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COPYRIGHT LAW AND FACTUAL WORKS—IS RESEARCH PROTECTED?—*Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).*

Gene Miller, a reporter for the *Miami Herald*, collaborated with a kidnapping victim in writing the book *83 Hours Till Dawn*. The book detailed the victim's experience of being placed in a coffin-like container and buried alive in the Georgia woods for five days. Universal City Studios negotiated with Miller to purchase the movie rights to the work, but no agreement was reached. Nevertheless, Universal produced and aired a television movie about the kidnapping. Miller brought an action alleging that Universal's making of the movie infringed his copyright in the book. The trial court instructed the jury that, while facts cannot be copyrighted, an author's research of factual matters is copyrightable.¹

In *Miller v. Universal City Studios, Inc.*,² the Fifth Circuit Court of Appeals reversed, holding that research is not copyrightable. The court based its holding on the copyright distinction between facts and ideas, which do not receive copyright protection, and the expression of facts or ideas, which does.³ It reasoned that the research upon which Miller based his book more closely resembled unprotected "facts" than protected "expression."⁴

The court attempted to reconcile the maxim that facts and ideas are not protected by copyright with the longstanding limited protection granted to directories composed exclusively of facts.⁵ It suggested that a copyright in a directory does not protect an author's research in producing the work, but rather rests upon the arrangement or selection of facts contained therein.⁶ Alternatively, it stated that protection for directories may be considered an anomaly, made possible by their inclusion within the scope of the Copyright Act.⁷

* A slightly different version of this piece is entered in the Nathan Burkan Memorial Competition at the University of Washington and in the national competition. The Burkan Competition is sponsored by the American Society of Composers, Authors, and Publishers.

1. *Miller v. Universal City Studios, Inc.*, 460 F. Supp. 984, 987 (S.D. Fla. 1978), *rev'd*, 650 F.2d 1365 (5th Cir. 1981).

2. 650 F.2d 1365 (5th Cir. 1981).

3. See *infra* notes 15–20 and accompanying text.

4. 650 F.2d at 1372.

5. See, e.g., *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Southwestern Bell Tel. Co. v. Nationwide Indep. Directory Serv., Inc.*, 371 F. Supp. 900 (W.D. Ark. 1974). The directory cases are instructive in understanding *Miller* because they concern works in which research is the most important original contribution of authors. See *infra* part IVA.

6. 650 F.2d at 1369–70.

7. *Id.* at 1370. Directories are compilations and thus are included under the Copyright Act. 17 U.S.C. app. §§ 101, 103 (1976 & Supp. V 1981). They were expressly listed as copyrightable subject matter under the current statute's predecessor, the Copyright Act of 1909, Pub. L. No. 60-349, § 5(a), 35 Stat. 1075, 1076 (1909).

This Note first reviews traditional copyright protection theory. It then discusses the application of copyright principles⁸ embodying the product of research. It concludes that the *Miller* court's holding that research is not copyrightable may be used to deny effective protection to works that embody little or no "expression." The Note proposes that copyright law should protect the most important stratum of original contribution contained in a work, and suggests that the strata approach provides a framework that avoids existing inconsistencies and affords effective protection to all authors.

I. BACKGROUND

A. *The History, Purpose and Scope of Copyright Law*

The Constitution authorizes Congress "To promote the Progress of Science and useful Arts" by granting authors limited monopolies in their works.⁹ These monopolies are given in the form of copyrights. Their purpose is to reward authors for their productive efforts and to benefit the public by encouraging creative efforts in the future.¹⁰

To be copyrightable, a work must be fixed in tangible form, and it must be original.¹¹ A work is fixed in tangible form if it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise com-

8. For purposes of this Note, "factual works" are works in which facts are represented through written words. In a broader sense, factual works might also include photographs, maps, charts, and other works in which facts are represented.

