBE: The yellow is Rural Telephone  
11 service area.

12 Okay. If you were in Spearville, Kansas, where  
13 Feist started out and you wanted to call your county seat,  
14 Dodd City, Kansas, to check on your property taxes, you  
15 couldn't find the number in your directory because your  
16 directory only had the listings for your exchanges that  
17 were serviced by your phone company. Dodd City was  
18 serviced by a different company. So you had to dial the  
19 information operator.

20 What Feist's idea was to put -- was to put all  
21 of these colors together into one area-wide directory, so  
22 if you were a phone subscriber, you could have access to  
23 all those listings for that area. If you wanted to call  
24 your county seat, if you wanted to call an implement  
25 dealer two towns over --

1 QUESTION: Well, good idea.

2 MR. KNOBBE: Thank you, Your Honor.

3 (Laughter.)

4 MR. KNOBBE: To do that -- what Feist did was  
5 went to the various phone companies here and licensed  
6 their updated white page listings so he could print those  
7 in the directory. Now, one thing that's important to note  
8 is he didn't necessarily just license the directory. He  
9 licensed updated, white page listings, the information  
10 that's available to the directory operator..

11 The reason for that is, for example, if you look  
12 on the map, the directory that covers the green area in  
13 the lower left-hand corner, that directory may have came  
14 in February. The directory that covers the red area up in  
15 the top may have came out in November.

16 Now a Feist directory that covers the whole area  
17 comes out in December, then the listings from the red area  
18 that came out in November, those will be fairly current.  
19 But the listings from this green area down here, if your  
20 looking solely at the directory, are almost a year out of  
21 date.

22 QUESTION: Counsel, did Feist leave in its  
23 directory the listings broken down by the areas you're  
24 showing or did it recompile the list into one giant  
25 alphabetical list?

1 MR. KNOBBE: It's in one giant alphabetical  
2 list, Your Honor. The two directories are part --

3 QUESTION: It's not broken down by the smaller  
4 areas?

5 MR. KNOBBE: Not broken down by town. If you  
6 wanted to call Joe Blow and you knew he lived in Jennings,  
7 Kansas --

8 QUESTION: Uh-huh.

9 MR. KNOBBE: -- in Feist's directory you still  
10 looked under the B's till you got to Blow. Now, if you  
11 wanted to call Joe Blow and you were sure of where he  
12 lived. He may have lived in Jennings or Decatur -- you  
13 weren't sure -- it's up in there somewhere -- you could  
14 still go alphabetically to look for Blow.

15 All of these companies licensed their listings  
16 to Feist except for the yellow area. That's Rural  
17 Telephone.

18 QUESTION: Did Feist's directory show the name  
19 of the city or the name of the town?

20 MR. KNOBBE: Yes, Feist's directory shows the --  
21 maybe I misunderstand the question.

22 QUESTION: Well, if you wanted to look up this  
23 person and you looked him up, could you see not only his  
24 phone number --

25 MR. KNOBBE: Yes.



1 QUESTION: -- and his street address, but then  
2 there would be a little --

3 MR. KNOBBE: His --

4 QUESTION: -- designation like OB for Oberlon or  
5 something?

6 MR. KNOBBE: Well, it was his name, address, and  
7 telephone number, and in this --

8 QUESTION: But would the address show the town?

9 MR. KNOBBE: Yes, it would show the town, Your  
10 Honor.

11 QUESTION: And so that had to be added, I take  
12 it, to the listing that was in the phone directory,  
13 because the phone directory would not have the name of the  
14 town after each little --

15 MR. KNOBBE: No, Your Honor, that's --

16 QUESTION: -- after each address.

17 MR. KNOBBE: I wish it were so, but that's  
18 incorrect.

19 QUESTION: All right.

20 MR. KNOBBE: The phone -- the phone company's  
21 directory does show the name, address, and telephone  
22 number and part of the address is the town.

23 QUESTION: In each listing or is the town just  
24 at the top of the page?

25 MR. KNOBBE: No. The -- what Rural's directory

1 is -- Rural Telephone's directory is also just a straight  
2 alphabetical list of every subscriber in the yellow area.  
3 There are some differences --

4 QUESTION: Well, let me ask the question this  
5 way. What are the -- are there any differences between  
6 each individual listing in the Feist directory and in the  
7 phone book directory?

8 MR. KNOBBE: Yes, there are approximately 3,800  
9 -- there are 4,935 listings that are potentially  
10 duplicates. And there are 3,800 of them are different.  
11 Some of the differences are in address to the extent of  
12 this. Joe Blow, Jennings, Kansas -- excuse me -- Joe  
13 Blow, Jennings is what appears in the Rural directory.  
14 Now in the Feist directory it may be Joe Blow, Route 2,  
15 Box 47, Jennings. The town is named in the --

16 QUESTION: All right.

17 MR. KNOBBE: -- directory throughout. This is  
18 not Washington, D.C. This --

19 QUESTION: Well, do you take the position that  
20 Rural's white pages contain no protectable expression at  
21 all and somebody like Feist could just xerox it and sell  
22 it as its own?

23 MR. KNOBBE: That's the position we take. It  
24 doesn't comply with the statute under Section 101. We  
25 have a --

1 QUESTION: That isn't what was done here, but  
2 you take the position --

3 MR. KNOBBE: No, it is not what was done here.

4 QUESTION: -- it could have been done.

5 MR. KNOBBE: That's correct. But that's our  
6 position if you look at the -- if you look at the statute.

7 QUESTION: And somebody could do --

8 QUESTION: You say it's not a compilation at  
9 all?

10 MR. KNOBBE: No, they're all preexisting facts.

11 QUESTION: Oh.

12 MR. KNOBBE: It's simply an alphabetical list of  
13 their subscribers. It doesn't comply -- the statute is  
14 Section 101 --

15 QUESTION: Yes.

16 MR. KNOBBE: -- which defines a compilation.

17 QUESTION: And this is not it? This is not a  
18 compilation?

19 MR. KNOBBE: This is a compilation in the normal  
20 accepted term, but it's not a compilation as defined in  
21 the statute.

22 QUESTION: Okay.

23 MR. KNOBBE: It's not a copyrightable  
24 compilation.

25 QUESTION: So I assume that somebody could just

1     come in and xerox your directory and sell it, right?

2             MR. KNOBBE:  If --

3             QUESTION:  You're in a pretty precarious  
4     business there.

5             (Laughter.)

6             MR. KNOBBE:  I think so.  If you're looking for  
7     a handle, you know, maybe that's the handle.  Maybe the  
8     handle is xerox piracy or something of the pages.  But you  
9     can't protect the name, address, and telephone number in a  
10    simple alphabetical list.

11            QUESTION:  Well, now, what's the statutory  
12    language that you rely on, please?

13            MR. KNOBBE:  The statutory language is in  
14    Section 101 of the copyright act.  That defines a  
15    compilation as a work formed by the collection and  
16    assembly of preexisting materials or data that are  
17    selected, coordinated, or arranged in such a way that the  
18    resulting work as a whole constitutes an original work of  
19    authorship.

20            QUESTION:  And you say that an alphabetical  
21    listing of phone numbers cannot be an original work of  
22    authorship?

23            MR. KNOBBE:  It doesn't -- it does -- yes, I say  
24    that.  It doesn't exhibit any coordination or arrangement.  
25    An alphabetical arrangement can't be a copyrightable



1 thing. That's simply the most efficient way to arrange  
2 something. Wouldn't we have some severe problems with  
3 dictionary people and everyone else if you could copyright  
4 the alphabet?

