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Recent Developments: Feist Publications, Inc. v. Rural Telephone Service Co.: Alphabetized Directory Listings Consisting of Surnames and Telephone Numbers Are Not Subject to Copyright Protection

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U.S. at 119 (1932)). The Supreme Court granted the Board's petition for certiorari and reversed.

In the majority opinion written by Chief Justice Rehnquist, the Court first considered whether the respondents could contest the 1977 order dissolving the desegregation decree. The Board argued that the 1977 finding of unitariness barred the respondents from challenging the order. *Id.* at 635. Because the lower courts inconsistently used the term "unitary," confusion arose in interpreting the 1977 order. As a result, the Court held that when a desegregation decree is to be terminated, all parties are "entitled to a rather precise statement" to that effect from the court. *Id.* at 636.

In its analysis, the Court focused on the standard for dissolving desegregation decrees and placed great weight on the nature of injunctions issued in desegregation cases. In distinguishing the nature of the *Swift* injunction on which the court of appeals had relied, the Court recognized that "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Id.* at 637. Accordingly, the Court found that dissolution standards, which applied to other injunctions that were designed to operate in perpetuity, were not the proper standards to apply to desegregation decrees that were temporary by their very nature. *Id.*

The Court held that after local authorities had complied with the desegregation decree for a "reasonable period of time," the decree's dissolution was proper. *Id.* In determining a school district's compliance with desegregation decrees, the court first must conclude that the school board had "complied in good faith with the desegregation decree since it was entered." *Id.* at 638.

In deciding the question of good

faith, "compliance with previous court orders is obviously relevant." *Id.* at 637. In this case, the Board complied with the decree from 1972 until 1985. The Court held, therefore, that the court of appeals had erred in relying on *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), for the proposition that "compliance alone cannot become the basis for modifying or dissolving an injunction." *Dowell*, 111 S. Ct. at 637. The Court also recognized that the "grievous wrong" test, which the court of appeals gleaned from *Swift*, would place school boards under judicial supervision indefinitely. *Id.* at 638. This result conflicted with the purpose of school desegregation injunctions, which sought only to remedy past segregation, prevent future discrimination, and ultimately return schools to local control. *Id.*

Next, the Court instructed lower courts to determine if the "vestiges of past discrimination had been eliminated to the extent practicable." *Id.* In evaluating this criteria, the Court stated that consideration must be given not only to student assignments, but also to "every facet of school operations - faculty, staff, transportation, extra-curricular activities and facilities." *Id.* (quoting *Green v. New Kent County School Board*, 391 U.S. 430, 435 (1968)).

On remand, the Court instructed the district court to determine (1) if the Board had complied in good faith with the desegregation decree since its imposition and (2) if the vestiges of past discrimination had been eliminated as far as practicable throughout every facet of the school district's operations. If the district court found that the Board was entitled to have the injunction lifted, it must then proceed to evaluate the SRP under the mandates of the Equal Protection Clause of the Fourteenth

Amendment. *Id.*

In dissent, Justice Marshall, joined by Justices Blackmun and Stevens, sought a stricter standard than the majority for ending court supervised desegregation. Drawing on *Brown v. Board of Education*, 347 U.S. 483 (1954), the dissenters argued that a decree should not be lifted while conditions likely to inflict the type of stigma identified in *Brown* still remained. So long as "racially identifiable schools" and other conditions likely to inflict such injury persisted, and while at the same time there were feasible means of eliminating them, the dissenters would not terminate desegregation decrees. *Dowell*, 111 S. Ct. at 639 (Marshall, J., dissenting).

The decision in *Board of Education of Oklahoma City v. Dowell* set down standards for dissolution of desegregation decrees, thus making it easier for school districts currently under supervision to be set on their own again. Under the new standards, a school system that was at one time segregated and subject to a desegregation order may have that order terminated upon a showing that it has complied with the order in good faith for a "reasonable period of time," has abandoned any discriminatory practices to the extent "practicable," and that it is unlikely that the school system would again resort to discriminatory practices.