9. The copyright clause grants Congress power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." U.S. CONST. art. I § 8. Copyright law was first codified in the United States under the Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified as amended at 17 U.S.C. app. §§ 101-810 (1976 & Supp. V 1981)). Among the exclusive rights accorded authors of copyrighted works is the right to reproduce, distribute and adapt those works. 17 U.S.C. app. § 106 (1976 & Supp. V 1981). These rights are not absolute, however. They are limited, for example, in time, 17 U.S.C. app. § 302 (1976 & Supp. V 1981), and by the fair use doctrine, 17 U.S.C. app. § 107 (1976 & Supp. V 1981).

10. The copyright, according to a leading expert, is primarily a utilitarian device to secure the public benefit derived from intellectual effort and the resulting product. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.03(A) (1982 revision). The United States Supreme Court has also expressed this view. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); see also *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Courts have nonetheless recognized the author's private interest in copyright. See, e.g., *infra* notes 24-27 and accompanying text. For a discussion of the tension between public and private interests in copyright, see Esezobor, *Concepts in Copyright Protection*, 23 BULL. COPYRIGHT SOC'Y 258 (1975).

11. "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. app. § 102(a) (1976 & Supp. V 1981).

municated for a period of more than transitory duration.”¹² Because encouragement of creative endeavor is the goal of copyright law, there is no reason to copyright non-original works. Nevertheless, the measure and quality of originality an author must contribute before being entitled to copyright protection is minimal. “No matter how poor . . . the ‘author’s’ addition, it is enough if it be his own.”¹³

All components of a work are not protected once a copyright is obtained.¹⁴ For example, copyright does not protect the ideas¹⁵ and facts¹⁶ contained in a copyrighted work. If ideas and facts could be monopolized, the available material upon which authors could freely draw would be greatly reduced.¹⁷ Also, as the *Miller* court noted, “a fact does not originate with the author of a book describing the fact.”¹⁸

While copyrights do not protect ideas or facts, they do protect their “expression.”¹⁹ If the expression of facts in a work is sufficiently original, it will be protected and may not be duplicated verbatim by a second author.²⁰ To establish copyright infringement, an author generally must show that the copier had access to her work²¹ and that the copier’s work is “substantially similar” to the expression found in her own work.²²

12. 17 U.S.C. app. § 101 (1976 & Supp. V 1981).

13. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951).

14. For an insightful discussion of copyright considerations affecting the protection given to various forms of factual works, see Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569 (1963).

15. See 17 U.S.C. app. § 102(b) (1976 & Supp. V 1981). *Accord* *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

16. See, e.g., *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.), cert. denied, 449 U.S. 841 (1980); *Greenbie v. Noble*, 151 F. Supp. 45, 65 (S.D.N.Y. 1957).

17. 1 M. NIMMER, *supra* note 10, § 1.10(B)(2). Professor Nimmer has also argued that the facts-and-ideas/expression dichotomy represents a constitutional balance between copyright policies and first amendment protection of a marketplace of ideas. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970).

18. 650 F.2d at 1368.

19. E.g., *Mazer v. Stein*, 347 U.S. 201, 217 (1954). For the purposes of this Note, “expression” means the original manner in which an author represents ideas or facts in a work.

20. See, e.g., *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977) (expression of facts in financial reports protected), cert. denied, 434 U.S. 1014 (1978); *Chicago Record-Herald Co. v. Tribune Ass’n*, 275 F. 797 (7th Cir. 1921) (expression of facts in news article protected). Although facts are not protected, authors may copyright works embodying original representations of facts in diverse tangible forms. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (photographs); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937) (directories); *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*, 46 F. Supp. 198, 201 (D. Mass. 1942) (horse racing charts); *Woodman v. Lydiard-Peterson Co.*, 192 F. 67, 70 (C.C.D. Minn. 1912) (maps), *aff’d.*, 204 F. 921 (8th Cir. 1913).

21. *Morse v. Fields*, 127 F. Supp. 63, 66 (S.D.N.Y. 1954); see generally 3 M. NIMMER, *supra* note 10, § 13.02 (discussing proof of access).

