

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEXANDRIA DRAFTING CO.,
Plaintiff,

v.

ANDREW H. AMSTERDAM
d/b/a FRANKLIN MAPS,
Defendant.

Civil Action
Nos. 95-1987, 95-6036

Gawthrop, J.

June , 1997

M E M O R A N D U M

Plaintiff Alexandria Drafting Co. filed suit on April 5, 1995, alleging that Defendant Franklin Maps copied from Plaintiff's map books in violation of the Copyright Act of 1976, 17 U.S.C. § 101 et seq. A second infringement action, filed when Defendant issued new editions of the maps in suit, has been consolidated with the first. Plaintiff is seeking injunctive relief, statutory damages for willful infringement, attorney's fees, and costs. Defendant counters that the information copied was in the public domain, and that any copying of Plaintiff's products was too minimal to constitute infringement.

After a four-day bench trial, I find that Defendant did copy from Plaintiff's copyrighted products. However, because the original, copyrightable, element Defendant copied is too insubstantial to support a claim of infringement, and because Defendant generally copied only unprotectible facts, Defendant

did not infringe Plaintiff's copyrights. I thus find for Defendant.

FINDINGS OF FACT

Plaintiff Alexandria Drafting Company ("ADC") and Defendant Franklin Maps ("Franklin") both publish maps of the Philadelphia region. Both companies seem to specialize in highly detailed, local-minutiae maps -- the sort that include every new cul-de-sac in every new development in the constantly burgeoning suburbs. Although other publishers, including Patton, produce maps of the Philadelphia area, only Franklin and ADC publish atlases of the region.¹

ADC, a Virginia corporation with over 120 employees, provides cartographic services and publishes maps of the mid-Atlantic seaboard from Atlanta, Georgia to Philadelphia, Pennsylvania. ADC produces its maps by compiling information from a variety of sources, including highway plans, construction plans, city plans, and its own field research such as aerial photos. Cartographers adjust these sources to be on a common scale, then edit the information for accuracy and completeness. The average cost to produce a map from scratch is \$ 3,000 per page. To update its maps, ADC spends an average of \$ 800 per page. Among ADC's products are map books of Philadelphia and environs, which it spent over \$ 500,000 to produce.

1. Franklin produces the current edition of Rand McNally's Philadelphia atlas.

ADC field and sales personnel regularly purchase competitors' products, which ADC then reviews. In 1993, Michael Swauger, ADC's Chief of Data Research, performed a two-day review of Franklin's newly revised maps. He concluded that, because of their high quality and strong aesthetic presentation, the maps had excellent marketability. Their presence on booksellers' shelves thus constituted a competitive threat to ADC's work product. Mr. Swauger did not review the maps for possible infringement. A later review by ADC revealed the presence of copyright traps² on Franklin's products. ADC filed suit, alleging that six Franklin publications infringed upon seven ADC maps.³ When Franklin published new editions of its maps in 1995,

2. Copyright traps are fictitious names, streets, etc., placed on maps by the publisher. They are a recognized means for detecting and demonstrating copying by showing that the fictitious entries also appear in the alleged infringer's work. See 1 William F. Patry, Copyright Law and Practice 692 (1994). Approximately 200 trap streets exist in ADC's maps in suit.

3. The allegedly infringing Franklin Maps' publications are: (1) Metro Philadelphia, PA, including Main Line and Delaware County, Eastern Montgomery County, copyright 1994, 1995, (2) Metro Atlas, Bucks, Chester, Delaware, Montgomery, Philadelphia Counties of Pennsylvania, copyright 1993, (3) Franklin's Street and Zip Code Atlas of Bucks County, PA and Montgomery County, PA, copyright 1991, (4) Franklin's Map of Chester County, Zip Code Edition, copyright 1992, (5) Franklin's Map of Philadelphia and Suburbs, Zip Code Edition, copyright 1993, and (6) Franklin's Map of the Main Line, PA, including the entire Blue Route (I-476), copyright 1993. Plaintiff withdrew its infringement claims as to the Main Line map in the Acknowledgments filed on March 3, 1997.

