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Note to Theresa: as you can see, part I is more polished than part II, and there is more to come. Any comments? They'd be appreciated!

Thanks for being so understanding and helpful with this project. I hope you like this.

Best,

Wendy

Reality as Artifact: From *Feist* to Fair Use

by Wendy J. Gordon*

I.

Lawyers more than most people should be aware that what language calls "facts" are not necessarily equivalent to things that exist in the world. After all, when in ordinary conversation someone says "it's a fact that this [*X*] happened," the speaker usually means, "I believe the thing I describe has happened in the world". But when a litigator says something is a "fact" she often means only that a good faith argument can be made on behalf of its existence. Two sets of fact finders can look at the same event and come to diametrically opposed conclusions-- each of which is binding, but on different people.[1] Most law students come to accept pragmatically this necessary byproduct of the adversary system.[2]

Yet lawyers have not yet accepted that all investigative efforts are similarly limited by observers' expertise, viewpoints, and tools. A Justice on the Supreme Court recently announced that facts like population density cannot be "created",[3] and used that assumption to deny copyright protection to inhabitant lists on the ground that facts are only "discovered" rather than "authored".[4] This was, of course, the famous *Feist* case, in which the Supreme Court denied copyright to the white pages of a Kansas telephone book .[5] Though I entirely concur with the Court's conclusion, the opinion's reasoning is deeply flawed. The opinion reads as if the Supreme Court had distinguished two sorts of facts-- Facts_1 which are 'out there in the world' and

$Facts_2$ which are human attempts to depict $Facts_1$ -- and had denied copyright in lists of $Facts_2$ on the ground that $Facts_1$ and $Facts_2$ were the same.

We academics may or may not applaud the denial of copyright, but most of us unite in protesting this conceptual error.[6] The embarrassingly high level of approximation in the United States census[7] should itself have reminded the judges that any "fact" on the books is indeed created by people; though the census-taker has not created what a number seeks to measure, the number itself has its origin with him. True, other observers might arrive at the same number, and this consideration is relevant to the policy question of whether the first counter should receive copyright in his number-- but this does not make the number on the printed page an uncreated artifact.

Assume for the moment that the Supreme Court had admitted in *Feist* that facts and created works are not mutually exclusive categories -- that $Facts_2$ can be "created". Then the Court would have had to deny copyright in lists of $Facts_2$ for straightforward reasons of interpreting Congressional policy and statute.

This would have been a significant step forward, for such an approach would have forced the Court to articulate the policy weighings that can affect how the law will treat the range of created works that function as fact. [8] By instead continuing to pretend that created facts simply do not exist, the Court disabled copyright from dealing with the other contexts in which the hybrid nature[9] of created facts causes conceptual and practical difficulties.

This short article deals with works which do not primarily attempt to reflect the world; they are not $Facts_2$ seeking to describe $Facts_1$. Rather, they are imaginative works -- songs, cartoons, architectural designs, sculptures, stories, letters -- in which the depiction of $Facts_1$ plays a minor and untroubling role.[10] The reason these works are problematic is because they

are themselves facts with which their audiences have to deal. They are a special species of 'facts in the world' because they are so clearly a product of special human creation; let us call them art/facts, or $Facts_{1a}$.

The existence of $Facts_{1a}$ should have been no surprise to copyright law. After all, the law of evidence applies as much to copyright trials as to other kinds of litigation, and the Federal Code of Evidence has long recognized that sometimes testimony on prior utterances can be relevant not for the truth of the matter asserted, but rather to show that the utterance (a fact) occurred. A jury is generally entitled to make conclusions about 'facts in the world' from testimony by any person who directly witnessed them, and $Facts_{1a}$ are no exception. Therefore the same utterance that is hearsay and inadmissable as a $Facts_2$ reflection of what occurred can, at another time, be admitted as a $Fact_{1a}$ --- not hearsay at all. [11]

But though evidence law is ready to admit that an utterance originally intended as a communication can later function as a fact, copyright law has trouble with that notion. Judge Pierre Leval twice gave special latitude to biographers who used, as facts, quotations from their subjects' unpublished writings; his approach was emphatically rejected.[12] (Judge Leval, standing by his view that "at times it is the subject's very words that are the facts,"[13] described the cases as placing him "at the cutting edge of the law . . . in the role of a salami".)[14]

Some progress has been made on the question of biographers' freedom to quote,[15] but the larger issue remains unsettled. When an artist sends an artifact into the world, it affects other people and becomes part of their reality. And to depict their reality accurately, they may need to reproduce the artifact.

The assumption that "fact" and "created works" are mutually exclusive categories led to denying $Facts_2$ protection in *Feist*. In cases where the object is

more obviously creative the same spurious need to chose a single category leads to overprotection of $Facts_{1a}$. The latter result is very troubling, for the overprotection of art/facts enables private censors to disable their critics and hamper accurate discussion of their lives. In short, the epistemological error has serious free speech consequences.

II.

