COPYRIGHT DOCTRINE BEFORE THE TRIBUNAL OF SCIENCE: A RESPONSE TO PROFESSOR SILBEY

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I. INTRODUCTION

In an important new Article, titled *A Matter of Facts: The Evolution of the Copyright Fact-Exclusion and Its Implications for Disinformation and Democracy*, Professor Jessica Silbey argues provocatively that we "'only" know that facts are excluded from copyright protection because *Feist Publications v. Rural Telephone Service*[2] "says so."[3] She argues that both the nature and importance of facts has been underdefined and is in flux, nonetheless tracing it to the foundational cases of United States (U.S.) copyright law, and argues for a stronger exclusion of facts, which are *publici juris*, and belong in the public domain.[4] This central thesis is most agreeable, as is her analysis of doctrine and legislative history. The Article's rich study of American pragmatism, legal realism, the Cambridge school of analytic philosophy, and the "new social scientists," which Professor Silbey uses to support a strong fact-exclusion, is a tour de force. The Article ends with a list of proposals for a strong *Feist* application to evaluations, catalogs, manuals, and legal documents.[5] It also includes a call not to allow for industrial dilution of copyright's framework, including the facts and ideas exclusion.[6] Both are laudable and timely in the era of generative artificial intelligence (AI), where proposals to protect non-

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[2] 499 U.S. 340 (1991); *see also* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 339 (1992).

[3] Jessica Silbey, *A Matter of Facts: The Evolution of the Copyright Fact-Exclusion and Its Implications for Disinformation and Democracy*, [X] J. COPYRIGHT SOC'Y U.S.A. 1, 2 (2024).

[4] *Id.* at 5-6. *See* International News Service v. Associated Press, 248 U.S. 215, 234 (1918) ("the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is history of the day.").

[5] *Id.* at 86-94.

[6] *Id.* at 93-95.

authorial quasi-expression[7] or to prevent copying of non-expressive subject matter abound.[8]

While I agree with a call for a robust public domain and strong fact-exclusion, and devote Part II of this Response to explore further doctrinal grounds for them, in Part III I explore Silbey's argument that "pragmatist philosophy's challenge to universal truths combined with legal realist challenges to formalist jurisprudence eventually shape what is (or should be) copyright law's broad public domain in 'facts.'"[9] It is not immediately clear if pragmatism and realism are a solid ground for justifying strong legal principles and axioms.[10] Engaging with this provocative argument allows us to uncover what realism means to Professor Silbey and the much more radical consequences of her arguments. Part IV concludes.

II. DOCTRINAL FACT-EXCLUSION AND ANOTHER LINK IN THE CHAIN

The Copyright Act of 1976 protects only "original works of authorship."[11] The Act incorporates the idea-expression dichotomy but is not explicit about "facts."[12] It does, however specify, that while compilations are protectable, "preexisting material" is not.[13] Professor Silbey traces the case law antecedents of *Feist*'s statement of strong fact-exclusion, including the foundational subsistence case law,[14] establishing the idea-expression dichotomy and originality standard, as well as the cases denying protection in facts reported in news and in written judicial

[7] *See* Matt Blaszczyk, *Impossibility of Emergent Works' Protection in U.S. and EU Copyright Law*, 25 N.C. J.L. & TECH. 1 (2023).

[8] *See* Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. COPYRIGHT SOC'Y OF THE U.S.A. 291 (2019).

[9] Silbey, *supra* note 2, at 65.

[10] *See generally e.g.,* Lady Hale, *Principle and Pragmatism in Developing Private Law* (Cambridge Freshfields Lecture 2019, Mar. 7, 2019), https://www.supremecourt.uk/docs/speech-190307.pdf.

[11] 17 U.S.C. § 102(a).

[12] 17 U.S.C. § 102(b).

[13] 17 U.S.C. §103.

[14] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); Baker v. Selden, 101 U.S. 99 (1897); Bleistein v. Donaldson Lithographing Company, 188 U.S. 239 (1903).

opinions,[15] and ending with a fair use case which reverse-engineered the "distinction between copyrightable expression and uncopyrightable facts and idea" into the Constitution's First Amendment.[16] That said, Silbey regards *Feist*'s finding of principle[17] both "surprising *and* compelling."[18] While I agree with the latter, I am unsure about the former.