The ADC publications from which Franklin Maps allegedly copied are: (1) Bucks County, PA Street Map Book dated 8/22/90, Registration No. VA 420 890, (2) Bucks County, PA Street Map Book dated 3/13/92, Registration No. VA 495 575, (3) Chester County, PA Street Map Book dated 8/22/90, Registration No. VA 420 893,
(continued...)

ADC filed a second action.⁴ ADC has received certificates of registration from the Register of Copyrights for each of its maps in suit.

The defendant, Andrew H. Amsterdam, is the sole proprietor of Franklin Maps, a company founded by his father in Philadelphia in 1928. In 1986, Franklin moved to its current location in King of Prussia, Pennsylvania. It has six employees, not including Mr. Amsterdam and his wife, Judith, who also work for the company. Franklin operates a retail map store and produces maps of Philadelphia and its neighboring counties. Among its products is the 1993 Metro Atlas of Bucks, Chester, Delaware, Montgomery and Philadelphia Counties of Pennsylvania ("1993 Metro Atlas"). Franklin derived its 1994/1995 Metro Philadelphia Atlas and the 1995 county atlases from this 1993 Metro Atlas. Mr. Amsterdam's best estimate is that it cost \$ 250,000 to create the 1993 Metro Atlas.

3. (...continued)

(4) Delaware County, PA Street Map Book dated 3/13/92, Registration No. 495 570, (5) Montgomery County, PA Street Map Book dated 10/2/90, Registration No. VA 428 855, (6) Philadelphia, PA & Vicinity Street Map Book dated 3/13/92, Registration No. VA 495 571, and (7) Philadelphia, PA & Vicinity Street Map Book dated 11/8/93, Registration No. VA 607 150.

4. The Franklin Maps' publications, all copyright 1995, identified in the second complaint are: (1) Five County Metro Street Atlas, (2) Metro Street Atlas of Bucks County, PA, (3) Metro Street Atlas of Chester County, PA, (4) Metro Street Atlas of Delaware County, PA, (5) Metro Street Atlas of Montgomery County, PA, and (6) Metro Street Atlas of Philadelphia, PA.

Kenneth Easterday is a former Franklin Maps' employee. Hired out of college by Amsterdam in early 1991, Mr. Easterday headed Franklin's drafting department for the 1993 Metro Atlas project. After the project's completion, Mr. Easterday concluded that there was no room for advancement at Franklin and began searching for employment elsewhere. In June, 1994, he left Franklin to begin employment with ADC in its digital/ computer mapping division. He later was promoted to Compilation Supervisor, in which role he reviewed Franklin's products for copyright traps. When he found several traps, his employer requested that he do an in-depth examination of all similarities between ADC's and Franklin's products, including the 1993 Metro Atlas.

Before publication of the 1993 Metro Atlas, Franklin never had published an atlas of the Philadelphia region. The 1993 Metro Atlas was broader in scope than any prior Franklin publication. The end product included 34,000 streets.

Atlas production began in early 1992. To produce the atlas, the draftpersons gathered geographic information from various sources. Then, they scribed a specific type of information, such as political boundaries or secondary roads, onto a "layer," a clear piece of plastic with an opaque surface, which served as a negative. Draftpersons scribe a layer by using specialized tools to dig into the opaque surface of the plastic. Multiple layers form the map as a whole.

Because the manual technique of scribing is difficult, scribed information often is imprecise. To obtain an exact duplication of the source material would be a time-consuming, difficult, and unnecessary process. A slightly misplaced, or mis-angled, intersection will not preclude a motorist from finding the way, making the right turn. Franklin thus tolerated variations and errors, so long as they did not affect the product's usability as a general representation of the area. In addition, draftpersons frequently must use their best judgment about how to align streets and subdivisions. Alignment refers generally to the placement and orientation of a street or subdivision on a map. When a draftperson finds a new development depicted on a county tax map, he will trace it, or sketch it freehand onto a piece of paper, trying to duplicate it as exactly as possible. During the process of transferring that depiction onto the plastic layer, the precise north-south position is sometimes slightly askew, one way or the other. So also, the tracing or sketching process can produce slight digressions of the pencil or different degrees of curvature. These differences in alignments which arise during map production, if they are precisely reflected by the cartographic poacher, are telltale signs of copying. Examples are reproduced in the Appendix.