5 QUESTION: What about computer databases  
6 generally? Same thing.

7 MR. KNOBBE: Well -- same thing, but computer  
8 databases I think are really -- I don't know if they're  
9 published or not. I mean there's a lot of stuff in the  
10 amicus here about, oh, we're going to affect this -- you  
11 know the sky will fall and nothing will be copyrightable.  
12 Most computer databases are handled by license agreements.  
13 They're protected by contract. I contract my computer  
14 database to you and as part of that your contract says  
15 you're not going to further disseminate it or whatever.

16 Here we've got a published -- we've got a  
17 published directory.

18 QUESTION: Well, I mean, there is certainly some  
19 selection. If you're advertizing to the words of the  
20 statute, there certainly has been some selection here,  
21 hasn't there, of names? Their directory selected only the  
22 names of people in the yellow areas.

23 MR. KNOBBE: That's their entire list of  
24 subscribership.

25 QUESTION: Well, it may well be, but that's a

1 selection. They didn't publish anybody else's  
2 subscribership. That's a selectionsip, isn't it?

3 MR. KNOBBE: We don't think -- publishing your  
4 entire list doesn't seem to be a selection to us.

5 QUESTION: Well, sure, I've just chosen to  
6 publish my entire list and not somebody else's list. Why  
7 isn't that selection?

8 MR. KNOBBE: Well --

9 QUESTION: I could have done what you did.  
10 They, they could have decided to put out a directory for  
11 the whole thing. They didn't. They said, we're going to  
12 be more selective. We're only going to publish a list of  
13 the people in our (inaudible). Now you may think that's  
14 not a very -- what should I say -- inventive selection,  
15 but it is a selection, is it not?

16 MR. KNOBBE: If it's a selection, it's not a  
17 copyrightable selection. That's our position.

18 QUESTION: Well, okay, so what it comes to, it  
19 has to be the kind of a selection that causes -- that  
20 causes the whole thing to be a work of authorship.

21 MR. KNOBBE: A work of authorship, yes.

22 QUESTION: Where do we look for that -- for what  
23 kind of a selection causes something to be a work worth of  
24 authorship?

25 MR. KNOBBE: Isn't there some type of -- our

1 position is there's some type of objective or subjective  
2 that you select -- maybe we can --

3 QUESTION: Creativity? Is that what has to go  
4 into it?

5 MR. KNOBBE: And I -- we can't say creativity --

6 QUESTION: No?

7 MR. KNOBBE: -- because if you get into  
8 creativity what you get into -- that's what the new act  
9 gets away from.

10 QUESTION: Uh-huh.

11 MR. KNOBBE: Selection -- if you can select the  
12 whole -- the whole range of data, and that's  
13 copyrightable, okay? Actually, as one answer, we didn't  
14 take their selection.

15 QUESTION: Yes, but when you say selection --

16 MR. KNOBBE: We did the whole area, not just  
17 theirs.

18 QUESTION: When you say select the whole range  
19 of data, you're begging the question. I mean, deciding  
20 what the range is is itself a selection. You can decide  
21 to publish all the restaurants in town or you can decide  
22 to publish just the 100 best restaurants. But either one  
23 is a selection. You could have chosen instead of all the  
24 best restaurants in town, all -- or instead of all the  
25 restaurants in town, all the restaurants in the county, or

1 all the restaurants in the State. No, I'm going to be  
2 more selective. People aren't interested in all the  
3 restaurants in the State, just all the restaurants in the  
4 city. That's a selection. Now, why is that selection in  
5 your view not copyrightable. But if I say, because I know  
6 what your view is -- if I say just the best restaurants in  
7 town, that is. Now why -- what's the difference between  
8 those two?

9 MR. KNOBBE: In our view, that has made some  
10 selection, other than just publish everything.

11 QUESTION: But I just said --

12 MR. KNOBBE: If I publish --

13 QUESTION: It doesn't publish everything. I'm  
14 just publishing the restaurants in this city. I've made  
15 the judgment that --

16 MR. KNOBBE: All are published are facts.

17 QUESTION: -- a list of all the restaurants in  
18 the State would be useless to people. But I know a lot of  
19 people that would want to know all the restaurants in the  
20 State capital. So I'm being selective to that extent.  
21 That's a selection.

22 MR. KNOBBE: What I've published then is I've  
23 selected just to publish all the facts, and all the facts  
24 that I've published cannot be --

25 QUESTION: Not all the facts.



1 MR. KNOBBE: -- are not protected.

2 QUESTION: Just the restaurants in the State  
3 capital. I've excluded restaurants elsewhere. That's a  
4 selection, isn't it? You will not concede that that's a  
5 selection?

6 MR. KNOBBE: I will concede that's a selection.  
7 I won't concede that that's a copyrightable selection,  
8 because what have I done other than just publish a list of  
9 the facts?

10 QUESTION: Well, if that's true, the  
11 Encyclopedia Britannica just publishes facts. Can you  
12 copy that?

13 MR. KNOBBE: Their coordination, arrangement,  
14 selection, if they exhibit sufficient coordination,  
15 arrangement, and selection, sure that's copyrightable.

16 QUESTION: Well, why haven't you got it here? A  
17 variant on Justice Scalia's question is even within the  
18 service or the phone company, all the phone company  
19 publishes are the names and addresses and numbers of  
20 people who subscribe to phone service. They don't publish  
21 the listing of everyone who lives in that town. That's a  
22 selection. That's not publishing all the facts about the  
23 people in that town. It's publishing facts only about  
24 people who subscribe to phone service.

25 MR. KNOBBE: Yes, Your Honor. Our position is

1 if you publish them all, that's not.

2 QUESTION: Does --

3 QUESTION: Isn't your position, Mr. Knobbe,  
4 isn't your position that one should identify the author  
5 making the selection and who made the selection here? Did  
6 the phone company make it or did the public utility which  
7 required them to list everyone make the selection?

8 MR. KNOBBE: Well, the public utility obviously  
9 made it because you're required to --

10 QUESTION: So the public utility really is the  
11 author of this particular compilation?

12 MR. KNOBBE: I don't think that's necessarily  
13 correct.

14 QUESTION: It seems it would help you if it  
15 were.

16 (Laughter.)

17 MR. KNOBBE: I could probably use the help.

18 QUESTION: Because if they are the selector,  
19 then the publisher of the directory has not contributed a  
20 bit of authorship to the compilation. It's quite  
21 different from the Encyclopedia Britannica or something  
22 else where the author decides what to go in. Here the  
23 utility -- the regulatory agency decided what would be  
24 selected.

25 MR. KNOBBE: If I publish -- you know, here's a

1 seating chart of the Supreme Court. If I come in here and  
2 make this out and I select only to publish the senior-  
3 most five justices -- I mean, if I select to publish  
4 here's the seating chart, haven't I just published  
5 everything? I published all the facts. So I don't quite  
6 understand what work of authorship I've done. It's  
7 appears to me that the selection, coordination, and  
8 arrangement has to be like the baseball card case where  
9 the author selected the 5,000 premium cards out of there,  
10 the X case out of the Second Circuit.

11 QUESTION: Isn't the difference that you can  
12 find out who the members of the Court are without having  
13 to consult that card. The fact it's available elsewhere?  
14 Whereas if we were a secret Court and the only way you  
15 could find out who we were would be by looking at a chart  
16 published by some third party, that chart would be  
17 copyrightable insofar as it was a compilation of the  
18 names, wouldn't it?

