

Hunter's Red Book is a "system"? Compare *American Dental Association v. Delta Dental*, Chapter 2, page 94 *supra*.

4. Recall the *Lotus* case earlier in this chapter concerning the lack of copyright protection for the menu command hierarchy of the Lotus 1-2-3 spreadsheet program. Should Lotus have argued that the menu command structure was really a compilation that evidenced originality either in its selection of which commands to include, or in its arrangement of those commands?

2. What Is a "Fact"?

If facts are not copyrightable, it is important to know what constitutes a "fact" for copyright purposes. As you can see from the previous pair of cases, the stakes are high for individuals who may have exerted labor and expense in creating a work that has significant utility, but that is deemed to be an unoriginal compilation of facts. As the following cases suggest, what constitutes a fact may be in the eye of the beholder.

≡≡≡ *CDN Inc. v. Kapes*
 ≡≡≡ 197 F.3d 1256 (9th Cir. 1999)

O'SCANNLAIN, J.: We must decide whether prices listed in a wholesale coin price guide contain sufficient originality to merit the protection of the copyright laws.

I

Kenneth Kapes operates a coin business, Western Reserve Numismatics, in Ohio. In response to many inquiries he received regarding the price of coins, Kapes developed "The Fair Market Coin Pricer," which listed on his internet web page the retail prices of many coins. In order to generate the prices he listed, Kapes used a computer program he developed to create retail prices from wholesale prices. The exact process is unclear, but Kapes acknowledges using appellee CDN, Inc.'s wholesale price lists.

CDN publishes the Coin Dealer Newsletter, a weekly report of wholesale prices for collectible United States coins, as well as the Coin Dealer Newsletter Monthly Supplement and the CDN Quarterly. The Newsletter, or "Greysheet" as it is known in the industry, includes prices for virtually all collectible coins and is used extensively by dealers. In December 1996, CDN discovered the existence of Kapes' internet site and list of current retail prices. CDN filed a complaint on February 21, 1997 in the U.S. District Court for the Central District of California, alleging that Kapes infringed CDN's copyrights by using CDN's wholesale prices as a baseline to arrive at retail prices. . . . [The district court granted summary judgment for CDN on the threshold issue of copyrightability, and the court of appeals affirmed.]

Discoverable facts, like ideas, are not copyrightable. But compilations of facts are copyrightable even where the underlying facts are not. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991). The distinction between facts and non-facts, and between discovery and creation, lies at the heart of this case. The essential ingredient present in creations, but absent in facts, is originality, "the sine qua non of copyright." *Id.* at 345. Subject matter created by and original to the author merits copyright protection. Items not original to the

author, i.e., not the product of his creativity, are facts and not copyrightable. . . . In order to warrant protection, compilations and other works must contain a minimal amount of originality or creativity. . . .

Appellant's attempt to equate the phone number listings in *Feist* with CDN's price lists does not withstand close scrutiny. First, Kapes conflates two separate arguments: (1) that the listing, selection, and inclusion of prices is not original enough to merit protection; and (2) that the prices themselves are not original creations. Whether CDN's selection and arrangement of the price lists is sufficiently original to merit protection is not at issue here. CDN does not allege that Kapes copied the entire lists, as the alleged infringer had in *Feist*. Rather, the issue in this case is whether the prices themselves are sufficiently original as compilations to sustain a copyright. Thus Kapes' argument that the selection is obvious or dictated by industry standards is irrelevant.

Although the requirement of originality is a constitutional one inherent in the grant to Congress of the power to promote science and the useful arts, the required level of originality is "minimal." . . . "The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Feist*, 499 U.S. at 345 (quoting 1 M. Nimmer & D. Nimmer, *Copyright* §1.08[C][1] (1990)). This spark glows in CDN's prices, which are compilations of data chosen and weighed with creativity and judgment. . . .

. . . [CDN] begins with examining the major coin publications to find relevant retail price information. CDN then reviews this data to retain only that information it considers to be the most accurate and important. Prices for each grade of coin are determined with attention to whether the coin is graded by a professional service (and which one). CDN also reviews the online bid and ask prices posted by dealers. . . . CDN also considers the impact of public auctions and private sales, and analyzes the effect of the economy and foreign policies on the price of coins. As the district court found, CDN does not republish data from another source or apply a set formula or rule to generate prices. . . .

Our holding that the prices are copyrightable is consistent with that of the Second Circuit in *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61 (2d Cir. 1994). . . . [There, t]he court held that the [Red Book] valuations were not "pre-existing facts that had merely been discovered by the Red Book editors," but instead "represented predictions by the Red Book editors of future prices estimated to cover specified geographic regions." *CCC*, 44 F.3d at 67. Like CDN's prices, the prices in the Red Book granted copyright protection by the Second Circuit, are "based not only on a multitude of data sources, but also on professional judgment and expertise." *Id.*

Kapes attempts to distinguish *CCC* by arguing that the prices in the Red Book were projections of future values, while the prices in the Greysheet are estimates of present value. But the distinction between present and future values is not important to this case. What is important is the fact that both Maclean and CDN arrive at the prices they list through a process that involves using their judgment to distill and extrapolate from factual data. It is simply not a process through which they discover a preexisting historical fact, but rather a process by which they create a price which, in their best judgment, represents the value of an item as closely as possible. If CDN merely listed historical facts of actual transactions, the guides would be long, cumbersome, and of little use to anyone. Dealers looking through such data would have to use their own judgment and expertise to estimate the value of a coin. What CDN has done is use its own judgment and expertise in arriving at that value for the dealers. This process imbues the prices listed with sufficient creativity and originality to make them copyrightable. . . .