It seems to me that both idea and fact exclusions have always been principles of copyright, even if the cases which explicate the fact-exclusion came only in the 20th Century, when the news industry rose to prominence.[19] Isn't *Feist* simply another link in the chain,[20] which follows the originality and authorship standards using a principled common law method? This is what *Feist* says explicitly, saying that the sweat-of-the-brow doctrine had not been good law, and the courts which applied it erred.[21] One may wonder, however, if sweat-of-the-brow properly applied must lead to protection of facts. It seems not, and a virtue of principled doctrinal reasoning could be seen, for example, in the classic Australian case of *Victoria Park Racing and Recreation Grounds Co Ltd v. Taylor*,[22] finding that copyright protects "originality in the expression of thought,"[23] and thus it "does not operate to give any person an exclusive right to state or to describe particular facts. A person cannot by first announcing that a man fell off a bus or that a particular horse won a race prevent other people from stating those facts."[24] This case demonstrates that even the sweat-of-the-brow jurisdictions have been able to defend fact-exclusion and, more importantly, that principled reasoning following from the foundational assumptions of copyright, which could be described as "formalist," has

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[15] Int'l News Serv. v. Associated Press, 248 U.S. 215, 234 (1918); Wheaton v. Peters, 33 U.S. 591, 668 (1834)

[16] Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).

[17] A committed positivist, and perhaps a realist broadly understood, may speak of finding law, but perhaps a realist as stylized by Silbey cannot. *See e.g.,* Stephen E. Sachs, *Finding Law*, 107 Cal. L. Rev. 527, 536 (2019).

[18] Silbey, *supra* note 2, at 86.

[19] *See* Millar v. Taylor (1769) 98 ER 201.

[20] *See* RONALD DWORKIN, LAW'S EMPIRE 228-38 (1986).

[21] *Feist*, 499 U.S. at 353-354 ("Without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles."); *see also* Brian L. Frye, *Against Creativity*, 11 N.Y.U. J.L. & LIBERTY 426, 427 (2017) ("creativity requirement is indeed irrelevant, because it does not actually affect the scope of copyrightable subject matter").

[22] (1937) 5 8 CLR 479.

[23] *Id* (Latham CJ).

[24] *Id.* at 498.

excluded facts successfully. While it is fascinating to trace, together with Professor Silbey, the history of 20th Century "ontological politics" of facts, values, and ideas, it may also be unnecessary; copyright simply excludes both facts and ideas as unoriginal.[25] I will return to this point below.

While Silbey's analysis of the pre-*Feist* doctrine and legislative history is thorough (refreshingly analyzing even the *faux*-Georgist arguments made in the 1970s),[26] further support for her main thesis can be found in title 37 of the Code of Federal Regulations.[27] In a part titled "Material not subject to copyright," the Copyright Office's regulations specify several examples of works that are not subject to copyright and thus unregistrable, including "ideas, plans, methods, systems, or devices," as opposed to the manner in which they are expressed; what has now been labeled as blank forms, that is works "designed for recording information and do not in themselves convey information;" and, importantly, "works consisting entirely of information that is common property containing no original authorship."[28] The provision was adopted in 1957, and is substantially unchanged since.[29] Traces of the idea and fact exclusions can also be found in the Compendium of U.S. Copyright Office Practices, First Edition (1967).[30] Importantly, both the Regulations and Compendium express the principle of information or fact exclusion, long predating *Feist*, and thus allows to ask about *Feist's* importance in this history.

It is noteworthy that both fact-exclusion and idea-exclusion form part of the international copyright framework, being implicit in the

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[25] *Compare* Silbey, *supra* note 2, at 83, writing that the 20th century "epistemological paradigm shift troubles copyright law's fact-exclusion," *with* STANIFORTH RICKETSON, THE LAW OF INTELLECTUAL PROPERTY 185 (1984) ("it is a truism that there is no property in facts, just as there is no property in ideas"); Alan T. Dworkin, *Originality in the Law of Copyright*, 39 BOSTON U. L. REV. 526, 526 (1959) (copyright excludes what is not original).

[26] *See* Silbey, *supra* note 2, at 58-62 (describing how Irwin Karp, counsel for the Author's League of America, inverted the philosophy of Henry George, to advocate for a more extensive copyright protection).

[27] 24 FR 4956, June 18, 1959, as amended at 38 FR 3045, Feb. 1, 1973; 57 FR 6202, Feb. 21, 1992.

[28] 37 C.F.R. § 202.1 (b)-(d) (cleaned up).

[29] *See supra* note 27.