19 MR. KNOBBE: Yes, that it's a public fact? I  
20 mean -- yes.

21 QUESTION: Okay, well, in this case, you're not  
22 publishing facts which are generally available to you  
23 through sources that you use. You're simply publishing  
24 the compilation itself or a portion of the compilation as  
25 distinguished from the situation you would be in if you

1 went out on the streets and stopped at every house and  
2 said, do you have a phone? If so, what is your number?  
3 You'd have to do that in order to get into the situation  
4 that you're in when you use the analogy of the Supreme  
5 Court seating chart.

6 MR. KNOBBE: Well, if the answer is that a name,  
7 address, and telephone number are not a fact, that they're  
8 somehow a copyrightable authorship, that may be correct.  
9 But a name, address, and telephone number --

10 QUESTION: I don't think -- I don't think anyone  
11 claims that to be the case.

12 MR. KNOBBE: A name, address, and telephone  
13 number is a preexisting fact that under Section 103(b)  
14 that we've got the right to publish it. If you take the  
15 opinions of this Court --

16 QUESTION: Sure, you're got the right to publish  
17 it. The question is have you got the right to public --  
18 have you got the right to publish it by copying their  
19 directory when that's the only way you get it? You don't  
20 otherwise go out and find the fact yourself. That's what  
21 raises the copyright problem, isn't it?

22 MR. KNOBBE: Well, the copyright -- we think  
23 it's a preexisting fact and our position would be then,  
24 the name, address, and telephone number are like the  
25 decisions of this Court. Okay, those are public domain



1 information.

2 QUESTION: Well, what does the -- does the  
3 statute require more than just selection? What are the  
4 Register of Copyright's guidelines on this? Can a simply  
5 alphabetical listing of all the data in a given area meet  
6 the Register's guidelines for what meets Section 101?

7 MR. KNOBBE: No, as I understand it --

8 QUESTION: What do we have to look at here?

9 MR. KNOBBE: As I understand it --

10 QUESTION: And does it have to result ultimately  
11 in an original work of authorship?

12 MR. KNOBBE: Yes, Your Honor.

13 QUESTION: I mean, maybe it's not enough to  
14 focus on the word "selection." Maybe the statute requires  
15 a series of things.

16 MR. KNOBBE: There are three portions to the  
17 statute. Collecting and assembling, which is the sweat-  
18 of-the-brow theory that's adopted below, and that is if  
19 you put a lot of stuff together, you're an author of it.  
20 The second portion is selection, coordination, and  
21 arrangement. And the third is so that the work as a whole  
22 is a work of authorship.

23 QUESTION: An original work of authorship?

24 MR. KNOBBE: Yes, an original work of authorship  
25 under the statute, under 101.

1 QUESTION: And how does the Register of Contract  
2 -- of Copyright (inaudible) this statute?

3 MR. KNOBBE: The register interprets the statute  
4 -- as I understand it, there's an article by William  
5 Patry, who's a policy planning advisor with the copyright  
6 office, and in that -- in that article it talks about what  
7 the copyright office does. As I understand it -- this is  
8 not part of the record -- but they, for example, rejected  
9 the copyright on an alphabetical list of contributors of  
10 \$2,500 or more to the Republican Party. It's --

11 QUESTION: What about the -- what about  
12 telephone yellow pages?

13 MR. KNOBBE: Telephone yellow pages --

14 QUESTION: How about telephone books?

15 MR. KNOBBE: Telephone books they copyright and  
16 there's an interesting footnote in that article which I  
17 didn't realize is the reason they copyright them is  
18 typically telephone books are a combination of material.  
19 For example, in here there are yellow-page advertising in  
20 the telephone company's book that has art work and layout  
21 in it and that's --

22 QUESTION: Well, a lot of telephone directories  
23 --

24 MR. KNOBBE: The white --

25 QUESTION: -- are not subject from them.

1 They're just white pages.

2 MR. KNOBBE: Yes, these -- the white page only  
3 ones -- that's footnote 98 of his article. As I  
4 understand it what they do is the reason they register  
5 them is because of the sweat-of-the-brow theory, because  
6 of the split in the circuits between sweat of the brow --  
7

8 QUESTION: You think they're wrong about -- in  
9 granting copyrights on that or in registering them?

10 MR. KNOBBE: Well, no until -- unless the  
11 Supreme Court tells them what they're suppose to do. I  
12 assume that -- you know, if you came out of a sweat-of-  
13 the-brow circuit like the Seventh Circuit and published a  
14 white page only directory, the copyright office would have  
15 to -- I assume would have to register it.

16 QUESTION: But you don't think -- but you don't  
17 think that's a valid copyright?

18 MR. KNOBBE: Not, not on that portion of the  
19 directory -- not on white pages only.

20 QUESTION: Okay.

21 MR. KNOBBE: Now, if there are other --

22 QUESTION: But the yellow pages are  
23 copyrightable?

24 MR. KNOBBE: The yellow pages have got original  
25 art work. They've got ad layouts in them. They've got

1 works of -- works of authorship, and those are  
2 copyrightable. There are some -- in this directory of the  
3 phone company's, there's forward text in here. This has  
4 how to -- you know, how to dial the phone company, how to  
5 make a long distance call, a party line. I assume Rural  
6 authored that and that's copyrightable. But that's really  
7 not what's involved. What's involved in this case is this  
8 little piece right here, the alphabetical list of white  
9 pages.

10 Yeah, it's a public domain fact. . The other  
11 statute is 103(b). 103(b) says that the copyright in a  
12 compilation, okay, extends only to the material  
13 contributed by the author as distinguished from  
14 preexisting material employed in the work and does not  
15 imply any exclusive right to that. For example, the  
16 decision of this Court are public domain information. As  
17 a -- they're preexisting material. If, as a compiler, I  
18 put together all the decisions of this Court dealing with  
19 copyright law, then I've got a copyright in that as a  
20 whole, but I don't have a copyright in the decision of the  
21 Court.

22 QUESTION: Mr. Knobbe, do you think the 1976 act  
23 changed the copyrightability of a directory such as is  
24 involved here?

25 MR. KNOBBE: Yes, Your Honor, the '76 act



1 included a definition of compilation in Section 101 and  
2 included a preexisting fact provision in Section 103(b).

3 QUESTION: Do you think the kind of directory we  
4 have here would have been copyrighted -- copyrightable  
5 under the law as it existed before 1976?

6 MR. KNOBBE: Yes, Your Honor. I didn't research  
7 that, but I assume it --

8 QUESTION: So then you say that you must depend  
9 then on the changes wrought in the law in the 1976 --

10 MR. KNOBBE: Not necessarily the changes. Maybe  
11 the changes were only a clarification, but I'm dependent  
12 upon the statute, the words of the statute.

13 QUESTION: But you said a moment ago you thought  
14 it would be copyrightable under the preexisting law but  
15 it's not copyrightable under this law. Then you must  
16 depend on the changes effected in the 1976 act, must you  
17 not?

18 MR. KNOBBE: Yes. I think we're -- I think my  
19 confusion is the same as the courts below, that is, this  
20 directory is copyrightable as a whole. We're not -- we're  
21 not contesting the validity of that. What we're saying is  
22 these facts in this directory, this white page list of  
23 name, address, and telephone number, is available to  
24 subsequent compilers. The copyright law --

25 QUESTION: So --

1 MR. KNOBBE: -- as I understand it is like --  
2 it's a balancing test between the public's right to  
3 information, public access, and profit to an author.