- Robert D. Cole Jr.

***Feist Publications, Inc. v. Rural Telephone Service Co.*: ALPHABETIZED DIRECTORY LISTINGS CONSISTING OF SURNAMES AND TELEPHONE NUMBERS ARE NOT SUBJECT TO COPYRIGHT PROTECTION.**

In Feist Publications, Inc. v. Rural Telephone Service Co., 111 S.

Ct. 1282 (1991), the Supreme Court of the United States held that a telephone directory listing subscribers alphabetically by surname was not sufficiently original to be afforded copyright protection. The Court classified the directories as compilations of factual raw data, but held that the directories were not “selected, coordinated, or arranged” as necessary to constitute a valid copyrightable compilation.

Feist Publications, Inc. (Feist), was a publishing company of large directories covering eleven telephone service areas. Rural Telephone Service Company, Inc. (Rural), was a certified public telephone service who, pursuant to state regulation, produced a telephone directory for its telephone service subscribers. As both Feist and Rural profited from the sale of yellow page advertisements, the two directories were in direct competition with one another.

Feist attempted to obtain a license from Rural to use Rural’s white page listings. Although Rural refused to issue the license, Feist nevertheless used the listings for its directory. Although Feist performed some independent verification and specifically used street addresses with its listings, 1,309 of the 46,878 listings in Feist’s directory were identical to those in Rural’s. Of those identical listings, four were fictitious names and numbers which Rural had intentionally placed in its directory to detect copying.

The District Court for the District of Kansas held that Rural’s directories were copyrightable compilations and that Feist had infringed on Rural’s valid copyright. The Court of Appeals for the Tenth Circuit affirmed. Certiorari was granted by the United States Supreme Court to determine whether the alphabetized directory consisting of sur-

names and telephone numbers was copyrightable.

The Court began its analysis by stating that “[t]he most fundamental axiom of copyright law,” is that, facts and ideas are not copyrightable. *Id.* at 1287 (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985)). The Court noted that the Constitution mandates originality, which has been developed to mean that “the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Id.* (citing 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer)). The Court explained that originality does not require novelty, but only a slight amount of creativity. *Id.* (citing Nimmer, § 1.08[C][1]). Moreover, the Court noted that two identical works that were created independently may both be the subject of a valid copyright. *Id.* at 1287-88 (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2nd Cir. 1936)).

The Court went on to explain that facts were not subject to copyright because facts were not original and were not attributable to an act of authorship. “The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.” *Id.* at 1288. Facts, therefore, remain in the public domain.

Although facts are not copyrightable, factual compilations may be the subject of copyright. However, only those elements of the compilation which are original to the author will be protected. A telephone directory is considered by the Court to be a compilation. *Id.* Identical facts may be used without

infringement so long as the facts are not “selected, coordinated and arranged” identically. *Id.* at 1289.

The Court noted that a number of lower court decisions mistakenly permitted copyright protection for “sweat of the brow,” which was the courts’ way of rewarding hard work of an author. *Id.* at 1291. The most blatant flaw with this type of doctrine, the Court explained, was that it extended copyright protection to the underlying facts of a compilation, preventing subsequent authors of compilations from using already acquired factual information. They instead had to arrive at the same result through their own hard work and independent creation. *Id.* (citing *Jeweler’s Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2nd Cir. 1922)).

The object of copyright law, the Court noted, was to “promote the Progress of Science and useful Arts,” not to reward the labor of authors. *Id.* at 1290 (quoting U.S. Const. art. I, §8, cl. 8). One reason for not permitting facts to retain copyright protection, the Court explained, is the need to “disseminate factual works.” *Id.* at 1292 (quoting *Harper & Row*, 471 U.S. at 563).