[30] *See e.g.,* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, FIRST EDITION (1967), §§ 2.4.4.II; 2.8.3.I.1.(b); 2.8.3.I.b.1.

concepts of a work of authorship and originality.[31] A couple of years before *Feist*, the U.S. acceded to the Berne Convention,[32] shortly followed by accession to two other treaties, the TRIPS Agreement of 1994[33] and the WIPO Copyright Treaty of 1996.[34] All three instruments are committed to the paradigm of authorial intellectual creation.[35] And all three are premised on the ontological split between ideas and expressions, which TRIPS and the WCT make explicit.[36] Ironically, one of the provisions of Berne where the dichotomy can be found is Article 2(8), which provides that copyright protection "shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."[37] This is interpreted to denote the "basic principle that copyright protects only the form in which works are expressed is clearly intended to leave ideas, facts, and information in the public domain for all to use."[38] Importantly, this is a mandatory exception, making any protection in the area outside the scope of the international copyright framework (but not, e.g., the scope of unfair competition law).[39] In fact, some drafters thought the principle of fact-

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[31] P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (Amsterdam Law School Research Paper No. 2012-43) 13.

[32] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, revised at Paris July 24, 1971, as amended on 28 September 1979, 1161 U.N.T.S. 3. ("Berne").

[33] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) ("TRIPS").

[34] WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 2186 U.N.T.S. 12 ("WCT").

[35] *See* Daniel Gervais, *The Compatibility of the "Skill and Labour" Originality Standard with the Berne Convention and the TRIPS Agreement*, 26 EUR. INTELL. PROP. REV. 75, 76 (2004).

[36] TRIPS art. 9(2) and WCT art. 2. *See generally* SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND (3d ed., 2022).

[37] *See* RICKETSON & GINSBURG, *supra* note 35, at ¶ 8.104.

[38] *Id.* ¶ 8.106. Further adding that this "general principle has not been doubted." *Id.* ¶ 8.09. While the Copyright Act of 1976 makes facts-exclusion implicit, while ideas-exclusion explicit, Berne does the reverse, explicitly (if not entirely clearly) aiming to exclude the facts constituting the "news" and "miscellaneous items."

[39] *Id.* ¶ 8.106; *see also* TANYA APLIN & LIONEL BENTLY, GLOBAL MANDATORY FAIR USE 35 (2020); Hugenholtz & Okediji, *supra* note 30, at 13; *see generally* Sam Ricketson & Jane C. Ginsburg, *Intellectual Property in News? Why Not?*, *in* RESEARCH HANDBOOK

exclusion to be so "self-evident" to the general framework of Article 2, they objected to its inclusion.[40] Importantly, too, Berne did not contemplate copyright in non-original collections of data or non-works.[41] TRIPS clarified that protectable compilations are those which "constitute intellectual creations," while "[s]uch protection … shall not extend to the data or material itself,"[42] which the WCT repeats, adding that its and TRIPS's formulation is consistent with Berne.[43] In this way, U.S. law first clarified its compliance with the Berne framework in *Feist*, and then exported it further.[44] Perhaps, then, a "non-scientific" approach to copyright, faithful to doctrine,[45] the Statute,[46] copyright's ontology, and even to the Enlightenment myths on which copyright rests,[47] suffices to defend strong fact-exclusion.

III. REALISM, PRAGMATISM, AND LEGAL AXIOMATICS

A. Realism

As we have seen, identifying and defending fact-exclusion as a rule of law is straightforward regardless of methodology, and so is a call to local coherence and faithful application of principle.[48] Yet, to do this, copyright lawyers may not need a sophisticated theory of ideas and facts, or perhaps even to distinguish between them,[49] and may instead merely

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ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT 10 (Megan Richardson & Sam Ricketson eds., 2017).

[40] 1 RECORDS OF THE STOCKHOLM CONFERENCE (1967) 664 (Switzerland).

[41] *See* Berne, art. 2(5); *see also* RICKETSON & GINSBURG, *supra* note 31, at ¶ 8.89-8.90.

[42] TRIPS art. 10(2).

[43] WCT art. 5.

[44] Both in TRIPS, WCT, and other treaties. *See e.g.,* North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289 (1993), art. 1705(1).

[45] Lady Hale, *supra* note 10, at 13 ("the incremental approach from established principle is to be preferred to imposing the court's own choices which are clearly based upon practical or policy considerations rather than on principle.")

[46] 17 U.S.C. §§ 101-3.

[47] *See* Jessica Silbey, *The Mythical Beginnings of Intellectual Property,* 15 GEO. MASON L. REV. 319 (2008).

[48] *See e.g.,* Joseph Raz, *The Relevance of Coherence*, in ETHICS IN THE PUBLIC DOMAIN 277, 301 (1995).