4 QUESTION: Well, then do you say that the Rural  
5 directory here was copyrightable?

6 MR. KNOBBE: Yes, Your Honor. I think the  
7 directory is copyrightable as a whole even under the '76  
8 act, because there is copyrightable provisions in here.  
9 There are copyrightable yellow pages.

10 QUESTION: Well, because there are yellow pages  
11 in it?

12 MR. KNOBBE: No, because --

13 QUESTION: Otherwise you take the position that  
14 --

15 MR. KNOBBE: -- they have original works of  
16 authorship. There's original --

17 QUESTION: In the yellow pages?

18 MR. KNOBBE: The yellow pages have an original  
19 work of authorship.

20 QUESTION: I thought I understood you to say  
21 that a directory that consists only of the normal white  
22 pages is not copyrightable at all?

23 MR. KNOBBE: If it's solely a white page  
24 directory. This is a combined directory. That's why we  
25 say this directory is copyrightable as a whole.

1 QUESTION: And that is the Rural directory --

2 MR. KNOBBE: This is the Rural directory and the  
3 Rural directory is on file with the clerk. So is the  
4 Feist directory.

5 QUESTION: And is the Feist directory  
6 copyrightable?

7 MR. KNOBBE: Yes, the Feist directory is  
8 copyrightable.

9 QUESTION: Why?

10 MR. KNOBBE: Because it --

11 QUESTION: If it had just the white pages -- if  
12 you had just white pages?

13 MR. KNOBBE: If it had just white pages and  
14 nothing more? No. That's a bad example in this case,  
15 because there's some ads on the white pages, too. But if  
16 it had just white pages and nothing more, no. It's simply  
17 an alphabetical list of name, address, and telephone  
18 number. It's available -- it should be available to the  
19 public. The public has access to that.

20 QUESTION: You made the remark a moment ago, I  
21 think at the time ou were holding up the Rural directory,  
22 that all of the listing information in there was in the  
23 public domain. What is your reason for saying that?

24 MR. KNOBBE: That the name, address, and  
25 telephone number -- my name, address, and telephone number

1 I assume is in the public domain. Once I -- once I make  
2 the --

3 QUESTION: What do you mean by that statement?

4 MR. KNOBBE: It's available to the public. I  
5 have not paid the phone company to have an unlisted  
6 number, so I've allowed the phone company to give it to  
7 the directory information operator, to publish it. It's a  
8 preexisting fact. I have that name, address -- that's my  
9 name, address, and telephone number. So it has to be  
10 public domain information. What else can it be?

11 QUESTION: Well, I guess I'm not sure how you're  
12 using the term. You seem to be using the term to mean  
13 that if the subject matter of information consents to its  
14 publication, then anything which publishes that  
15 information is in the public domain. Is that what you  
16 mean?

17 MR. KNOBBE: That -- yes, that if it's a fact,  
18 it's in the public domain. Once we publish a fact, that's  
19 part of the public domain available to any later authors.

20 With the Court's permission I'd like to reserve  
21 my remaining time for rebuttal.

22 QUESTION: Very well, Mr. Knobbe. Mr.  
23 Caplinger, we'll hear now from you.

24 ORAL ARGUMENT OF JAMES M. CAPLINGER, JR.

25 ON BEHALF OF THE RESPONDENT



1 MR. CAPLINGER: Mr. Chief Justice, and may it  
2 please the Court:

3 There's two issues that I would like to address  
4 in my argument today. Number 1 is whether the Rural  
5 Telephone directory is copyrightable and specifically  
6 including the white page listing section. And number 2,  
7 whether Feist's substantial copying of this white page  
8 listing information in the copyrighted directory is an act  
9 of copyright infringement.

10 Since this case hinges on statutory  
11 interpretation, the 1976 Copyright Act, I thought I would  
12 start right there. Section 102(a) of the 1976 Copyright  
13 Act states in part that copyright extends to original  
14 works of authorship fixed in any tangible means of  
15 expression.

16 There were some questions of Mr. Knobbe as to  
17 did the law change in 1976 in any way. The House report  
18 setting out the congressional intent behind the 1970 act  
19 -- '76 act -- states, the phrase, quote, "original work of  
20 authorship," which is purposely left undefined is intended  
21 to incorporate without change the standard of originality  
22 established by the courts under the 1909 Copyright Act.  
23 Nothing changed in the way of copyrightability of  
24 telephone directories or other --

25 QUESTION: Well, what changed, of course, was

1 the definition of compilation. Isn't that right?

2 MR. CAPLINGER: The --

3 QUESTION: Don't we now have in the '76 act a  
4 definition of compilation that we have to look to?

5 MR. CAPLINGER: Yes, Justice O'Connor. The --

6 QUESTION: And we have to apply that section,  
7 101, I take it?

8 MR. CAPLINGER: No, Justice O'Connor.

9 QUESTION: No?

10 MR. CAPLINGER: No.

11 QUESTION: This isn't a compilation?

12 MR. CAPLINGER: This is a compilation, but as  
13 the lower courts and other courts have unanimously found  
14 that a telephone directory is copyrightable under two  
15 sections, Section 102 of the '76 Copyright Act and 103.  
16 Section 102, where I stated copyright extends to original  
17 works of authorship, the congressional intent sets out --  
18 well, if you look at Section 102(a), it goes on to  
19 include various items, one of which is 102(a)(1) literary  
20 works. And on the House report, page 54, setting out the  
21 congressional intent, Congress said the term, quote,  
22 "literary works," end quote, does not connote any  
23 criterion of literary merit or qualitative value. It  
24 includes catalogs, directories, and similar factual  
25 reference or instructional works and compilations of data.

1 And that's why the lower courts in this case said that  
2 Rural's telephone directory is copyrightable under Section  
3 102 or 103.

4 QUESTION: Well, this is a compilation. You  
5 concede that?

6 MR. CAPLINGER: Yes, and in (inaudible) --

7 QUESTION: And you think we don't have to apply  
8 the definition in the act of what is a compilation?

9 MR. CAPLINGER: Justice O'Connor, I don't think  
10 you have to, but I would recommend that the Court do -- do  
11 so.

12 QUESTION: Well, I would think that's exactly  
13 where we'd look.

14 MR. CAPLINGER: Well, maybe I misunderstood your  
15 question. What -- what I was saying that you can look  
16 under either one. Directories are included in 102, but  
17 we'd also say that it's included under 103. And 103 was  
18 added in 1976 to encompass -- well, I take that back. The  
19 1909, the previous Federal Copyright Act, specifically set  
20 out directories. And I believe that in my interpretation  
21 of the legislative intent, because of the creation of so  
22 many different types of catalogues, encyclopedias, and  
23 directories, especially in light of new technology  
24 encyclopedias.

25 QUESTION: Now, you can't copyright the facts

1 contained in the white pages, can you?

2 MR. CAPLINGER: No. What is --

3 QUESTION: So what is to prevent Feist from  
4 looking at your directory and taking the listings of names  
5 and telephone numbers and including them in their own --

6 MR. CAPLINGER: Well, the -- Justice O'Connor --

7 QUESTION: -- as factual material?

8 MR. CAPLINGER: Justice O'Connor, we are not  
9 alleging that the copyright in the telephone directory  
10 extends to the names -- to the particular name and  
11 particular number. What a copyright and a compilation  
12 extends to is the -- is to the work of authorship on the  
13 part of the author.