22. 3 M. NIMMER, *supra* note 10, §§ 13.01–.03; see, e.g., *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966). Substantial similarity can be demonstrated in two ways: the two

B. *Copyright Protection for Research*

Courts disagree as to whether copyright protects research.²³ In *Toksvig v. Bruce Publishing Co.*,²⁴ the Seventh Circuit Court of Appeals suggested that the research upon which biographical or historical books are based is protected. In *Toksvig*, the plaintiff wrote a biography of Hans Christian Andersen based upon original Danish sources. The defendant copied general concepts and specific passages from the plaintiff's book in her own biography of Andersen.²⁵ The court upheld the plaintiff's claim of infringement,²⁶ stating that a second author cannot rely upon proof that the copied information could have been obtained from the same sources, but must actually go to the sources and do independent research.²⁷ Under the *Toksvig* court's analysis, a second author must independently confirm facts uncovered by the first author to avoid infringing the first author's work concerning the same subject.

Conversely, the Second Circuit Court of Appeals indicated in *Rosemont Enterprises, Inc. v. Random House, Inc.*²⁸ that copyright cannot protect research. In *Rosemont*, the plaintiff held the copyrights to several articles about Howard Hughes that had been published in *Look Magazine*. The defendant quoted, copied and paraphrased substantial passages from the *Look* articles in a Hughes biography written for Random House.²⁹ The

works may be generally similar although not verbatim copies, or they may be similar in a fragmented literal (virtually word-for-word) manner. For a more complete discussion of substantial similarity, see 3 M. NIMMER, *supra* note 10, § 13.03.

23. For the purposes of this Note, "research" means the labor expended and expense incurred to gather and record facts. This definition is consistent with the *Miller* court's interpretation of research as meaning the labor, as opposed to the product, of research. See *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369, 1372 (5th Cir. 1981).

24. 181 F.2d 664 (7th Cir. 1950).

25. *Id.* at 666.

26. While the court based the defendant's liability on her failure to do independent research, the large amount of copying, regardless of such failure, may have been a sufficient ground for finding infringement. See *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966) (discussed *infra* notes 28-33 and accompanying text), *cert. denied*, 385 U.S. 1009 (1967); cf. *Eisen-schimi v. Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir.) (no infringement where copying found insubstantial, even though defendant copied theories and facts discovered by plaintiff's extensive research), *cert. denied*, 355 U.S. 907 (1957).

27. 181 F.2d at 667. By requiring independent research, the court emphasized the original author's private interest in copyright. This view grants the copyright holder certain rights by virtue of the labor expended in creating her work. The *Toksvig* theory impairs the public interest to the extent that it requires authors to duplicate research. If protection of expression sufficiently protects an author's private interest in a work, then the *Toksvig* approach may conflict with the fundamentally utilitarian purpose of the copyright. See *supra* note 10; see also Gorman, *supra* note 14, at 1582-84 (factual product of historical research not protected under traditional copyright concepts).

28. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

29. Upon motion for a preliminary injunction, the district court found substantial copying of expression from the *Look* articles. *Rosemont Enters., Inc. v. Random House, Inc.*, 256 F. Supp. 55,

court expressly rejected the *Toksvig* approach,³⁰ allowing use of both research and substantial expression³¹ under the doctrine of fair use.³² It concluded that the public's interest in biographical information about public figures outweighed the plaintiff's interest under its copyright.³³

The Second Circuit followed *Rosemont* in *Hoehling v. Universal City Studios, Inc.*³⁴ The plaintiff in *Hoehling* wrote an account of the last voyage and destruction of the Hindenberg. The project required extensive research.³⁵ The defendants' works, a book and a movie about the incident, allegedly copied Hoehling's theory that the Hindenberg was destroyed by sabotage and duplicated certain facts and sequences of events from Hoehling's book.³⁶ The court, relying on its decision in *Rosemont*, concluded: "In works devoted to historical subjects . . . a second author may make significant use of prior work" ³⁷ The court nevertheless added an important qualification: the second author may use the prior work only "so long as he does not bodily appropriate the expression of another."³⁸ Thus, the Second Circuit in *Hoehling* reaffirmed the *Rosemont* conclusion that research is not protected, while clarifying that second authors may not copy expression in substantial quantities.