[49] *Cf.* Silbey, *supra* note 2, at 83 ("objectivity is impossible and human subjectivity both inevitable and celebrated, facts are always 'created' by intellectual labor and therefore copyrightable."). Here, Silbey downplays Holmesian skepticism to favor "objective

distinguish them from original expression. It is not immediately clear whether fact-exclusion is any more or less elusive than the infamously ephemeral idea-exclusion (or preexisting-material-exclusion) doctrine, either.[50] After all, scholars critical of doctrinal formalism have long insisted that the idea-expression dichotomy is impossible to define with analytic precision, seeing it instead as a form of policy making, fixing the boundary between the public and private, and deprived of the free speech or free flow of knowledge protection enchantments.[51] Similarly, the bulk of litigation concerns not whether facts are "in or out," but whether they are "facts" as opposed to "expression."[52] In hard cases, such as those concerning "fictional facts,"[53] delineating the original and non-original is no easy matter.[54] The virtually endless practically minded commentary, including that penned by judges, insists that in copyright litigation discerning whether something is an expression or an idea, original or non-original subject matter is difficult to predict and theorize.[55] And it is in hard cases that judges respond primarily to the "stimulus of facts" and

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truths." But see Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 703 (2011) ("If there is a truth that goes beyond the beliefs held by the dominant group, it is simply the Holmesian truth that, like all other phenomena, human life is governed by force."); Matt Blaszczyk, *Section 230 Reform, Liberalism, and their Discontents*, 60 CAL. W. L. REV. 221, 245-249 (2024) (analyzing Holmes's marketplace of ideas).

[50] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (Hand J.); Chuck Blore & Don Richman Inc. v. 20/20 Advert. Inc., 674 F. Supp. 671, 676 (D. Minn. 1987) ("The first axiom of copyright is that copyright protection covers only the expression of ideas and not ideas themselves ... The second axiom of copyright is that the first axiom is more of an amorphous characterization than it is a principled guidepost"). *See e.g.,* Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law,* 10 PACE L. REV. 551 (1990).

[51] Patricia Loughlan, *The Marketplace of Ideas and the Idea-Expression Distinction of Copyright Law*, 23 ADELAIDE L. REV. 29, 44 (2002).

[52] *Cf.* Silbey, *supra* note 2 at 17, 63-64.

[53] These cases blur all three concepts. *See e.g.,* Warner Bros. Entertainment, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y 2008).

[54] Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (copyright approaches the "metaphysics of the law," where "distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.").

[55] *E.g.,* Leon R. Yankwich, *Legal Protection of Ideas. A Judge's Approach*, 40 VA. L. REV. 375, 394 (1957) ("There is no rigid formula or uniform measuring device applicable"); Jon O. Newman, *New Lyrics for an Old Melody: The Idea/expression Dichotomy in the Computer Age*, 17 CARDOZO ARTS & ENT. L.J. 691 (1999); Charles B. Collins, *Some Obsolescent Doctrines of the Law of Copyright*, 1 S. CAL. L. REV. 127 (1928).

"rational indeterminacy" of law, and resort to different normative standards, policy reasoning, etc., to fill in the gaps.[56] It is unclear whether such judgment could ever be made scientifically or simply, as the Article seems to suggest. If this were to be the realist approach, it would precisely mirror naturalistic formalism, ignoring the artifice of law's system on the one hand, and the nature of judgment in penumbral cases on the other. At least to a positivist, there is an essential difference between "scientific laws of nature" - that is, the "rules by which the science of nature describes its object" - and the rules by which ethics and law, as separate normative systems, describe their objects.[57] One cannot logically infer from a scientific "is" to a legal "ought"; legal reasoning involves relative values of a particular legal system and its authors.[58] In other words, whether a manual is an original work is not for the tribunal of social science to determine. What a realist can do, however, is to predict multiple outcomes, and thus embrace indeterminacy.[59] Does practical realism not conflict with an axiomatic approach to fact-exclusion?

The Article defines legal realism broadly as opposed to "universal or formal principles," which are "abstractions divorced law from reality draining it of legitimacy," and as aiming to replace "formalism" with a "pragmatic attitude" to law, treating it as a social construct, "based on human experience, policy, and ethics, rather than formal logic," designed for specific purposes.[60] Further, realists want to unify law and social

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[56] *See* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269 (1997).

[57] Hans Kelsen, *The Natural-Law Doctrine before the Tribunal of Science,* 2 W. POL. Q. 481, 482 (1949).