14 QUESTION: Well, what Feist did was to take the  
15 listings, names and telephone numbers, and use them in  
16 their own directory.

17 MR. CAPLINGER: Yes, and Justice O'Connor, I'm  
18 saying that the white page listings are not preexisting  
19 material. The name by itself. The address by itself.  
20 But without the telephone company being author of  
21 compiling and creating a listing -- when I say listing it  
22 means all here --

23 QUESTION: Well, didn't the telephone company,  
24 Rural, simply make an alphabetical listing of all  
25 telephone subscribers within its geographical area covered



1 by the book?

2 MR. CAPLINGER: That --

3 QUESTION: Isn't that what was done?

4 MR. CAPLINGER: Justice O'Connor, that was one  
5 part of the selection. I think that to -- to fully answer  
6 your question, let's look right at 103, the definition of  
7 a compilation. And a compilation is a work formed by the  
8 collection and the assembly of preexisting materials or of  
9 data that are selected, coordinated, or arranged in such a  
10 way that the resulting work as a whole constitutes an  
11 original work of authorship.

12 What Rural Telephone -- just like any other  
13 telephone company -- they on a day-to-day basis gather,  
14 collect, and assemble a lot of information about the  
15 subscriber. The addresses, the towns, the types of  
16 equipment, et cetera, et cetera. There's a lot of  
17 information they receive. Then what they do is then they  
18 turn and they make the subjective decision of how to  
19 select, how to coordinate, and how to arrange that and how  
20 to create something that's a useable --

21 QUESTION: Well, isn't it just an alphabetical  
22 listing by geographic area?

23 MR. CAPLINGER: In this particular area, yeah,  
24 that was the decision to --

25 QUESTION: Isn't that what you have there?

1 MR. CAPLINGER: In this particular --

2 QUESTION: In the white pages?

3 MR. CAPLINGER: Yes, in this particular annual  
4 directory we decided to put out the Rural subscriber  
5 listing in alphabetical order. But we have 20 -- we have  
6 26 different exchanges. And if you look back on that same  
7 map that the Court was looking at earlier, we have three  
8 distinct, noncontiguous geographic areas and that Rural  
9 Telephone made the decision to -- not -- to put out one  
10 directory. It could have put out 26 directories. It  
11 decided also in putting out one alphabetical directory for  
12 its white page listings, to do that not by town but to do  
13 it interlocking, include all of the towns, all of the  
14 telephone exchanges. It very well could have put out 26  
15 different directories --

16 QUESTION: Are you saying that that's the  
17 component of originality in this case?

18 MR. CAPLINGER: That's one of many that the  
19 telephone company subjectively decides, or decision-making  
20 which the compilation as a whole copyrightable, not the  
21 bits and pieces. And I --

22 QUESTION: If we can assume, and I think it's  
23 true, that the name and the address and the number are a  
24 fact that's not copyrightable --

25 MR. CAPLINGER: Separate.

1 QUESTION: -- what elements of originality have  
2 you added to those facts that make this a work of original  
3 authorship under 101?

4 MR. CAPLINGER: Well, Justice Kennedy, I think  
5 that --

6 QUESTION: You've said -- you've told us one of  
7 the things, and that is you've selected the counties in  
8 this yellow area. What else?

9 MR. CAPLINGER: We've --

10 QUESTION: You've alphabetized, which I think we  
11 could talk about, but I don't think that's very original.  
12 What else?

13 MR. CAPLINGER: We decided to, instead of -- we  
14 decided to put them in one list instead of 26 telephone  
15 exchanges.

16 QUESTION: Well, that just repeats what you said  
17 before. All right.

18 MR. CAPLINGER: Communities. We decided to  
19 include business listings within this. We decided that in  
20 some communities we only put the town where in other  
21 communities we put the full address. We also decide what  
22 name, because my full name might be a fact. But I go by  
23 several names, James, Jim, Jay, JR, et cetera. And --

24 QUESTION: I'm not stunned by the originality so  
25 far.

1 (Laughter.)

2 MR. CAPLINGER: Well, the congressional intent  
3 behind that says that the -- in dealing with the standard  
4 of original works of authorship, it says this standard  
5 does not include requirements in novelty, ingenuity, or  
6 aesthetic merit.

7 QUESTION: Yes, but it must constitute an  
8 original work of authorship?

9 MR. CAPLINGER: Yes. Yes, and those decisions.  
10 I mean, it doesn't require anything unique or novel. All  
11 directories out there are made upon facts. That's what a  
12 directory is.

13 QUESTION: Well, a dictionary of quotations --  
14 there's nothing original in it in the sense of having  
15 created something.

16 MR. CAPLINGER: Justice Kennedy, what makes that  
17 original is how you use those facts and how you present  
18 those facts. That's where it creates an original work of  
19 authorship. If it's simply -- take the idea that, well,  
20 all this is is a book of facts. All directories, and the  
21 encyclopedia included, are a compilation. That's what a  
22 compilation is. These are books of facts.

23 What makes them original is how the author  
24 arranges that information and that's where I believe that  
25 the petitioner here has tried to create this split in the



1 lower courts. I don't see a split in the lower courts.  
2 What you have is this -- supposedly this sweat-of-the-  
3 brow theory on one side, and the original act of  
4 authorship on the other side.

5 The original or the sweat of the brow is where  
6 the author gathers, collects, and assembles. He gathers  
7 all this factual information. But if he doesn't then  
8 somehow make a decision on how to put that in a  
9 compilation, it's not -- it's not a useable compilation.  
10 You have to make -- after you collect this the sweat of  
11 the brow and you have all --

12 QUESTION: He has to say, ah-hah, I am going to  
13 put this in there alphabetically.

14 (Laughter.)

15 MR. CAPLINGER: No.

16 QUESTION: He has to make that further step.

17 MR. CAPLINGER: Justice Scalia, that is -- that  
18 is one step.

19 QUESTION: Well, my, my, that's --

20 MR. CAPLINGER: At --

21 QUESTION: You think -- it seems to me that we  
22 have here a statutory definition that is obviously a  
23 definition of art. If you wanted the common meaning of  
24 compilation, you would have stopped that definition right  
25 after the first phrase. It would read a compilation is a

1 work formed by the collection and assembling of  
2 preexisting materials, period. That's the normal meaning  
3 of compilation. But the act goes on with malice  
4 aforethought and adds to that "that are selected,  
5 coordinated, or arranged in such a way that the resulting  
6 work as a whole constitutes an original work of  
7 authorship."

8 All of that is added to tell us something and I  
9 think it's telling us something more than it has to be in  
10 alphabetical form. It's an awful lot of --.

11 MR. CAPLINGER: Well, that's -- well, Justice  
12 Scalia, I think the reason that Congress added that  
13 language is that if somebody goes out and researches and  
14 accumulates a lot of facts, that alone, the labor of  
15 collecting and assembling, you can't copyright that. What  
16 authorship is there? What creates the original work is  
17 what you do with the information that you've gathered,  
18 collected, and assembled.

19 QUESTION: Right.

20 MR. CAPLINGER: And --

21 QUESTION: What has to be done is it has to be  
22 either selected, coordinated, or arranged. But it doesn't  
23 even end there. It doesn't say they have to be selected,  
24 coordinated -- but they have to be selected, coordinated,  
25 or arranged in such a way that the resulting work as a

1 whole constitutes an original work of authorship. And  
2 we're being asked in this case to give content to what  
3 that means: "in such a way that the resulting work  
4 constitutes an original work of authorship."