Five or six draftpersons worked on Franklin's 1993 Metro Atlas, including Mr. Easterday, but excluding Mr. Amsterdam. Mr. Easterday, a skilled draftperson, did most of the scribing. He began by using public-domain information: United

States Geological Survey ("USGS") maps and maps from the Delaware Valley Regional Planning Commission ("DVRPC"). The USGS and DVRPC maps provided approximately 60% of the information for the 1993 Metro Atlas. Some of the remaining 40% was derived from tax maps, existing Franklin Maps products, and road research. Chris Peterson, a former draftsperson at Franklin Maps, confirms the use of these sources. Most of the remaining 40%, however, was information gleaned from ADC atlases.

Mr. Easterday believes that Mr. Amsterdam authorized him to copy from ADC maps; he recalls that Mr. Amsterdam specifically told him that anything he took off an ADC map was to be verified from other sources. Verification, Mr. Easterday believed, would prevent infringement litigation. When information from ADC had been verified, either by locating it in a non-ADC source or by physically driving through and inspecting the area in question, Mr. Easterday would either place the ADC map onto a light table and trace a copy onto the DVRPC or the layer itself, or he would freehand a copy of the information. The information thus copied included streets, subdivisions, and points of interests. Mr. Easterday thought these shortcuts might be improper, but felt that Franklin was bending the rules, not breaking the law.

Mr. Amsterdam, however, intended that Mr. Easterday use ADC maps only for verification purposes, for double-checking, not for the origination of geographic research. In 1985, ADC and Mr. Amsterdam had engaged in trademark infringement litigation, which

apparently soured his taste for courtrooms. Copying from a competitor, even were the copying to occur only after verification, would have presented too great a risk of suit. Further, Mr. Amsterdam took pains to borrow maps from Montgomery County and to collect public-domain information from the tax assessment offices in Bucks, Chester, and Delaware Counties, as well as from the Philadelphia Department of Streets. Although Mr. Amsterdam gave this research to Mr. Easterday to use in the production in the 1993 Metro Atlas, Mr. Easterday used these tax maps sparingly.

On the other hand, I do not find that Mr. Amsterdam unequivocally instructed Mr. Easterday not to take anything from ADC. Such an instruction would be at odds with the acknowledged purpose of keeping competitors' products in the drafting room for use as reference material. ADC and Patton maps were available to verify information, especially when there was a conflict, such as a disputed spelling, between a Franklin product and a government map. Rather, I find that Mr. Amsterdam gave unclear instructions about the use of ADC maps. He remained unaware of Mr. Easterday's misinterpretation, however, because he never saw him copying from an ADC map. Yet, he now admits that Franklin must have copied from ADC products during the production of the 1993 Metro Atlas. Indeed, because so many of ADC's copyright traps appeared within the Franklin atlases, that copying took place is clear, beyond cavil.

After completion of the 1993 Metro Atlas, Mr. Amsterdam perceived Mr. Easterday's waning interest in his work at Franklin and thus, in September, 1993, demoted him to be the head of the darkroom. Although Mr. Easterday did much of the same work as during the production of the Atlas, he no longer supervised others. Mr. Easterday claimed that he did not feel this was a demotion; he simply felt his duties changed because the nature of the work to be done had changed. Updating the 1993 Metro Atlas for the 1995 edition was one of his new duties.

Generally, even a professional cartographer cannot tell just by looking at a map whether information comes from one source, such as ADC, or another. To make that determination, it is necessary to review the source material and determine which information could have come only from ADC because it appears on no other map. Mr. Easterday performed such a review for the 1993 Metro Atlas, using DVRPC maps, earlier Franklin products, and maps from the Bucks County and Montgomery County Planning Commissions. He did not use county tax maps. The result was a list of four ADC copyright traps and 804 perceived similarities in road alignments and positioning of symbols. Two of these alleged road alignments were later deleted. During his review of the 1995 Metro Atlas, he found 179 similar road alignments and symbol positions (ten of which Plaintiff later deleted) in addition to those already identified in the 1993 Metro Atlas. He also found twenty-five more copyright traps. Mr. Amsterdam

attributes the additional copyright traps to Mr. Easterday's sloppy work on the update.