Much of the modern environment is a product of deliberate human creation -- our world is constituted more by buildings and landscape architecture than by natural woods and water -- and art will address as its object much that is itself art. This is obvious when one considers the painting of cityscapes, the performance of parodies, or much of the art known as post-modern. The use of prior art as object is less obvious yet nevertheless present in virtually all writing.[16] When use of a predecessor's art includes substantial detail, a collision may occur between copyright and the second author's desire to depict accurately the forces of which her world consists. The artifact that began as pure creation is now a fact of life -- and in its transmutation of function the policies against the protection of fact become relevant. For it is a human necessity to discuss and transform the facts that influence the structures of one's mind.

> [T]he row over "The Satanic Verses" was at bottom an argument about who should have power over the grand narrative, the Story of Islam, and that that power must belong equally to everyone. . . . [T]hose who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts.
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> - - - Salman Rushdie, speech at Columbia University [17]

One way to resolve this conflict is to condition the enforcement of copyright on the preservation of a certain equality between early and later authors, namely, an equality of subject matters. The desire to preserve such an equality arguably operates in John Locke's labor theory of property, for Locke's theory includes a proviso that private property should not arise unless "enough and as good" opportunities remain open to the non-propertied. [18] Regardless of whether one follows Locke, a guarantee of an equality of subject matters is an independently justifiable moral precondition to the exercise of ownership rights.

One substantive implication of so guaranteeing equality among authorial starting points is that artists who had available for depiction on their canvases all their surroundings should have no entitlement to bar the replication of surroundings they in turn create, and that in turn a second generation should have no power to bar a third from such replication. Thus an artist could not justly bar a later comer from placing on later canvas some version of the predecessor's painting that hangs-- perhaps as a cheap print behind a human model's head-- on the successor's kitchen wall.

There are hints of this approach in copyright commentary. Nimmer's argument that "differences of function" should play a large role in fair use doctrine implicitly suggests that latitude should be given when one copies another's copyrighted work as an object.[19] Judge Leval took something like the approach I suggest in his now-superseded opinion in New Era v. Henry Holt & Co.[20]:

> "[T]he fact on which the biographer/critic comments is the protected exoression. ... The words are the 'facts' that support the conclusion... The objective of fair use demands that [such instances] come within its scope..." (Emphasis in original.)

John Carlin argued for something similar in Culture Vultures.[21] Yet most courts remain innume to its appeal,[22] even in cases such as Air Pirates (involving a satire of the Mickey Mouse characters), where the used art is not only object but enemy.

The notion of art as object, art as environment and raw material, has yet to enter mainstream law as a sufficient basis for fair use. One reason is undoubtedly the fear that such a notion cannot be articulated in a manner narrow enough to prevent it from making every infringement suit an exercise in uncertainty.

So part of the challenge I face is a matter of policy to convince the legal audience of the truth of this normative proposition: that when art is used as object its author should not be able to enjoin it as infringement. The other part of the challenge is a matter of legal sylistics to state that normative truth coherently and narrowly, in a way that will not threaten to erode copyright as a whole.

Footnotes

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1 In first year courses, law students are usually introduced to this odd phenomenon through a pair of cases arising out of an oil spill and subsequent fire. In both cases the question was whether a reasonable man could have foreseen that the oil could ignite when spread on water. In the first case the dispute was between two parties each of whom would have been hurt by such a finding; not surprisingly, after listening to the parties' witnesses (including a noted expert), the court concluded that fire on the oily water was unforeseeable. Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd. (The Wagon Mound) Privy Council, 1961; [1961] A.C. 338. The second *Wagon Mound* case included a party who would have been helped rather than hurt by a finding of foreseeability. This time, an equally objective finder of fact came to the conclusion that a slight danger of fire could have been foreseen. Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. (Wagon Mound No. 2), [1967] 1 A.C. 617.

2 In addition, the collateral estoppel doctrine often prevents relitigation of facts. See Blonder-Tongue Laboratories, Inc. v University of Illinois Foundation, 402 U.S. 313 (1971) (party who has had full and fair opportunity to litigate a fact that is resolved against him may not relitigate that fact in later suits with third parties).

3 Feist Publications Inc. v Rural Telephone, 111 S. Ct. 1282, __ (1991) (O'Connor, J., using the census as an example).

4 *Id.* (denying copyright to white pages listing Kansas area's inhabitants by name, town and telephone numbers).

5 *Id.*

6 See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 27 Virginia Law Review__ at nn. 21-22 (forthcoming, 1992) (pointing out the conceptual error but agreeing with the Court's result on other grounds); Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 996-7 (1990) (arguing that facts "do not exist independently of the lenses through which they are viewed"); Jane Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History After* Hoehling v Universal City Studios, 29 J. Copyright Soc'y USA 647, 658 (1982)(identifying the "fallacy" in the

"Platonic fact precept"that "facts merely exist"); but see 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §§ 2.03(e), 2.11 (A)(1990) (arguing that facts are uncopyrightable because they can only be discovered and not created; relied upon by the Court in *Feist).*

On the connections between language and reality generally, see Hanna Fenichel Pitkin, Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought (U. of California Press, 1972).