As in other contexts, original expression is protected in news stories³⁹

61-64 (1966). The district court granted the motion, but the circuit court reversed. *Rosemont Enters., Inc. v. Random House, Inc.* 366 F. 2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

30. "We, however, cannot subscribe to the [*Toksvig*] view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material." 366 F.2d at 310.

31. See *supra* note 29. The decision may also have rested on the ground that substantial copying was not clearly proven for purposes of issuing a preliminary injunction, 366 F.2d at 306, although reliance upon this rationale would have constituted an implicit reversal of the trial court's finding of substantial copying.

32. Fair use is a doctrine under which copyrighted material may be copied without liability. It is generally considered an affirmative defense to a *prima facie* showing of infringement. 3 M. NIMMER, *supra* note 10, § 13.05. Among the traditional uses of copyrighted material considered "fair use" are criticism, comment, news reporting, teaching, scholarship, and research. 17 U.S.C. app. § 107 (1976 & Supp. V 1981). Purely commercial uses, such as the use in *Rosemont*, have not been traditionally sanctioned under the doctrine. See 17 U.S.C. app. § 107(1), (4) (1976 & Supp. V 1981); 3 M. NIMMER, *supra* note 10, § 13.05(A)(4)-(B).

33. 366 F.2d at 307-09. Because the court denied copyright protection to expression under the guise of the fair use doctrine, its result has been disapproved by the Ninth Circuit. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1171 n.17 (9th Cir. 1977).

34. 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

35. 618 F.2d at 975.

36. *Id.* at 978-79.

37. *Id.* at 980.

38. *Id.*

39. The Supreme Court has stated that news articles possessing a "literary quality" are copyrightable. *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) (*dicta*); see also *Inter-City Press, Inc. v. Siegfried*, 172 F. Supp. 37, 40-41 (W.D. Mo. 1958) (reproduction of article presumptively containing original expression held infringement); *Morse v. Fields*, 127 F. Supp. 63, 65-66 (S.D.N.Y. 1954) (expression protected, but copying not shown).

while research is not. For instance, in *Chicago Record-Herald Co. v. Tribune Association*,⁴⁰ the *Chicago Herald* copied substantial portions of a copyrighted article first published in the *New York Tribune*. The court held that the first article was protected by the copyright laws, insofar as it involved “authorship and literary quality and style.”⁴¹ The court noted that the first article, a description of German submarines, “reveals a peculiar power of portrayal, and a felicity of wording and phrasing.”⁴² The *Chicago Record-Herald* court thus focused on expression and not research as the protected element in news stories.⁴³ Had the plaintiff’s article not possessed a distinct literary quality, it would not have been protected.⁴⁴

C. Copyright Protection for Directories

Courts have granted protection to the research required to produce directories and indexes.⁴⁵ In *Leon v. Pacific Telephone & Telegraph Co.*,⁴⁶ the Ninth Circuit Court of Appeals found infringement where the defendants copied the plaintiff’s telephone directory. The defendants merely rearranged the listings from the prior directory by telephone numbers instead of by alphabetized names. The court noted that a compiler of a directory “acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright.”⁴⁷ By stressing the act of acquiring facts and the labor required to produce a directory, the court isolated research as the basis for copyright protection in a directory. The court protected the original compiler’s research by holding that wholesale copying of the information in a telephone directory constitutes copyright infringement.⁴⁸

40. 275 F. 797 (7th Cir. 1921).

41. *Id.* at 798–99.

42. *Id.* at 799.

43. One commentator has suggested, however, that courts easily find original expression in news stories because of their underlying concern for the labor and expense in gathering news. Gorman, *supra* note 14, at 1578.

44. 275 F. at 798; *see also* *National Tel. News Co. v. Western Union Tel. Co.*, 119 F. 294, 297–98 (7th Cir. 1902).

45. *See, e.g.*, *Jewelers’ Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 85 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922); *Southwestern Bell Tel. Co. v. Nationwide Indep. Directory Serv., Inc.*, 371 F. Supp. 900, 905 (W.D. Ark. 1974).