Mr. Easterday was not involved in the preparation of Franklin's 1991 map of Bucks and Montgomery County, 1992 Chester County map, or its 1993 Philadelphia map. He did, however, review these maps for ADC and found 91 similar road alignments on the Bucks/Montgomery Counties map, and 17 similar alignments on the Chester County map. He also found 24 copyright traps on the Bucks/Montgomery Counties map, 18 on the Chester County map, and 6 on the Philadelphia map. Mr. Amsterdam credibly attributes the presence of these copyright traps to one Robin Lupinacci, a former Franklin Maps' employee. Mr. Amsterdam fired him when he realized Mr. Lupinacci was copying from an ADC map rather than doing research in the courthouse.

Mr. Amsterdam learned of ADC's objections to Franklin's products in early April, 1995 when this suit was filed. Because Franklin had sent its 1995 atlases to the printer in March, 1995, Franklin made no changes to the 1995 atlases after ADC filed suit. Franklin has since removed all ADC trap streets from its negatives. No street alignments have been changed, however. Mr. Amsterdam believes that a street's alignment is a fact and that he does not know what he could do to make them different. He considers his maps to be "clean."

This court has federal-question jurisdiction over these claims under 28 U.S.C. § 1338(a) and 17 U.S.C. § 101 et seq.

Venue is proper in this district under 28 U.S.C. §§ 1391 and 1400(a).

DISCUSSION

I. Proving Infringement

To prove copyright infringement, a plaintiff must prove, at a minimum, (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original. Feist Publications, Inc. v. Rural Telephone Serv. Co. Inc., 499 U.S. 340, 361 (1991). In addition, a plaintiff must show that (3) the copying was sufficiently substantial to constitute an improper appropriation of plaintiff's work. See Ford Motor Co. v. Summit Products, Inc., 930 F.2d 277, 290-91 (3d Cir.), cert. denied, 502 U.S. 939 (1991); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir.), cert. denied, 423 U.S. 863 (1975).

Plaintiff ADC has satisfied the first prong of the test for copyright infringement. A certificate of registration made within five years after the first publication of a work is prima facie evidence of the validity of the copyright. 17 U.S.C. § 410(c). ADC has placed into evidence its certificates of registration for the maps in suit.

II. Evidence of Copying

The second prong of the infringement test requires a finding that the defendant has copied original elements of

plaintiff's work. As to copying, there is no quarrel, either.

"Copying" means the act of infringing any of the exclusive rights enumerated in 17 U.S.C. § 106, including the rights to reproduce the copyrighted work and to prepare derivative works based upon the copyrighted work. Ford Motor Co., 930 F.2d at 291. If direct evidence of copying is unavailable, copying may be proved indirectly by showing that the defendant had access to the copyrighted material, and that the allegedly infringing work is substantially similar to the copyrighted work. Id.

Plaintiff has at least partially satisfied the second prong of the infringement test; there is no question that Franklin employees copied portions of ADC's maps. Andrew Amsterdam admitted it. He observed one of his employees, Robin Lupinacci, copying an ADC map, and further acknowledged that ADC maps must have been copied during the production of the 1993 Metro Atlas. Kenneth Easterday also testified that, while working for Franklin Maps, he copied from ADC maps to create the 1993 Metro Atlas.

This testimony is compellingly corroborated by the evidence of copied copyright traps. Eighty-one traps appear in five distinct Franklin products.⁵ Principally, these traps were fictitious streets, little dead-end additions to the roadways of

5. Specifically, 4 traps appear in the 1993 Metro Atlas, 29 traps in the 1995 Metro Atlas, 24 traps in the Bucks/Montgomery Counties Atlas, 18 in the Chester County map, and 6 in the map of Philadelphia and Suburbs. Some traps appear in more than one publication.

the region that had no basis in the reality of what was actually on the ground. They had their genesis solely in the creative minds of ADC cartographers who seeded these fictional geographic tidbits here and there in order to capture the unwary cartographic plagiarist. In short, the assertion that ADC maps were present in Franklin's drafting room solely for the purpose of double-checking, for corroborative research, is weakened by evidence of direct copying, by the appearance of copyright traps and similar road alignments, as well as by the defendant's frank admissions.