5 MR. CAPLINGER: Yes.

6 QUESTION: And what -- original -- you --

7 MR. CAPLINGER: Justice Scalia --

8 QUESTION: -- disclaim any inventiveness or  
9 novelty or anything else in that?

10 MR. CAPLINGER: Justice Scalia, the -- I know  
11 that alphabetizing this list doesn't take a lot of  
12 thought, but there are other things that went into this  
13 and in fact if it wasn't for Rural Telephone being the  
14 author of this, this information would not exist.

15 Yes, the names, addresses, and numbers are  
16 floating out there in bits and pieces, but they could  
17 still be floating until Rural Telephone took that  
18 information, decided -- selected what it was going to  
19 include in the directory, how it was going to coordinate  
20 that directory, and how it was going to arrange that  
21 information. And just because it is -- it appears to be  
22 simple, it still meets the test under the 1976 act.

23 QUESTION: Well, the fact that it wouldn't be  
24 available proves not -- I mean you can say that of any  
25 collection and assembling of preexisting materials. Your

1 client could have spent a lot of time gathering all this  
2 material together. Or take a researcher in some  
3 scientific field who spends years assembling all sorts of  
4 data. And he has all the data. Let's assume he has even  
5 stored all the data alphabetically and then he dies. Now,  
6 is that -- was that a copyrightable work?

7 MR. CAPLINGER: Well, Justice Scalia --

8 QUESTION: It would take a lot of time to  
9 reduplicate all the research he's done.

10 MR. CAPLINGER: Justice Scalia, in your  
11 hypothetical there, did he make a subjective decision on  
12 his selection of what information he was going to --

13 QUESTION: Of course, anyone who selects data  
14 does that.

15 MR. CAPLINGER: Okay, that's one part of it.  
16 And then he -- if he makes a subjective decision on how  
17 he's going to arrange that to --

18 QUESTION: Alphabetically he decided.

19 MR. CAPLINGER: Well, that was his subjective  
20 decision. He could have put it backwards. He could have  
21 made a cross-reference. He could put it upside down. He  
22 made the decision. What the copyright law -- it doesn't  
23 require inventiveness --

24 QUESTION: All right.

25 MR. CAPLINGER: -- like the patent copyright



1 law, because if -- well, let me go back a second here.

2 This book, the white page listings, are  
3 copyrightable. But that doesn't prevent, like patent law  
4 or something, from somebody else doing the same work.  
5 They can acquire the same names, addresses, towns, numbers  
6 --

7 QUESTION: But they have to start from scratch  
8 and go door to door and do it. They can't draw the facts  
9 from your white pages directory to make their own  
10 directory.

11 MR. CAPLINGER: Justice O'Connor --

12 QUESTION: That's your position.

13 MR. CAPLINGER: Justice O'Connor, under the  
14 copyright law they cannot wait till we publish this  
15 directory and then copy this information.

16 QUESTION: Well, what about -- what about a  
17 weekly news magazine where the reporters go out and  
18 research some current event like the events that occurred  
19 during Watergate and they undercover all those facts and  
20 then write about them. Now, I assume their expression is  
21 copyrightable. But do you think that no one else can  
22 resort to use of the facts that they uncovered?

23 MR. CAPLINGER: Justice O'Connor, no. I agree.

24 QUESTION: That would be (inaudible)  
25 composition.

1 MR. CAPLINGER: No. Because those facts cannot  
2 be independently duplicated. I think that that analysis  
3 is like Harper --

4 QUESTION: Of course they can. Any other  
5 reporter could be just as hard working and inventive.  
6 They could go out and make the same inquiry.

7 MR. CAPLINGER: Well, excuse me, I thought you  
8 were referring to like the Harper and Row case of this  
9 Court in 1985, and in that particular case it involved a  
10 statement by Gerald -- President Gerald Ford. And the  
11 second publisher used that identical factual information,  
12 and this Court had to go in depth in fair use section of  
13 this copyright act. And I think what the concerns of this  
14 Court were at that time was that there's only one  
15 statement made by the President, how can it be duplicated.

16 In this particular situation, this information  
17 as well as then apparently in your hypothetical, if the  
18 other person can go out on their own and collect that  
19 information and express it in their own fashion, and even  
20 if, after their own independent work, if it comes out  
21 identical, that's still not copyright infringement.

22 The copyright -- the telephone company directory  
23 copyright does not extend to the names and addresses  
24 listed there but rather the compilation of the same,  
25 because there's nothing to prevent the other party from

1 doing the same. Whereas in patent law, if Feist invented  
2 something at the same time that Rural invented it.  
3 Whoever finished inventing that first has a monopoly on it  
4 forever. But in copyright law, if they both go out and  
5 independently create something and it just happens that  
6 it's -- it comes out identical or substantially identical,  
7 there's no copyright infringement there.

8 What we're saying is that the white page  
9 listings information would not be here but for the  
10 telephone company gathering, collecting, and making a  
11 decision how to put this directory out and in fact each  
12 year it differs.

13 QUESTION: Mr. Caplinger, this is to protect  
14 authors, isn't it?

15 MR. CAPLINGER: It is.

16 QUESTION: Who's the author of this?

17 MR. CAPLINGER: Justice Marshall, the telephone  
18 company.

19 QUESTION: Oh, the telephone company.

20 MR. CAPLINGER: Yes.

21 QUESTION: That's the author?

22 MR. CAPLINGER: Yes. If it wasn't -- if it  
23 wasn't for the telephone company, this directory wouldn't  
24 exist.

25 QUESTION: What individual. I never heard of a

1 publisher being an author. An author's an individual,  
2 isn't he?

3 MR. CAPLINGER: Justice Marshall, an author  
4 could be a individual, a corporation, an entity who --

5 QUESTION: It's usually the work of an  
6 individual, isn't it?

7 MR. CAPLINGER: Well, customarily when you look  
8 at artwork --

9 QUESTION: The phone company couldn't exist  
10 without this, could they? Would you buy a phone if you  
11 didn't get a phone book?

12 MR. CAPLINGER: That's questionable, but --

13 QUESTION: I mean, I just don't see all of the  
14 originality of somebody in this that just copied something  
15 out of a book -- somebody's records.

16 MR. CAPLINGER: Well, Justice Marshall, maybe I  
17 can -- and I know this Court in getting prepared to argue  
18 here today, they would like to hear how not only the law  
19 would be affected by the facts of this case, but the  
20 industry nationwide. I think that if you went to New York  
21 City and you took NYNEX, who spent \$2 million a year  
22 putting this information together.

23 QUESTION: As a matter of fact they charge you  
24 to take you name out.

25 (Laughter.)



1 MR. CAPLINGER: Well -- that -- Justice  
2 Marshall, I know that's the position, you know, when  
3 you're representing the telephone company, everybody hates  
4 the telephone company and utilities.

5 But back to my point is if --

6 QUESTION: I'm not speaking about everybody.

7 (Laughter.)

8 MR. CAPLINGER: If --

9 QUESTION: Do you want to speak about it?

10 (Laughter.)

11 MR. CAPLINGER: If this Court were to find that  
12 because the bits -- individual bits and pieces of this  
13 information in a directory are factual in nature and that  
14 the author's work of creating that directory, collecting,  
15 assembling, and making the decisions on how to put that  
16 out, if a defense would fly that, well, I'll wait until  
17 you put it out and spend \$100,000 doing that and then I'll  
18 just copy it, like they did in this case --

19 QUESTION: Well, just looking at the white pages  
20 alone you's still have the same number of telephone books,  
21 wouldn't you? Because you've got a -- your corporation  
22 commission compels you to publish a telephone directory  
23 annually. So even if you don't have it copyrighted,  
24 you're going to have to do it.