46. 91 F.2d 484 (9th Cir. 1937).

47. *Id.* at 486 (quoting *Jewelers’ Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 88 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922)).

48. *See also* *Northwestern Bell Tel. Co. v. Bedco of Minn., Inc.*, 501 F. Supp. 299 (D. Minn. 1980). In *Northwestern Bell*, the defendant photocopied advertisements from the plaintiff’s copyrighted yellow pages directory for purposes of soliciting advertising for its own directory. The court

The compiler's research was also protected in *Schroeder v. William Morrow & Co.*⁴⁹ In *Schroeder*, the plaintiff's book listed the names and addresses of seed and plant suppliers, along with descriptive information about each supplier. The defendant copied a substantial number of the names and addresses from the plaintiff's book.⁵⁰ The court noted that "'[a]ppropriation of the fruits of another's labor and skill in order to publish a rival work without the expenditure of the time and effort required for independently arrived at results is copyright infringement.'"⁵¹ In finding infringement, the Seventh Circuit Court of Appeals rejected the district court's holding that the plaintiff's copyright protected only descriptive material and not names and addresses.⁵²

II. THE MILLER DECISION

Gene Miller sued Universal City Studios for copyright infringement, alleging that Universal had copied material from his copyrighted book, *83 Hours Till Dawn*, in producing its movie about the kidnapping depicted in both works. At trial, significant similarities between the book and the film were demonstrated,⁵³ including incorrect facts apparently copied from the book by Universal's scriptwriter.⁵⁴ The judge instructed the jury that research is copyrightable.⁵⁵

The jury found that Universal had infringed Miller's copyright and the district court denied Universal's subsequent motion for a new trial.⁵⁶ The

first concluded that such a directory more closely resembled a traditional telephone directory than an advertising periodical. *Id.* at 302. It then applied the *Leon* line of reasoning:

There is nothing that would prevent a subsequent compiler from collecting this information by independent research, or even from using the copyrighted directory to ascertain the names of prospective advertisers. . . . However, "what a subsequent compiler cannot do is copy from an already copyrighted directory and save himself the labor and expense incurred by the prior compiler."

Id. (citation omitted) (quoting *Southwestern Bell Tel. Co. v. Nationwide Indep. Directory Serv., Inc.*, 371 F. Supp. 900, 906 (W.D. Ark. 1974)).

49. 566 F.2d 3 (7th Cir. 1977).

50. *Id.* at 4.

51. *Id.* at 6 (quoting *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 120 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962)).

52. *Id.* at 5.

53. In order to prove infringement, the plaintiff must establish that the defendant copied her work. A necessary element of proof is the substantial similarity of the two works. *See supra* note 22; *see also Kustoff v. Chaplin*, 120 F.2d 551 (9th Cir. 1941).

54. *Miller v. Universal City Studios, Inc.*, 460 F. Supp. 984, 985 (S.D. Fla. 1978), *rev'd*, 650 F.2d 1365 (5th Cir. 1981). Courts generally regard common error as strong evidence of copying. 3 M. NIMMER, *supra* note 10, § 13.03(C).

55. 460 F. Supp. at 987.

56. *Id.* at 988.

Fifth Circuit Court of Appeals reversed,⁵⁷ holding that the trial court's instruction that research is copyrightable was erroneous.⁵⁸

The court of appeals first considered the traditional distinction between facts and expression.⁵⁹ It noted that one who discovers facts does not thereby establish an original copyrightable interest,⁶⁰ because facts do not originate with the discoverer.⁶¹ The court concluded that the *Rosemont-Hoehling* approach,⁶² which protects only expression, was "more consistent with the purpose and intended scope of protection under the copyright law" than the *Toksvig* approach,⁶³ which also protects research.⁶⁴ According to the court, the distinction between facts and expression balances the public's interest in encouraging creative effort against its need for access to information and permits use of information without unnecessary duplication of effort.⁶⁵

Miller relied in part on the directory cases to support his contention that copyright law protects research. The court found the directory cases difficult to distinguish adequately.⁶⁶ It concluded that copyrights in directories are based upon original selection and arrangement of facts, not upon authors' efforts in gathering information.⁶⁷ The court alternatively suggested that the directory cases are an anomaly resulting from the inclusion

57. 650 F.2d 1365 (5th Cir. 1981).