Compilation was defined by statute as “a work formed by the collection and assembly of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” *Id.* at 1293 (quoting 17 U.S.C. § 101 (1976)). The Court explained that the purpose of statutory language was to emphasize that compilations are not copyrightable per se. The Court noted:

[the] statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation:

(1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, and arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an "original" work of authorship. *Id.*

The Court noted that the first and third elements were self-explanatory. The key issue was found in the second element: "whether the selection, coordination, and arrangement are sufficiently original to merit protection." *Id.* at 1294. The Court noted that the language, "in such a way," suggested that some compilations would be copyrightable while others would not. *Id.* Relying on precedent, the Court justified that every clause and word of a statute should be given effect. *Id.* (citing *Moskal v. United States*, 111 S. Ct. 1032 (1991)).

The Court held that alphabetizing surnames for white pages did not satisfy the minimum constitutional standards for copyright protection and was "devoid of even the slightest trace of creativity." *Id.* at 1296. The selection of surnames, the Court found, was obvious and "lacks the modicum of creativity necessary to transform mere selection into copyrightable expression." *Id.* Moreover, Rural did not "select" to publish the surnames in its directory, but was required by state statute to publish the names and telephone numbers of its subscribers. *Id.* at 1296-97. Lastly, the Court noted that alphabetizing by surname was "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course." *Id.* at 1297.

The Supreme Court's holding in *Feist* allows publishers of white page

listings to pilfer from their competitors simply because the surnames were alphabetized, thereby lacking originality. Although *Feist* and Rural made their profit exclusively from yellow page advertisements, many other directories exist where the publishers profit solely from the directories themselves. Knowing that a rival may simply reproduce and profit from one's compilation may result in publishers engaging in other forms of publication which are less vulnerable to piracy by competitors.

- Kimberly A. Doyle

***Harmelin v. Michigan*: MANDATORY SENTENCE OF LIFE WITHOUT PAROLE DOES NOT VIOLATE EIGHTH AMENDMENT.**

In the plurality opinion of *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), the United States Supreme Court held that a mandatory sentence of life in prison without the possibility of parole did not violate the Eighth Amendment's proscription against cruel and unusual punishment. In its analysis, the Court reviewed the history of the Eighth Amendment in order to determine whether a mandatory sentence could be imposed without considering mitigating factors. The Court refused to extend the so-called "individualized capital-sentencing doctrine" to cases other than those imposing the death penalty.

Ronald Harmelin was convicted of possessing 672 grams of cocaine. Although Harmelin had no prior convictions, he received a mandatory sentence of life in prison without the possibility of parole pursuant to Michigan law. The Michigan Court of Appeals reversed Harmelin's conviction on the grounds that evidence in support of the conviction was obtained in violation of Michigan's Constitution.

On petition for rehearing, however, the court of appeals vacated its reversal and affirmed Harmelin's sentence. The Michigan Supreme Court denied leave to appeal, and the United States Supreme Court granted certiorari.

Harmelin set forth two reasons that his sentence was unconstitutional as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. First, Harmelin contended that the sentence was unconstitutional because the punishment was significantly disproportionate to the crime committed. *Id.* Second, Harmelin argued that the sentence violated the Eighth Amendment because it was mandatory, and therefore, precluded the trial judge from considering any particular circumstance of the crime and the criminal. Specifically, Harmelin contended that it was cruel and unusual to impose such a severe, mandatory sentence as life imprisonment without considering mitigating factors.

To begin its analysis, a plurality of the court held that "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense . . ." The Court noted that our nation's history has long provided examples of mandatory penalties, including death sentences. *Id.* The Court reasoned, therefore, that a sentence which was not otherwise cruel and unusual did not become such simply because it was mandatory. *Id.*

The Court then considered whether the Eighth Amendment required an individualized sentencing determination that the punishment imposed be appropriate to the crime committed. *Id.* The Court noted that such an individualized sentencing determination was, in fact, applicable in capital cases, and imposition of the death penalty without