25 MR. CAPLINGER: Justice Stevens, yes --

1 QUESTION: And I suppose you're going to have to  
2 do it alphabetically, because otherwise nobody can use it.

3 MR. CAPLINGER: Well, Justice Stevens, I think  
4 that --

5 QUESTION: Well, isn't that right?

6 MR. CAPLINGER: Well, we're told by the Kansas  
7 Corporation Commission to annually publish a directory.  
8 It doesn't say what's to be include in that directory.

9 QUESTION: Do you suppose any other form of  
10 directory would satisfy their requirement? Have you ever  
11 seen a telephone directory of a different form than this  
12 one? That is, the white pages?

13 MR. CAPLINGER: Justice Stevens, yes. And in  
14 fact in subsequent years this directory is different. It  
15 goes back to what I was saying earlier --

16 QUESTION: In what respect does it differ?

17 MR. CAPLINGER: Because of the -- of this white  
18 page listing section could have been set out in 26  
19 different alphabetical sections of the -- encompassing the  
20 same listings because -- in fact we have people that say  
21 that we're completely on the other side of western Kansas

22 -- QUESTION: Oh, I see what you're saying.

23 MR. CAPLINGER: -- I would like to have you  
24 prepare your book to where you have the same listings,  
25 however, I'd like A through Z for Agra, A through Z for

1 Bolta --

2 QUESTION: I see. So that's your selection.

3 MR. CAPLINGER: Yes --

4 QUESTION: It's not the alphabetizing, it's if  
5 you had a single telephone company with just one area of  
6 service like the City of Chicago and nothing else, say,  
7 then it would have -- there would -- the same telephone  
8 directory would have to be published year after year.

9 MR. CAPLINGER: Yes, and that would be a  
10 decision for them.

11 I know it hard to stand here and try to say --  
12 and try to build something, because I don't believe the  
13 alphabet or alphabetizing something takes a genius of a  
14 great work of an author. But that's just one of a number  
15 of things that the author of this directory makes a  
16 decision on.

17 QUESTION: Well, what other than the selection  
18 of which areas of service to be included in the directory  
19 would be different if we held it was not copyrightable?  
20 In fact, why would your decision be any different, whether  
21 it's copyrightable or not in your decision of whether to  
22 have one directory for all areas of service or several  
23 different directories? What difference does it make  
24 whether it's copyrighted or not?

25 MR. CAPLINGER: I'm not sure if I understand

1 your question.

2 QUESTION: Well, does the copyright law  
3 protection have any impact at all on your decision as to  
4 how to assemble the white pages?

5 MR. CAPLINGER: Yes, Justice Stevens, the  
6 copyright law expresses our contribution by the author of  
7 creating this and those listings -- how those listings are  
8 listed there --

9 QUESTION: I understand, but my question is  
10 would you create them any differently if there were no  
11 copyright law protection? And if so, why.

12 MR. CAPLINGER: Well, Justice Stevens, to answer  
13 that question, there's a market for this information that  
14 if we do not put accurate, complete listing information,  
15 we're not going to sell the yellow page advertising.

16 QUESTION: Well --

17 MR. CAPLINGER: And in northwest Kansas, the  
18 revenue from this directory and from the yellow and white  
19 --

20 QUESTION: From the yellow pages.

21 MR. CAPLINGER: -- goes back to -- goes into the  
22 rate base to keep the rates or affect the rates to the  
23 subscribers and the owner-members of this coop. So you  
24 asked --

25 QUESTION: Well, that's true whether or not



1 there's copyright protection. It seems to me it's equally  
2 true whether or not there's copyright protection.

3 The only thing your copyright protection does,  
4 as I understand it, is to give you a right to collect  
5 royalties from people who want to publish the same  
6 information and make it more broadly available to the  
7 public. At least that's all I can see.

8 May I ask you --

9 MR. CAPLINGER: Your Honor, I'm not sure what  
10 the company did. I think that for their service, since  
11 this company -- it's a nonprofit coop and it's owned by  
12 its members, they would take whatever steps, copyrightable  
13 or not copyrightable, to provide an up-to-date, accurate  
14 telephone directory. But it --

15 QUESTION: Sure, because they want people to use  
16 the service.

17 MR. CAPLINGER: That's right. But it would be  
18 disturbing and it would turn the Federal copyright law as  
19 directories straight up on top of its head is -- if  
20 somebody is allowed to wait until somebody puts out a  
21 compilation and then say, well, all we have to do -- all  
22 we have to do is dump that information into our computer  
23 and we'll rearrange it with the stroke of a computer key  
24 and then we'll copyright it ourselves. And in fact, white  
25 page listing information, there's a market for it. They

1 sell --

2 QUESTION: And how does that -- I understand  
3 that it may intrude on your revenues from the advertising  
4 yellow pages, but otherwise it doesn't have any impact on  
5 your business at all, does it?

6 MR. CAPLINGER: Well, we -- there is --

7 QUESTION: You're trying to use your copyright  
8 on the white pages to protect your business -- the  
9 business interest in the advertising in the yellow pages.  
10 That's what's at stake here, isn't it?

11 MR. CAPLINGER: Well, there is revenue produced  
12 from the white page listings. We sell advertising in the  
13 white pages in the way of bold print. We get revenue from  
14 that. Extra listings we charge. So there is -- the white  
15 pages are revenue producing on their own. But in reality  
16 you are correct. Without up-to-date accurate white page  
17 listings, the yellow pages -- it would be difficult to  
18 maintain sales.

19 QUESTION: Are you -- I take it the courts of  
20 appeals that have dealt with this are on your side.

21 MR. CAPLINGER: Every -- excuse me, Justice  
22 White, every single case since the landmark case of Leon  
23 in '37 to the most recent case of the United Telephone are  
24 -- Illinois Bell --

25 QUESTION: What was the earliest case that's on

1 your side?

2 MR. CAPLINGER: Leon.

3 QUESTION: What date was that?

4 MR. CAPLINGER: 1937. They call it the landmark  
5 telephone copyright case.

6 QUESTION: And Congress didn't intend to change  
7 the definition of an original work of art in '76.

8 MR. CAPLINGER: Justice --

9 QUESTION: I take it they knew what the law was?

10 MR. CAPLINGER: That's -- Justice White, that's  
11 exactly right and in fact --

12 QUESTION: Well, does that bring us to Section  
13 103? Could you spend a little time going through Section  
14 103 with us, because I take it Feist's argument is that  
15 even if this is copyrightable, the information can still  
16 be taken subject to 103(b). Am I correct that that's the  
17 argument?

18 MR. CAPLINGER: Justice Kenney, in my opinion of  
19 103 was set out --

20 QUESTION: Justice Kennedy.

21 MR. CAPLINGER: I mean, Justice Kennedy. It was  
22 set out to show that the person who goes out and collects  
23 factual information just because he collects factual  
24 information and the work as a whole in a compilation is a  
25 protected work, that doesn't mean that you now own a

1 copyright on those noncopyrightable bits of information,  
2 such as somebody's name.

3 QUESTION: But isn't the problem under 103(b)  
4 and the problem for the sweat-of-the-brow theory that it  
5 provides that the protection extends only to the material  
6 contributed by the author and doesn't the word material  
7 imply something different from effort? Doesn't it imply  
8 something about the content of the work?