58. *Id.* at 1368. The court noted that the record contained sufficient evidence to support a finding of infringement under correct theories of copyright law. The record indicated sufficient similarities between the plaintiff's and the defendant's works to establish that the defendant copied the plaintiff's expression. *See id.* at 1367. The court nevertheless remanded the case because it concluded that the instruction that research is copyrightable was prejudicial error. *Id.*

The court's holding that research is not copyrightable was unnecessarily broad. The issue properly before the court was not copyrightability—the validity of Miller's copyright. Rather, it was whether the erroneous instruction so misled the jury as to result in an incorrect finding that Universal had copied protected components of Miller's book, thereby infringing his copyright. The record was clear that, under traditional analysis, Universal had copied the protected expression in Miller's book. Therefore, remand of the case was unnecessary. Moreover, the holding that research is not copyrightable is unclear. Works that are the product of research are copyrightable; the issue is whether a copyright protects the author's research.

59. *See supra* text accompanying notes 14–20.

60. 650 F.2d at 1368. The Copyright Act of 1976 clearly says that copyright protection does not apply to discoveries: "In no case does copyright protection for an original work of authorship extend to any . . . discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. app. § 102(b) (1976 & Supp. V 1981).

61. 650 F.2d at 1368–69.

62. *See supra* notes 28–38 and accompanying text.

63. 650 F.2d at 1371. *See supra* notes 24–27 and accompanying text.

64. 650 F.2d at 1370–72.

65. *Id.* at 1371–72.

66. *Id.* at 1369.

67. *Id.*

of directories within the Copyright Act of 1909. It noted that protection of research has not been extended to subject matter such as news articles.⁶⁸

III. ANALYSIS

Miller demonstrates that the dichotomy between facts and ideas, on the one hand, and expression, on the other, is inadequate to encompass the many types of works, including directories and indexes, currently protected under copyright law. Its holding that research is not copyrightable may deny protection to some works in which research is the only original element. An analytical framework emphasizing protection of the most important stratum of original contribution in various works would allow courts to protect research in appropriate circumstances. Under this type of analysis, *Miller* is correct in its result, because *Miller's* book is a factual work containing recognizable expression, and that expression is the most important stratum of original contribution. If research had been the most important stratum, however, the court's statement that research is not copyrightable would have been incorrect.

A. *Problems Under Conventional Analysis*

The *Miller* court used the traditional facts-and-ideas/expression dichotomy as a framework for determining which elements of *83 Hours Till Dawn* were protected by copyright. While this approach is appropriate for works containing expression, it is inadequate for factual works that contain no expression. It is based upon an examination of the end product; certain intrinsic elements of the work are protected or not protected. Yet, in some cases, protection of an author's original research in producing that end product is desirable in light of the copyright function of encouraging creative effort. For this reason, courts have considered research as well as expression in determining which elements are protected by copyright.⁶⁹

The *Miller* holding that research is not copyrightable could be used to deny effective protection to such works as directories and indexes, which do not contain expression that is simple to identify. To conclude, as did the *Miller* court, that copyright protects the original selection or arrangement of facts in directories does not adequately harmonize directory cases with traditional facts-and-ideas/expression analysis. In the telephone directory cases, for instance, arrangement of listings alphabetically does

68. *Id.* at 1370. The court relied upon *International News Serv. v. Associated Press*, 248 U.S. 215 (1918). See *supra* note 39.

69. See *supra* parts IIB & IIC.

not seem sufficiently unique to constitute even the minimal "originality" required under present copyright law.⁷⁰ "Names, addresses, telephone numbers and their patterning in alphabetical order are what they are, independent of creative authorship by the compiler."⁷¹ Thus, some other rationale must be developed for granting copyright protection to works in which research is the only significant original contribution.