[7] See, e.g., "The Uncountables; The Census", 320 *Economist* A29 (July 20, 1991).

[8] It also would have eliminated the supremacy clause problems introduced by the real opinion's odd epistemology. First, there could be a conflict over the interpretation of section 301 of the Copyright Act, 17 USC § 301. That section seems to state that anything that is not a "work of authorship" can be regulated by states, so that the Court's apparent view that uncreatively arranged facts cannot be"works of authorship" may open the door to state protection. Yet the legislative history of section 301 also indicates that fixed works which fail to attain copyrightability because of insufficent creativity are still within Congress's exclusive power. Under that section, then, can states protect works whose preparers' only skill was in discovering $Facts_2$? Second, if section 301 were interpreted to allow state protection for facts, this might conflict with general supremacy clause principles -- under which it would be argued that state protection of facts must be pre-empted lest it erode the foundations of copyright. The Supreme Court has not yet decided whether section 301 is itself exhaustive on the pre-emption question. See Gordon, *On Owning, supra* note __ at nn. 21-22, and the sources cited therein (on the *Feist* pre-emption question); Gordon, *Toward a Jurisprudence, supra* note __ at 1020-26 (on pre-emption generally).

[9] The "created" part of their nature pulls toward protectionism; the "fact" part pulls toward freedom of use.

[10] For example, perhaps the song names a city that exists, or the cartoon depicts a face that exists.

[11] For example, assume that some years ago a branch office employee, Jane Doe, called the boss at the main office to say, "There's an emergency. You better come over." In a later trial Doe is unavailable but the boss, Adam Smith, wants to testify that this was said to him. If Smith is introducing the testimony to prove there was an emergency, he is introducing it as a $Fact_2$ reflection of what Doe said had occurred, and it will probably be excluded as hearsay: ordinarily the jury should not make conclusions about $Facts_1$ [was there an emergency?] when the speaker of the $Fact_2$ is not present for her credibility to be assessed. With Doe absent and unavailable for cross-examination, it is highly risky to make any conclusions about whether she was telling the truth.

But Smith may want to introduce the testimony only to prove that the phone call occurred (a $Fact_{1a}$), perhaps to show that he had some reason to investigate what was occurring at the branch. In that case Smith's testimony about Doe's utterance is not hearsay; the jury is entitled to make conclusions about events from any person who observed them, and Smith witnessed this $Fact_{1a}$. The jurors do not need Doe to be present to make a judgment about whether Smith received a phone call and what words he heard over the line; Smith's demeanor should tell them what they need to know on this score.

[12] The first case involved the letters of J.D. Salinger. Salinger v. Random House, Inc., 650 F. Supp. 413, 424 (S.D.N.Y. 1986) (preliminary injunction denied) (the "fact" issue appears here by implication), *rev'd*, 811 F. 2d 90, 96 (2nd Cir. 1987) (asserting that a biographer loses little by being required to use "words of his own choosing" instead of his subject's words), *rehearing den.*, 818 F. 2d 252 (2nd Cir. 1987); *cert. denied*, 108 S. Ct. 213 (1987).

The second case involved the unpublished work of L. Ron Hubbard, founder of the Church of Scientology. New Era Pub. Int'l v. Henry Holt & Co., 695 F.Supp. 1493 (S.D.N.Y 1988); *aff'd on other grounds*, 873 F. 2d 576, 2d Cir. 1989). Here the use of words as fact is a more explicit focus of discussion.

[13] Pierre N. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture,* 36 J. Copyright Soc'y USA 167, 171(1989).

[14] *Id.* at 168. For Judge Leval's views on the use of created work as fact, also see Pierre N. Leval, *Toward a Fair Use Standard,* 103 Harv L Rev 1105 , 1113 (1990) ("the need for quotation as a tool of accurate historical method").

[15] See Wright v. Warner Books, 748 F Supp 105 (S.D.N.Y. 1990) (biographer of Richard Wright permitted to include some quotations from unpublished work); also see the concurring opinion of Chief Judge Oakes in *New Era*, 873 F. 2d at 592.

[16] On the latter, consider the views of Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (Oxford, 1973); also see Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problems of Private Censorship,* 57 Chi L Rev 1009 at 1028-37 (1990).

[17] *Lessons, Harsh and Difficult, From 1,000 Days 'Trapped Inside a Metaphor'*, New York Times A16 (Dec. 12, 1991).

[18] [18]For a full exploration of the Lockean Proviso, see Gordon, Equality and Individualism in the Natural Law of Intellectual Property: A Property Right in Free Expression (1992 draft)(copy on file with the Journal of Law and Contemporary Problems).

[19] See the Nimmer Treatise at sec. 13.05[B].

[20]695 F. Supp. 1493, 1503 (S.D.N.Y. I988)

[21]13 Colum.-VLA J. L. & Arts 103 (1988).

[22]See Harper & Row.