The question thus turns to not whether there was copying, but to the significant question of whether that which was copied constituted original, protectible expression.

III. Maps and The Originality Requirement

Whether maps are copyrightable is in considerable doubt. See David B. Wolf, Is There Any Copyright Protection for Maps After Feist?, 39 J. Copyright Soc'y U.S.A. 224 (1992). The law traditionally has been that maps are a proper subject of copyright. See, e.g., Rockford Map Publishers, Inc. v. Directory Service Co., 768 F.2d 145 (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986). But the Supreme Court has called the traditional result into grave doubt by rejecting the sweat-of-the-brow doctrine under which courts formerly had protected maps. See Feist Publications, Inc. v. Rural Telephone Serv. Co. Inc., 499 U.S. 340 (1991).

A. The Traditional Perspective

Maps have been the object of copyright protection since the first Copyright Act in 1790. See 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2.08[A][1] (1996).

Currently, the Copyright Act protects "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). Although the Copyright Act specifically mentions maps only in connection to the "pictorial, graphic, and sculptural works"⁶ of authorship, courts also have protected maps as "compilations."⁷ See, e.g., Rockford Map Publishers, Inc., 768 F.2d at 148.

6. "Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.
17 U.S.C. § 101 (emphasis added).

7. A compilation "is a work formed by the collection and assembling of preexisting material 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. The term 'compilation' includes collective works." 17 U.S.C. § 101. The Copyright Act accords compilations only limited protection. See 17 U.S.C. § 103(b).

Traditionally, courts have perceived maps as a collection of pictorial facts representing an objective reality. See Wolf, supra, at 227-28. The originality in presentation of facts was considered far less important than the facts themselves, which were protected under the sweat-of-the-brow doctrine. Id. Under this doctrine, a copyright was perceived as the reward for the intense labor of compiling facts. Feist, 499 U.S. at 352. Because Feist roundly rejected the sweat-of-the-brow doctrine, a new perspective on maps is needed if they are to be protected by copyright law. Since originality is the touchstone for protectible expression, the focus must be upon the originality requirement.

A certificate of registration is prima facie evidence of validity, and hence of originality, of the copyrighted work as a whole. Because ADC has such certificates for its atlases, the originality of those atlases, viewed in their entirety, is not at issue here. Yet an understanding of why a map as a whole may be considered an original work of authorship is essential to an understanding of why and to what extent individual elements of a map are considered original, and hence protectible, under copyright law.

B. Protecting Maps After Feist

Although Feist rejects the sweat-of-the-brow doctrine, its holding still permits maps to be protected as factual compilations. Feist held that a factual compilation is

copyrightable if it "features an original selection or arrangement of facts." 499 U.S. at 350. Originality requires a compiler to make at least minimally creative, independent choices regarding the selection and arrangement of facts. Id. at 348. The "requisite level of creativity is extremely low; even a slight amount will suffice. 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." Id. at 345 (quoting 1 M. Nimmer & D. Nimmer, Copyright § 1.08[C][1] (1990)). An alphabetical listing of surnames in a telephone directory, however, is "devoid of even the slightest trace of creativity" and thus lacks the requisite originality. Feist, 499 U.S. at 362-63. In short, so long as a compiler uses a minimal degree of creativity in independently selecting and arranging geographic facts on a map, the map as a whole may be protected as a compilation.⁸

8. Feist also undermines the so-called "direct observation" rule, first articulated in Amsterdam v. Triangle Publications, Inc., 189 F.2d 104, 106 (3d Cir. 1951). In Amsterdam, the court concluded that a map lacked the requisite degree of originality when "the actual original work of surveying, calculating and investigating . . . was so negligible that it may be discounted entirely," reasoning that a map "is protected only when the publisher . . . obtains originally some of that information by the sweat of his own brow." Id. Amsterdam implies that a map's presentation of geographic features is not original unless the cartographer directly observed those features. Under this rule, none of Franklin's maps would be protected because, but for the occasional, informal drive through a neighborhood, Franklin's maps were created by combining information from existing sources. Amsterdam, however, premises its conclusion on the sweat-of-the-brow doctrine rejected by Feist. Because Feist undermines its reasoning, the
(continued...)