[58] *Id.* at 484. *See also e.g.,* Jules Coleman, *Methodology*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 350 (Jules Coleman & Scott Shapiro eds., 2002) (""[T]here is absolutely no reason to believe that the facts that interest us as philosophers and social theorists are the facts that social and natural scientific theories are interested in addressing or are designed to address."); Joseph Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 321-2 (1985) ("[I]t would be wrong to conclude… that one judges the success of an analysis of law by its theoretical sociological fruitfulness."); *cf.* BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007).

[59] Accounting for what judges actually do, and predicting judicial decisions, was the main point of descriptive, practical, realist jurisprudence. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

[60] *See* Silbey, *supra* note 2, at 74-75 (citing Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988)). For an example of taking broadly defined realism and positivism to be essentially similar, see e.g., Brian Leiter, *Legal Positivism as a Realist Theory of Law*,

science,[61] are said to have "attacked" the public-private distinction,[62] and are taken to have had a conspicuously progressive socio-political program.[63] This contrasts realists with formalists and Lochnerists,[64] who "denied local legislatures the ability to craft policies tailored to specific local contexts and instead prioritized universalist principles like 'freedom of contract.'"[65]

At this point, a question arises, whether a strong fact-expression dichotomy, one which *Feist* and *Harper & Row* read into the Constitution, is not copyright's own *Lochner*? In entrenching fact-exclusion, the Supreme Court held that protecting ideas, facts (and/or "preexisting material") was not up for bargain, foreclosing the possibility of considering the "economic and policy implications of inclusion or exclusion of the production from the ambit of copyright."[66] In this way, the constitutionalization of idea and fact exclusions precludes both judicial and statutory copyright protection of ideas, facts, and all the subject matter which cannot be easily classified into the originality-creativity schema. Indeed, to insist against protection of facts and fact-intensive works is precisely the kind of formalist technique as the Lochnerists apply, one which is neither flexible, pragmatic, nor addressing the political arguments which e.g., journalists or artists make in the context of AI and fair use.[67] Moreover, strong fact-exclusion, as outlined in Part III of this Response, seemingly broadens the judicial discretion to read the Patent and Copyright Clause narrowly, to differentiate or discriminate between different kinds

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in THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM (Torben Spaak & Patricia Mindus eds., 2021).

[61] *Id.* at 75; *but see* Curtis Nyquist, *Re-Reading Legal Realism and Tracing A Genealogy of Balancing*, 65 BUFF. L. REV. 771, 805 (2017).

[62] *Id.* at 75; *but see* Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1980-1981 (2015) (writing that the core of realism, as opposed to the later critical legal studies, was not concerned with the public-private distinction).

[63] *Id. But see* Nyquist, *supra* note 60, at 773 ("Legal realism was primarily a critique of progressive thought"). Nyquist adds that realists criticized progressive, sociological jurisprudence, for its "unmerited confidence in rules; it viewed fact-finding by courts as unproblematic; it failed to notice the observer effect; it was unwilling to examine its postulates; and in attempting to derive law from studying society, it fell into the same conceptualist error as Classical Legal Thought." *Id.* at 812.

[64] *See* Lochner v. New York, 198 U.S. 45 (1905).

[65] *Id.* at 76.

[66] *See* Ginsburg, *supra* note 1, at 381; *see also e.g., See* Norman Siebrasse, *A Property Rights Theory of the Limits of Copyright*, 51 U. TORONTO L. J. 1, 56 (2001).

[67] *See infra* note 96 and accompanying text.

of "writings," and to reinterpret the "progress of science and useful arts" based not on incremental developments, or the socio-economic needs of the society, but an ideological merger of pragmatism, realism, and progressivism.[68] Finally, both Professor Silbey's Article and *Lochner* defend the laissez-faire from regulation or monopolies, using general propositions of law, which Holmes's dissent famously criticized.[69]

In this respect, scholars have also argued that *Feist*'s categorical stance "ignores the elasticity of the concept of original authorship in our copyright law."[70] Further, the self-described progressive and critical scholars have, in the last few decades, cautioned about the perils of public domain romanticism and of discrimination inherent in a categorical approach to the concepts of work, authorship, fixation, and originality, given the exclusion of particular forms of artistic expression (e.g., dance, postmodern art), types of subject matter more broadly (e.g., traditional knowledge and traditional cultural expression), putative authors (e.g., women, indigenous peoples), or distributive effects on communities, supposedly harmed by strong legal axioms and the public domain itself.[71] The realism of such commentators leads them towards skepticism of exclusionary axiomatics. The question remains how to reconcile realism,

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[68] Isn't this what the first paragraph of Holmes's dissent critiques? *See Lochner*, 198 U.S. at 75 ("But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire.") (Holmes J. dissenting).

[69] *Id.* at 76 ("General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.") (Holmes J., dissenting).