B. Proposed "Strata" Approach

Courts should begin their analysis in copyright infringement cases by isolating the most important stratum of original contribution in the allegedly infringed works.⁷² Protectable strata in factual works are various levels of original contribution by an author, resulting in progressively more refined representation of facts. They would range from the simple gathering, compiling and recording of facts to the expression of facts in, for instance, unique prose. By protecting the most important stratum, courts can ensure in each case that some minimum, effective protection is given to each author. This result is consistent with the underlying purposes of copyright law.⁷³

Although the strata test requires courts to make a subjective determination of the "most important" stratum of original contribution in various kinds of works, that determination may be no more difficult than deciding what constitutes original "expression."⁷⁴ The strata test has the virtue of directing initial inquiry away from the distinction between ideas or facts and expression, which is a meaningless distinction when there is no definable original expression in a given work. Instead, the inquiry focuses on protecting the most significant level of an author's original contribution.

70. See *supra* note 13 and accompanying text.

71. Gorman, *supra* note 14, at 1584.

72. This strata test was originally suggested for works that defy categorization under specific tests defining "expression," such as the "pattern" test, which equates expression with the patterning or ordering of facts or ideas. Gerber, Book Review, 26 U.C.L.A. L. REV. 925, 961-62 (1979). Gerber suggests that infringement should be determined only after first isolating the most important stratum of a work. This method of analysis may be expanded to encompass virtually all works, including factual works in which "expression" is an insufficient concept for limiting or defining copyright protection.

More than one stratum conceivably could be protected in a single work. This would be true if a work were divisible into sections containing fundamentally different types of significant original contribution. For example, in *Schroeder*, discussed *supra* in text accompanying notes 49-52, expression in the plaintiff's descriptions of seed and plant suppliers as well as the selection of listed names and addresses should have been protected. See *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 6 (7th Cir. 1977).

73. See *supra* note 10 and accompanying text.

74. For a discussion of the difficulty in formulating a single definition of "expression" that can adequately indicate which elements of a work are protected, see Gerber, *supra* note 72, at 959-61.

This is in accord with the policy behind copyright law, which is to encourage a broad range of creative endeavor by guaranteeing protection for the product of such endeavor.

In factual works, the most important stratum of original contribution may be determined by examining the amount of creative work done by the author. For example, in historical and biographical books as well as news stories, the form of expression of both facts and original fictional elements, if any, would be protected.⁷⁵ In works like *83 Hours Till Dawn*, expression is the most important stratum of original contribution because it is the highest level of refinement in the representation of facts. Once a court determined that expression was the most important stratum of a work, only the expression in that work would be protected. Research would not be protected.⁷⁶

In other factual works, the selection and arrangement of facts may be the most important stratum. This would be the case if an author's work contained an original selection or arrangement of facts, but was not so refined as to contain original expression of those facts.⁷⁷ The *Guinness Book of World Records* is a well-known example of such a work.⁷⁸ A finding of infringement in these works would require that the defendant's work be substantially similar to the plaintiff's work in its arrangement and selection of facts. In these works, as in works containing original expression, an author's research would not be protected.

Finally, in directories and indexes, the only important original contribution of an author might be outside the form of the work itself and consist of the author's original research.⁷⁹ Protection of research to some ex-

75. 1 M. NIMMER, *supra* note 10, § 2.11(B), (C). See also *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir.) (expression of historical facts protected), *cert. denied*, 449 U.S. 841 (1980); *De Acosta v. Brown*, 146 F.2d 408, 409–10 (2d Cir. 1944) (fictional elements in a biographical screenplay protected).

76. Under this approach, the extension of protection in *Toksvig* beyond the stratum of expression to that of research would be incorrect. See *supra* notes 24–27 and accompanying text. On the other hand, *Rosemont* would also be incorrect because it arguably denied protection even to expression. See *supra* notes 28–33 and accompanying text.