Road map compilers such as ADC and Franklin satisfy the originality standard articulated in Feist. Mapmakers must make independent choices regarding the selection and arrangement of geographic information, choices which manifest far more than a minimal degree of creativity. For example, mapmakers decide how detailed the map will be, whether to include unnamed or private roads, the thickness of lines used to delineate roads, how to indicate political boundaries, and which color scheme to use. These decisions place maps on a creative level above that of an alphabetical listing of names in a phone book. Thus, maps may be protected as factual compilations under Feist.

The problem with viewing maps purely as factual compilations is that it affords them only a very limited protection. See Dennis S. Karjala, Copyright in Electronic Maps, 35 Jurimetrics J. 395 (1995). Viewing maps as factual compilations also ignores the statutory categorization of maps as "pictorial, graphic, and sculptural" works of authorship. Yet the realities of mapmaking demonstrate that they are also factual compilations. The two are not mutually exclusive: "authorship may consist of compilation or pictorial combination, or a combination of the two." 1 William F. Patry, Copyright Law and Practice 248 (1994). If a map is viewed more as a pictorial expression than as a factual compilation, the map will be entitled to greater protection under copyright law. See Wolf,

8. (...continued)
"direct-observation" rule does not survive Feist.

supra. See also Mason v. Montgomery Data, Inc., 967 F.2d 135 (5th Cir. 1992) (emphasizing the expressive element in maps to determine that the merger doctrine does not apply to maps).

C. Protectible Map Elements

While a map as a whole is copyrightable, the copyright does not protect all of a map's individual elements. "The mere fact that a work is copyrighted does not mean that every element of the work may be protected." Feist, 499 U.S. at 348.

Generally, facts are unprotected elements within a copyrighted work because they lack originality. Id. at 347. Although a copyright may protect an original selection or arrangement of facts, "a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement." Id. at 349.

Well over a century ago, the Supreme Court held that arbitrary signs and keys are not copyrightable elements. See Perris v. Hexamer, 99 U.S. 674, 676 (1879) ("The complainants have no more an exclusive right to use the form of the characters they employ to express their ideas upon the face of the map, than they have to use the form of type they select to print the key."). Similarly, a copyright does not protect the names of geographic locations. See Hayden v. Chalfant Press, Inc., 281 F.2d 543, 547 (9th Cir. 1960). The evidence in this case focused

upon the copying of three types of information: copyright traps, positions of symbols, and street alignments.

Copying of copyright traps consisting of "false facts" does not constitute infringement. See Nester's Map & Guide Corp. v. Hagstrom Map Co., 796 F. Supp. 729, 733 (E.D.N.Y. 1992) ("To treat `false' facts interspersed among actual facts and represented as actual facts as fiction would mean that no one could ever reproduce or copy actual facts without risk of reproducing a false fact and thereby violating a copyright."); Nimmer, supra, § 13.03[C]. The traps here easily fit the "false fact" mold. As noted above, the names of geographic features may not be copyrighted; thus, fictitious names may not be copyrighted. Similarly, the existence, or non-existence, of a road is a non-copyrightable "fact."

I also find that a copyright does not protect the exact placement of a symbol on a map. The positions of symbols on a map are simply the cartographic disclosure of geographic facts: the location of schools, post offices, police stations, etc. The precise positioning of these symbols is more a factual determination than an expressive one.

The question of street alignment devolves into whether a street's placement upon a map is a matter of originality, or is merely a rote reiteration of a geographic fact. To place these streets upon a map, cartographers would trace or make a freehand copy of the tax map or subdivision plan, trying to do so as accurately as possible. Any creativity or originality in that

exercise would result not so much from a desire to be expressive, but from an inability to keep the tracing pencil exactly above the line they were trying to trace. Although that process no doubt entails much expensive sweat of the brow,⁹ I do not see it as resulting in an original map element. The location and course of a road are fundamentally factual.