[70] Ginsburg, *supra* note 1, at 379.

[71] The literature is vast. *See e.g.,* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1331, 1138 (2004) (arguing that the romance of the public domain "bolster[s] the property rights claims of the powerful," leading to "global inequity"); Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 772 (2018) ("the public domain is not an unqualified good, nor is its designation as the opposite of property without complications. It is instead a social construction which often erases intellectual property law's protection of white supremacy and denies A2K [access to knowledge] to the world's most vulnerable populations"); April M. Hathcock, *Confining Cultural Expression: How the Historical Principles Behind Modern Copyright Law Perpetuate Cultural Exclusion*, 25 AM. U. J. GENDER SOC. POL'Y & L. 239, 250 (2017); David R. Hansen, *Protection of Traditional Knowledge: Trade Barriers and the Public Domain*, 58 J. COPYRIGHT SOC'Y 757 (2011); Cheng Lim Saw, *Protecting the Sound of Silence in 4'33: A Timely Revisit of Basic Principles in Copyright Law*, 27 EUR. INTELL. PROP. REV. 467 (2005); ANTHEA KRAUT, CHOREOGRAPHING COPYRIGHT: RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE (2015).

a categorical approach to facts and works, and a simultaneous adherence to the tenets of progressivism.

Interestingly, Silbey critiques Holmes's embrace of "utilitarianism *and* aesthetic idealism" in *Bleistein v. Donaldson Lithographing Company*[72] as "confusing."[73] However, this blending of (supposed) incentives for the (nominal) public interest on the one hand, and protection of ideal objects emanating from the human mind on the other, is the essence of copyright's foundational concepts and myths. She goes on to fault *Bleistein* for a "bloated" doctrine of originality, adding that "although *Bleistein* did not originate the sweat-of-the-brow doctrine," it "fed it by glorifying human creativity and the 'singular' 'personality' of each person who claims copyright authorship."[74] Yet it seems counter-intuitive to doctrinally link sweat-of-the-brow with "creativity" and "personality,"[75] or to fault *Bleistein*, but not *Feist*.[76] Comparatively, to insist that personality-based doctrines allow copyright to protect too much, compared to actual sweat-of-the-brow, as found in old English law, which generally protects more (but not necessarily as much as facts or ideas, as already shown).[77] And theoretically, to insist on the importance of the public domain, while disregarding rights-talk in favor of instrumentalism or realism.[78] If both authorial rights and the public domain are approached as instruments of the public interest, then there can be no inherent value to the public domain.[79] A realist could insist that public domain be minimized or eliminated to serve (the context-specific) public interest better, and there is nothing in the notion of public interest which clearly dictates whether

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[72] 188 U.S. 239 (1903).

[73] Silbey, *supra* note 2, at 81.

[74] Silbey, *supra* note 2, at 85 (cleaned up).

[75] On familiar accounts of originality standards, the two are explicitly contrasted, often described as "subjective" and "objective." *E.g.,* Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949 (2002).

[76] On some interpretations, *Feist* only purported to increase the requirements for originality, while in fact, it lowered them. *See* Brian L. Frye, *Aesthetic Nondiscrimination & Fair Use*, 3 BELMONT L. REV. 29, 40 (2016).

[77] *See* Gervais, *supra* note 66; *see also e.g.,* Global Yellow Pages Ltd. v. Promedia Directories Pte Ltd., [2017] SGCA 28 (A Singaporian case engaging in a comprehensive comparative analysis of originality standards).

[78] *See generally* Abraham Drassinower, *A Note on Incentives, Rights and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869 (2011).

[79] *Id.* at 1881. ("The point to grasp is that the instrumentalist commit- ment to the *public interest* is not a commitment to the *public domain*.").

the public domain should be vast or narrow,[80] or whether facts-intensive works, or even facts themselves, are "in" or "out." Indeed, just like supporting the institution of copyright may require an unscientific commitment, which we could call one of formalism, deontology, rights, or faith, the same seems true of the public domain, and of legal principles more broadly.[81] But how can legal realism ensure the same? The answer to this question and all the above lies in Silbey's embrace of philosophical pragmatism.