77. See, e.g., *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 812–13 (7th Cir. 1942) (compilation of choice restaurants); *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*, 46 F. Supp. 198, 201 (D. Mass. 1942) (arrangement of data in racing forms); see also *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 222 n.2 (D.N.J. 1977) (selection, involving significant subjective judgment, of facts protected); see generally 1 M. NIMMER, *supra* note 10, § 2.11(D) (discussing protection for the selection and arrangement of facts). The current definition of “compilation” in the Copyright Act supports these and similar decisions: “A ‘compilation’ is a work formed by the collection and assembling of preexisting 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.” 17 U.S.C. app. § 101 (1976 & Supp. V 1981) (emphasis added).

78. 1 M. NIMMER, *supra* note 10, § 2.11(D).

79. See *supra* notes 45–52 and accompanying text.

tent constitutes protection of facts, as the *Miller* court noted,⁸⁰ but such protection is presently afforded directories.⁸¹ Under a strata analysis, the *Miller* court's statement that "[a] copyright in a directory [does not rest] on the industriousness of the efforts to develop the information"⁸² would not be true.

In the cases where protection of research is requested, copyright law more closely resembles tort law than traditional statutory copyright law. It has been suggested that in cases like the directory cases, in which research is protected, it might be appropriate to apply the law of unfair competition.⁸³ Nevertheless, directories have historically been within the scope of copyright law. Moreover, copyright protection of research in such works is consistent with the proposed strata analysis and the copyright principles embodied therein.

Copyright protection of research in directories, furthermore, would typically be fairly limited under the strata approach. First, substantial similarity⁸⁴ must be demonstrated. Second, independent discovery of facts may not be required to avoid infringement; a second author's mere verification of the facts contained in the first directory may be sufficient.⁸⁵

80. 650 F.2d at 1369.

81. One court has recognized that both labor and selection of facts can constitute separate bases for copyright protection in factual works. *Dow Jones & Co. v. Chicago Board of Trade*, 546 F. Supp. 113, 115 (S.D.N.Y. 1982).

82. 650 F.2d at 1369.

83. Gorman, *supra* note 14, at 1571. In *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), the plaintiff relied on a theory of unfair competition; its news was not copyrighted. The court noted that unfair competition involves a quasi-property right between parties competing in a sphere of business, rather than a right (such as copyright) of a party as against the public. *Id.* at 236-42. That the law of unfair competition in the realm of intellectual endeavor, however, is relatively undeveloped perhaps explains the general reliance of plaintiffs upon copyright law in directory cases. See Gorman, *supra* note 14, at 1571.

84. *Cf. supra* note 22 (discussing substantial similarity in expression between two works). Because the theory underlying protection of copyrighted directories is that the second author should not be allowed to unfairly appropriate the product of the first author's research, substantial similarity in directory cases should require similarity in use. As a practical matter, copying of the first author's directory in a substantially similar form will usually correspond to a substantially similar use by the second author—i.e., the publication of a competing directory.

85. In discussing the extent to which copyright protects research in directories, Judge Learned Hand noted: "Every one [sic] concedes that a second compiler may check back his independent work upon the original compilation, but there has been some dispute whether he may use the original compilation after simply verifying its statements, or whether he must disregard the assistance of the original, except in subsequent verification." *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932, 935 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922). *But see* *Northwestern Bell Tel. Co. v. Bedco of Minn., Inc.*, 501 F. Supp. 299, 302 n.2 (D. Minn. 1980) (questioning the applicability of the no-verification standard to a telephone directory). See generally Gorman, *supra* note 14, at 1585-88 (discussing the verification standard).

IV. CONCLUSION

In *Miller v. Universal City Studios, Inc.*, the Fifth Circuit Court of Appeals held that research is not copyrightable. This holding demonstrates the inadequacies in current copyright law concerning works reflecting little original expression, in which research is the primary original contribution. By isolating and protecting the most original stratum of a work, courts could avoid these inadequacies. When the only stratum of original contribution consists of an author's research in compiling the copyrighted work, a court should protect that stratum, because the lack of easily definable expression in a work makes the facts-and-ideas/expression dichotomy inapplicable.

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