A similar analysis applies to subdivision alignment. Most of the subdivisions here in question involve new developments, where contractors have put in roads and loops and cul-de-sacs to enable the people who buy the houses to get from those houses to a more major, pre-existing, artery. When a cartographer has a tax map or plat of a subdivision which is connected to an existing main road by a single street, that subdivision usually cannot be manually aligned with absolute accuracy. Thus, given the same raw data, it is highly unlikely that two cartographers would scribe identical alignments; they would tilt a little bit to the right or to the left. Again, I do not view this tilting as some exercise in originality, but rather as reflecting the fallibility of human nature in trying to transfer the exact placement of the addition to the layer from which the map ultimately will be printed.

In sum, although there is a certain creativity in street and subdivision alignment, any such creativity is

9. As mentioned above, Defendant spent approximately \$ 250,000 to create his maps, while Plaintiff's maps cost over \$ 500,000 to produce.

fundamentally inadvertent. The purpose of a cartographer is to scribe the actual facts, and not to have them stray from the geographic reality, tilting from the way they actually appear on the source material or on the ground.

Finally, ADC presented evidence that Franklin copied several lists of street names. Some developments contain so many little streets that a cartographer, rather than trying to fit all the names onto the streets themselves, will put numbers on the streets and then place a list of the numbered names nearby. Because it often entails more than a minimal degree of independent creativity to ascertain which arrangement of numbers and names will be the most clear to the directionally challenged driver, the order in which these names is listed may be protected as an original selection and arrangement of facts.

Three lists appear in Plaintiff's exhibits which may be protected under copyright law. One list, that of roads off Kimberton Road in Chester County, clearly does not infringe: Franklin's arrangement does not duplicate the order in which ADC lists the street names (compare page 76 of 1993 Metro Atlas with page 14 of ADC's Chester County Atlas). The list of roads near Route 30 in Chester County also does not infringe, but for a different reason: assigning numbers clockwise is too unoriginal to merit copyright protection (compare page 127 of 1993 Metro Atlas with page 28 of ADC's Chester County Atlas). The numbering of the eighteen roads near I-76 in Chester County is not so simple, and except for switching the last two roads in the list,

Franklin's list exactly duplicates that of ADC (compare page 94 of 1993 Metro Atlas and grid EE-15 of Franklin's Chester County sheet map with page 21 of ADC's Chester County Atlas). Thus, Plaintiff has shown that Defendant copied an original element from an ADC atlas.

However, as discussed above, a plaintiff must also show that the copying of original elements was sufficiently substantial to constitute an improper appropriation of plaintiff's work. This one list is neither quantitatively nor qualitatively significant in ADC's atlas. The situation is analogous to the copying of a single, undistinguished sentence from a book; such de minimis copying generally would not warrant a finding of substantial similarity. See Nimmer, supra, § 13.03[A][2]. Here, too, I find that the copying of this one list is not sufficiently substantial to constitute an improper appropriation of material from ADC's atlases.

IV. CONCLUSION

In sum, I find that the defendant copied one original map element. However, the copying of a single list of street names is not an improper appropriation which would support a finding of infringement in this case. Although Defendant did copy many isolated, factual elements from ADC atlases, factual appropriations per se do not constitute copyright infringement. Overall, looking at the totality of the taking, the conclusion obtains that Defendant did not so pervasively copy Plaintiff's

protectible selection and arrangement of the facts so as to prevail on this cause of action. I thus conclude that the defendant did not infringe Plaintiff's copyrights.

I recognize that in according maps but a thin layer of protection, there is a potential disincentive for publishers to undertake the expensive process of compiling the facts, and making these very useful maps available to the public. But under Feist and its progeny, that appears today to be the law.

Hence, the following order.

IN THE UNITED STATES DISTRICT COURT
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Defendant.

Civil Action
Nos. 95-1987, 95-6036

O R D E R

AND NOW, this day of June, 1997, upon the reasoning
in the attached Memorandum, judgment is entered for the Defendant
and against the Plaintiff.

BY THE COURT

Robert S. Gawthrop, III, J.

A P P E N D I X