B. Pragmatism and Legal Reform

So far, I have not approached the most provocative and radical arguments found in the Article. While reviewing the doctrinal and theoretical puzzles, the simultaneous adherence to legal realism and axiomatic embrace of a broad fact-exclusion, and the difficult questions regarding legal theory and interpretation, it became apparent that the Article isn't really devoted to descriptive jurisprudence, predicting cases, recreation of Holmes's views,[82] or even a defense of *Feist*'s holding or copyright's ontology. Instead, the Article may be read as an imaginative revisionism of all the above, to apparently advocate for a radical reform of copyright law. Its realism is not one of rule-skepticism or raw social policy, but rather embracing a strong doctrine, now based in a new, "scientific" creed.[83]

Towards the end of the Article, Silbey argues for a "revitalization of *Feist* for the twenty-first century," which is to treat "facts" as "knowledge produced within and through institutions and organizations

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[80] *Id.* at 1882.

[81] Sag, *supra* note 8, at 303 ("Copyright is not an instrument of raw social policy: rather, copyright embodies a set of principles that (we hope) tend to the advantage of society as a whole"); *see also* Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2015).

[82] For example, the question of whether Holmes sympathized with pragmatism is a complex one. *See* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L. J. 449, 464 n.41 (1994).

[83] This follows the "core" of legal realism, rather than a broader or more colloquial understanding of what the movement stood for. *See* Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. Pa. L. Rev. 1975 (2015); *see also* Dan Priel, *Legal Realism and Legal Doctrine*, *in* JUDGES AND ADJUDICATION IN CONSTITUTIONAL DEMOCRACIES: A VIEW FROM LEGAL REALISM 139 (Pierluigi Chiassoni & Bojan Spaić eds., 2021).

characterized by contemporary epistemic virtues."[84] This reading "resets the metric for evaluating copyrightability and puts more pressure on that evaluation than current doctrine dictates," so that the "collective good [is] measured not by the aggregate of individual contributions … but by institutions and the communities they form. The rule is judicial deference to those institutions and communities—not to commerciality and the market."[85] Doctrinally, this means that "institutional outputs—law, science, and news" are to be "public property" and thus unownable *publici juris*.[86] This, supposedly, leads to a "a richer informational public domain and the judicial imprimatur of knowledge-producing institutions as authoritative and reliable, both of which help defend deliberative democracy."[87]

In other words, pragmatism and progressivism are taken to mean a strong faith in "disciplinary knowledge and knowledge-producing institutions," and ascribing these institutions with "social and political authority."[88] As we learn, originality as heretofore interpreted was too individualistic, undermining experts, institutions, and even democracy.[89] Rather curiously, this faith in knowledge-producing institutions seemingly leads to a revolutionary denial of their claim to copyright protection over outputs. Silbey roots this doctrinally in *Feist*'s rejection of sweat-of-the-brow, and its quotation from Nimmer:

> "Protection for the fruits of such research ... may in certain circumstances be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors.'"[90]

Professor Silbey interprets this as saying that "'facts' in *Feist* means more than 'information' or 'data.' It means knowledge produced through

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[84] Silbey, *supra* note 2, at 86. In other words, facts not found empirically by the public, but by the institutions; the distinction between brute and institutional facts seemingly collapses. *Id.* at 16.

[85] *Id.* at 86 (omission and alteration added).

[86] *Id.* at 6.

[87] *Id.* at 86.

[88] *Id.* at 9.

[89] *Id.* at 10.

[90] *Feist*, 499 U.S. at 354 (citation omitted).

institutions with disciplinary authority (such as journalism)."[91] She adds that "public property serving the general welfare supersedes the importance of private ownership."[92] The trouble is, however, how to interpret Silbey's argument. If it is to mean that original outputs of institutions are unprotected, *Feist* renders this contrary to the "modicum of creativity" standard and, by extension, contrary to the Constitution.[93] In other words, this would be an argument in equal parts fascinating, radical, and difficult to square with doctrine. Would it not allow for any institutional outputs of journalists and researchers to be protected, thus rendering both Silbey's Article and my Response entirely non copyrighted?[94] On the other hand, if the Article's argument is merely to restate *Feist*, argue for a "very broad" fact-exclusion,[95] call for narrow construction of originality when dealing with cases involving "law," "science," and "news," and for judges to resist industrial lobbying, it is most agreeable. Nonetheless, I remain unsure what philosophical pragmatism, legal realism, Weber, Durkheim, and Wittgenstein tell us about the hard cases, or how copyright is to establish (or follow) "deference" to "disciplinary practice and expertise."[96]

Some of these concerns were expressed by Judge Leval in Authors Guild v. Google Inc.,[97] in his discussion of the second fair use factor,[98] concerning the nature of the copyrighted work. Noting that courts have "sometimes speculated" the second factor means "a finding of fair use is more favored when the copying is of factual works than when copying is from works of fiction," "authors of factual works, like authors of fiction, should be entitled to copyright protection of their protected expression," unless "a persuasive fair use justification is involved."[99] He went on to say

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[91] Silbey, *supra* note 2, at 44-45.

