

===== *Bellsouth Advertising & Publishing Corp. v. Donnelley*
===== *Information Publishing, Inc.*
===== 999 F.2d 1436 (11th Cir. 1993) (*en banc*), cert. denied, 510 U.S. 1101 (1994)

BIRCH, J.:

I. Introduction

In this appeal, we must decide whether acts of copying infringed the compilation copyright registered in a “yellow pages” classified business directory. . . . [W]e are called upon to apply *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), which addressed copyright protection for a “white pages” telephone directory, to resolve the infringement claims presented to us concerning a directory of a different color.

The pivotal issue in this case is whether that which was copied by the alleged infringer was protected by the registered claim of compilation copyright. The parties agree that the only elements of a work entitled to compilation copyright protection are the selection, arrangement or coordination as they appear in the work as a whole. The parties dispute what elements of a classified directory constitute such selection, arrangement or coordination. Mindful that the protection afforded to a whole work by a compilation copyright is “thin,” the determination as to whether an infringement of a compilation copyright has occurred is particularly difficult where less than the entire work is copied.

II. Background

BellSouth Advertising & Publishing Corporation (“BAPCO”) is a wholly owned subsidiary of BellSouth Corporation (“BellSouth”) created for the purpose of preparing, publishing and distributing telephone directories. Using telephone listing information supplied by Southern Bell Telephone and Telegraph Company (“Southern Bell”), another wholly owned subsidiary of BellSouth, BAPCO publishes a classified, “yellow pages,” advertising directory for the Greater Miami area. . . .

After BAPCO published its 1984 directory for the Greater Miami area, Donnelley Information Publishing, Inc. and Reuben H. Donnelley Corp. (collectively “Donnelley”) began promoting and selling classified advertisements to be placed in a competitive classified directory for the Greater Miami area. To generate a list of business telephone subscribers to be solicited for placement in its directory, Donnelley gave copies of BAPCO’s directory to Appalachian Computer Services, Inc. (“ACS”), a data entry company. Donnelley first marked each listing in the BAPCO directory with one alphanumeric code indicating the size and type of advertisement purchased by the subscriber and a similar code indicating the type of business represented by the BAPCO heading under which the listing appeared. For each listing appearing in the BAPCO directory, ACS created a computer data base containing the name, address, and telephone number of the subscriber as well as the codes corresponding to business type and unit of advertising. From this data base, Donnelley printed sales lead sheets, listing this information for each subscriber, to be used to contact business telephone subscribers to sell advertisements and listings in the Donnelley directory. Relying on this information copied from the BAPCO directory, Donnelley ultimately prepared its own competitive directory for the Greater Miami area. . . .

. . . From the process by which Donnelley prepared its competitive yellow pages directory, the district court identified three acts of copying: (1) the entry of subscriber information into the computer data base by ACS; (2) the printout of sales lead sheets from this data base; and (3) the publication of Donnelley's directory. . . . [Pre-*Feist*, the district court granted summary judgment to BAPCO on its copyright infringement claim, and the court of appeals affirmed. On petition for certiorari, the Supreme Court vacated that decision and remanded for reconsideration given its intervening decision in *Feist*.]

III. Discussion . . .

B. BAPCO's Claim of Infringement

To establish its claim of copyright infringement, BAPCO must prove "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." 499 U.S. at —, 111 S. Ct. at 1296. The validity of BAPCO's copyright in its directory, considered as a whole, was conceded by Donnelley. To demonstrate the second element of infringement, BAPCO must prove that Donnelley, by taking the material it copied from the BAPCO directory, appropriated BAPCO's *original* selection, coordination or arrangement.

The district court found that BAPCO engaged in a number of acts of selection in compiling its listings. For example, BAPCO determined the geographic scope of its directory and the closing date after which no changes in the listing would be included. The district court erred, however, in implicitly determining that these selective acts were sufficiently original to merit copyright protection. Rural obviously established a geographic scope and closing date for its white pages, which were held uncopyrightable as a matter of law in *Feist*. The district court's analysis would protect such factual elements of every compilation; any collection of facts "fixed in any tangible medium of expression" will by necessity have a closing date and, where applicable, a geographic limit selected by the compiler. . . . The district court also focused on a number of marketing techniques employed by BAPCO to generate its listings, such as the determination of the number of free listings offered to each subscriber, the selection of which customers to contact by an on-premise visit from sales personnel, the selection of the date of commencement of its advertisement sales campaign, and the procedure used to recommend the purchase of listings under multiple headings. . . .

. . . [T]hese acts are not acts of authorship, but techniques for the discovery of facts. In *Feist*, the Court emphasized the distinction "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." 499 U.S. at —, 111 S. Ct. at 1288. By employing its sales strategies, BAPCO discovered that certain subscribers describe their businesses in a particular fashion and were willing to pay for certain number listings under certain available business descriptions. To be sure, BAPCO employed a set of strategies or techniques for discovering this data. Any useful collection of facts, however, will be structured by a number of decisions regarding the optimal manner in which to collect the pertinent data in the most efficient and accurate manner. If this were sufficient, then the protection of copyright would extend to census data, cited in *Feist* as a paradigmatic example of a work that lacks the requisite originality. 499 U.S. at —, 111 S. Ct. at 1288. Just as the Copyright Act does not protect "industrious collection," it affords no shelter to the resourceful, efficient, or creative collector. . . .

In addition to these acts of selection, the district court found that BAPCO engaged in feats of coordination and arrangement to generate its yellow pages directory. The court explains that BAPCO arranged its directory in an alphabetized list of business types, with individual businesses listed in alphabetical order under the applicable headings. . . . BAPCO's arrangement

and coordination is “entirely typical” for a business directory. With respect to business telephone directories, such an arrangement “is not only unoriginal, it is practically inevitable.” 499 U.S. at —, 111 S. Ct. at 1297. . . .