9 MR. CAPLINGER: Justice Souter, my opinion as to  
10 what preexisting material means is preexisting fact --

11 QUESTION: Well, this -- I'm not talking about  
12 preexisting material. I'm talking about the phrase that  
13 the copyright and the compilation of derivative work  
14 extends only to the material contributed by the author.  
15 What is the material contributed by the author? Doesn't  
16 that phrase imply that there is something about the  
17 content of the work rather than the process of compiling  
18 the work that is subject to protection?

19 MR. CAPLINGER: Well, Justice Souter, I think  
20 you have to go back. 103 applies to two separate works.  
21 There's what is known as collective work, and that's  
22 what's at issue here, and then there's a derivative work.  
23 And a derivative work is where -- and this might sound  
24 strange but since this is at issue -- if we take this  
25 copyrighted telephone directory and make it into a movie.



1 It's where you take a book and transform it to something  
2 else like a movie. They're saying that even though you  
3 change it, that the preexisting is still, you know,  
4 copyrighted or copyrightable. Maybe I'm not understanding  
5 your question.

6 QUESTION: Well, it's still -- unless I'm not  
7 parsing the sentence right, I think the sentence is still  
8 providing that the copyright in a compilation or  
9 derivative work, but in a compilation extends only to the  
10 material contributed by the author. And my suggestion is  
11 that material implies something about the content of the  
12 work rather than something about the effort that goes into  
13 producing the work. My question is, number 1, is that a  
14 fair reading of the provision, and number 2, if it is,  
15 what is the material in your directory that is contributed  
16 by the author?

17 MR. CAPLINGER: Okay, Justice Souter, to answer  
18 that question is that the -- again, the bits of factual  
19 information alone are not copyrightable. What the  
20 contribution is of the author in the form of collective  
21 work of a compilation is the hard work or labor as you put  
22 it.

23 QUESTION: Yes, but that's not material.

24 MR. CAPLINGER: But the --

25 QUESTION: That's effort. It's thought, but

1 it's not material. It's not something that's on the page.

2 MR. CAPLINGER: Well, the preexisting -- what  
3 we're saying is not preexisting material is the listing  
4 information. And we are the author of putting that  
5 together. We decided --

6 QUESTION: You're saying the arrangement is not  
7 preexisting.

8 MR. CAPLINGER: And that's part of --

9 QUESTION: Right.

10 MR. CAPLINGER: -- the second part of the  
11 definition.

12 QUESTION: Does material imply arrangement? In  
13 other words does -- it seems to me they're talking about  
14 content, not order.

15 MR. CAPLINGER: Well, the '76 laws have dealt  
16 with -- deals with directories. It's just a compilation  
17 or collection of material or factual -- factual material  
18 and that --

19 QUESTION: Let me, if I may, interrupt you. Let  
20 me ask you a different question. Was this particular  
21 phrase that I'm concerned with added at the time of the  
22 amendment or was that in the preexisting law?

23 MR. CAPLINGER: 103(b)?

24 QUESTION: Yes, the phrase referring to material  
25 contributed by the author. Was that new?

1 MR. CAPLINGER: I'm not sure. I think section  
2 --

3 QUESTION: If it was new, it could very well  
4 have had an effect on the extent to which the preexisting  
5 law, which we assume provides for copyright of such a  
6 directory, survived the amendment, wouldn't it?

7 QUESTION: Mr. Caplinger, before you sit down,  
8 just as a matter of curiosity, what is the status of the  
9 antitrust aspect of this case?

10 MR. CAPLINGER: The antitrust case --

11 QUESTION: Any development yet?

12 MR. CAPLINGER: It is presently on appeal before  
13 the Tenth Circuit.

14 QUESTION: And they -- has it been argued?

15 MR. CAPLINGER: No. I filed Rural's opening  
16 brief a week ago and Mr. Knobbe's brief is due the first  
17 of March.

18 QUESTION: One last question. You come from  
19 Topeka, not northwestern Kansas. I don't know what they  
20 do in Topeka, but I would be surprised if the telephone  
21 company there didn't have a directory by street addresses.  
22 I've seen them.

23 MR. CAPLINGER: A city directory?

24 QUESTION: By street address, not  
25 alphabetically, and some of the questions here seem to

1 assume that only an alphabetical arrangement is possible.

2 MR. CAPLINGER: That's true, and you go back to  
3 the landmark case that I referred to earlier, Leon.

4 That's where a second publisher took the alphabetized  
5 information and flipped it around and put it by telephone  
6 number and not A through Z. And the court said that that  
7 was still a taking of the work of a telephone company  
8 because they're the original author of that white page  
9 listing information. And also the most recent case,  
10 Illinois Bell --

11 QUESTION: I think you've answered the question,  
12 Mr. Caplinger. Thank you.

13 Mr. Knobbe, do you have rebuttal? You have 5  
14 minutes remaining.

15 REBUTTAL ARGUMENT OF KYLER KNOBBE

16 ON BEHALF OF THE PETITIONER

17 MR. KNOBBE: Thank you, Mr. Chief Justice. I  
18 have short points.

19 Perhaps when I answered your question, Mr. Chief  
20 Justice, that directories were copyrightable under the  
21 1909 act but not under the '76 act, I misspoke. Our  
22 position is that facts have never been copyrightable. A  
23 point was made by Mr. --

24 QUESTION: All these decision against you were  
25 just wrong.



1 MR. KNOBBE: They're wrong under this definition  
2 of the statute. Sweat of the brow has been rejected by  
3 the Second and the Ninth Circuit. The main cases cited,  
4 Leon out of the Ninth and Jeweler's Circular out of the  
5 Second, have both been disavowed by those very circuits.

6 QUESTION: Is Section 103(a) an addition to the  
7 1976 act in 103(b)?

8 MR. KNOBBE: Yes, I think so, Justice Kennedy.  
9 The point was that the information here in this phone  
10 directory would not exist without -- but for Rural  
11 Telephone was Mr. Caplinger's statement -- and that's the  
12 problem with the independent canvas theory, is that you  
13 can't get it anywhere else except out of the phone  
14 directory. You can't canvas it. It's like the opinions  
15 of this Court.

16 QUESTION: That's very interesting, but I don't  
17 see how it has anything whatever to do with whether it's a  
18 copyrighted -- I mean, that's a good argument for  
19 Congress.

20 MR. KNOBBE: I'll pass over it then.

21 QUESTION: I'll make an exception for this.

22 MR. KNOBBE: The final point was that a  
23 copyright doesn't require inventiveness like a patent law,  
24 and I think that's correct, too. The copyright is a  
25 limited monopoly. It's not a patent on those facts,

1 ideas, or public domain information.

2 Thank you, Your Honor.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Knobbe.

4 The case is submitted.

5 (Whereupon, at 11:59 a.m., the case in the  
6 above-entitled matter was submitted.)

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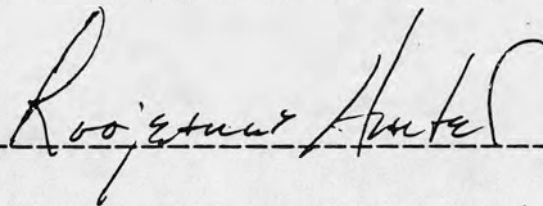
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No. 89-1909 - FEIST PUBLICATIONS, INC., Petitioner V. RURAL  
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