The district court’s suggestion that BAPCO could have arranged its headings according to the number of advertisers or to list its subscribers under each heading according to the length of time for which that subscriber had appeared under that heading misapprehends the question. The relevant inquiry is not whether there is some imaginable, though manifestly less useful, method of arranging business telephone listings. . . . The pertinent inquiry is whether the compiler has demonstrated originality, the “*sine qua non*” of copyright, in *its* arrangement or coordination. The arrangement of BAPCO’s yellow pages, like that of Rural’s white pages is “entirely typical” of its respective type.

The district court also identified acts of coordination and arrangement in the particular system of headings used in the BAPCO directory. The district court appears to find that, when Donnelley entered the listing information from the BAPCO directory, it also copied the particular heading under which that listing appeared in the BAPCO directory. 719 F. Supp. at 1558-59. BAPCO, however, failed to introduce evidence sufficient to establish a genuine dispute of material fact as to whether Donnelley copied the particular heading structure employed by BAPCO. Donnelley stipulated that it obtained the “business type” for each listing from the BAPCO directory. The evidence submitted to the district court in the form of affidavit, deposition, and witness testimony reveals that Donnelley established its own system of headings and that, in constructing its data base, Donnelley entered an alphanumeric code that corresponded to the Donnelley heading with each BAPCO listing. Further, the sales lead sheets generated by Donnelley from its database, as well as pages of the respective directories submitted to the district court, illustrate that Donnelley selected a somewhat different category of headings to describe the listings originally appearing in the BAPCO directory. Considering the extent to which the heading structure of a classified business directory is dictated by functional considerations and common industry practice, the differences apparent in the glossary of headings employed by Donnelley are sufficient to rebut any inference of copying that otherwise might be drawn from those terms that are common to both directories. In sum, the evidence before the district court requires the conclusion that, by determining the type of business of each subscriber by observation of the BAPCO directory and translating that business type into an encoded heading of its own creation, Donnelley extracted uncopyrightable information regarding the business activities of BAPCO’s subscribers without appropriating any arguably original, protectible expressive element in the BAPCO glossary of headings. . . .

We note that Donnelley did not copy, nor was alleged to have copied, the text or graphic material from the advertisements in the BAPCO directory, the positioning of these advertisements, the typeface, or the textual material included by BAPCO to assist the user. Unlike the infringer in *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801 (11th Cir. 1985), Donnelley did not photocopy, or reproduce by any equivalent means, the page by page arrangement or appearance of its competitor’s directory in the process of creating its own work. . . . Given that the copyright protection of a factual compilation is “thin,” a competitor’s taking the bulk of the factual material from a preexisting compilation without infringement of the author’s copyright is not surprising. *Feist*, 499 U.S. at —, 111 S. Ct. at 1289. While it may seem unfair for a compiler’s labor to be used by a competitor without compensation, the Court noted in *Feist* that “[t]he primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’” 499 U.S. at —, 111 S. Ct. at 1290 (quoting U.S. Const. art. I, §8, cl. 8). “To this end, copyright assures authors the right to their *original* expression, but encourages others to

build freely upon the ideas and information conveyed by a work.” *Id.* (emphasis added); *see also Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 545-46 (1985).

IV. Conclusion

By copying the name, address, telephone number, business type, and unit of advertisement purchased for each listing in the BAPCO directory, Donnelley copied no original element of selection, coordination or arrangement; Donnelley thus was entitled to summary judgment on BAPCO’s claim of copyright infringement. . . .

HATCHETT, J., dissenting: . . . The clearest example of BAPCO’s original selection is its choice of the classified headings that would be included in the *1984 Yellow Pages*. BAPCO selected the approximately 7,000 classified headings in the *1984 Yellow Pages* from the 4,700 primary headings and approximately 34,000 related headings in the BAPCO headings book. BAPCO presented the undisputed testimony . . . that the BAPCO headings book is not standardized to coincide with the menu of classified headings used in the National Yellow Pages Sales Association (NYPSA) publications. Moreover, even if BAPCO’s selection of classified headings is similar to other NYPSA publications, it would still be copyrightable under *Feist* so long as BAPCO selected [its headings] independently. . . .

==== *CCC Information Services, Inc. v. Maclean Hunter*
 ===== *Market Reports, Inc.*
 ===== 44 F.3d 61 (2d Cir. 1994), cert. denied, 516 U.S. 817 (1995)

LEVAL, J.: . . .

Background

. . . The appellant is Maclean Hunter Market Reports, Inc. (“Maclean”). Since 1911, Maclean, or its predecessors, have published the *Automobile Red Book — Official Used Car Valuations* (the “Red Book”). The Red Book, which is published eight times a year, in different versions for each of three regions of the United States (as well as a version for the State of Wisconsin), sets forth the editors’ projections of the values for the next six weeks of “average” versions of most of the used cars (up to seven years old) sold in that region. These predicted values are set forth separately for each automobile make, model number, body style, and engine type. Red Book also provides predicted value adjustments for various options and for mileage in 5,000 mile increments.

The valuation figures given in the Red Book are not historical market prices, quotations, or averages; nor are they derived by mathematical formulas from available statistics. They represent, rather, the Maclean editors’ predictions, based on a wide variety of informational sources and their professional judgment, of expected values for “average” vehicles for the upcoming six weeks in a broad region. The introductory text asserts, “You, the subscriber, must be the final judge of the actual value of a particular vehicle. Any guide book is a supplement to and not a substitute for expertise in the complex field of used vehicle valuation.”

. . . Appellee CCC Information Services, Inc. (“CCC”), is also in the business of providing its customers with information as to the valuation of used vehicles. Rather than publishing a