[92] *Id.* at 85.

[93] *Feist*, 499 U.S. at 354 ("As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.").

[94] This could be internationally revolutionary, especially in the educational sector. A practical realist, however, would be skeptical if this could ever be a "winner" in court, given the significant interests at stake.

[95] Silbey, *supra* note 2, at 66 ("one as broad (if not broader) than the idea-exclusion expressly contained in §102(b)").

[96] *See id.* at 66.

[97] Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

[98] 17 U.S.C. 107(2).

[99] Authors Guild v. Google, Inc., 804 F.3d 202, 220 (2d Cir. 2015).

that the "mere fact that the original is a factual work" does not "imply that others may freely copy it."[100] As if responding to the strong version of the Article's thesis, the Judge concluded that it "cannot seriously be argued that…others may freely copy and re-disseminate news reports" just because they are factual works.[101] This is striking, as is his oft-echoed observation that the analysis of the nature of work, and the focus on its closeness to the creative-expressive "core" of copyright,[102] has rarely "played a significant role in the determination of a fair use dispute."[103] Thus, while it could be argued that strengthened fact-exclusion could animate the second factor analysis, and indeed it could be doctrinally easier to argue for a defense to infringement rather than lack of subsistence on pragmatic grounds, it seems that the courts have explicitly rejected the strong version of fact-expression dichotomy and doubted its utility in hard cases.

This is concretized by the Article's discussion of *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc.*, where a computer database containing valuation information for used vehicles was awarded protection.[104] The court, applied *Feist* to hold that the "facts set forth in the compilation are not protected and may be freely copied; the protection extends only to those aspects of the compilation that embody the original creation of the compiler."[105] Silbey criticizes the ruling from the perspective of "new sciences and professional disciplines claiming epistemic authority for their work,"[106] but appears unsure how far the critique extends: "Does that mean the Defendant can copy the whole Red Book? Probably not, but much more of it should be in the public domain than *CCC* allows."[107] She adds that if in the above case, and similar ones, arguments were made not based on idea-exclusion or merger, but on facts-

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[100] *Id*

[101] *Id.*

[102] See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994).

[103] Authors Guild v. Google, Inc., 804 F.3d 202, 220 (2d Cir. 2015) (adding that "courts have hardly ever found that the second factor in isolation played a large role in explaining a fair use decision"); see also Pierre Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1116 (1990) ("The nature of the copyrighted work is a factor that has been only superficially discussed and little understood").

[104] 44 F.3d 61 (2d Cir. 1994).

[105] *Id.* at 66.

[106] Silbey, *supra* note 2, at 87.

[107] *Id.* at 88.

exclusion, the result would be "more straightforward."[108] But how does this case, and the finding of originality, become any less difficult than before? Either all that changes is the emphasis given to different extra-legal reasons for a decision (from economics to "pragmatism") or there is a wholesale discrimination against institutionally adjacent works, which by law cannot be. Original expression is, in principle, protected irrespective of its beauty or the specific statutory category to which it falls.[109] It is especially after *Feist*, the courts look for minimally creative, original elements in all works.[110] In this respect, perhaps, the Article aims to deconstruct the universal approach to "works," so that they are approached more instrumentally; once again aligning with the old English, sweat-of-the-brow approach to copyrightable subject matter, as contrasted with the modern U.S. or European law.[111] This is also the same school of thought which the Article explicitly critiques.

Nonetheless, hard cases remain hard, as exemplified by the recent New York Times lawsuit against Microsoft,[112] where copying and algorithmic processing of articles allegedly allows the AI to recreate them in entirety, that is, including the original elements of journalistic works. It is telling that in such cases even those most committed to the protection of non-expressive use may have trouble finding a clear answer concerning infringement.[113] Furthermore, it begs the question whether a "progressive"

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[108] *Id.* at 88.

[109] *Bleistein*, 188 U.S. at 251-252; Mazer v. Stein, 347 U.S. 201, 214 (1954) ("Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art."); *see also* Frye, *supra* note 66, at 35 ("*Bleistein* adopted a version of the de gustibus principle, holding that copyright should protect any original work of authorship, irrespective of its aesthetic value, because aesthetic value is inescapably subjective."); Andrew Tutt, *Blightened Scrutiny*, 47 U.C. DAVIS L. REV. 1807, 1825 (2014) ("There is a sense woven into our constitutional fabric that we should be free from the aesthetic judgments of the State"); *cf.* Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017). This is also one of the messages of *Feist* and its sometimes misinterpreted concept of "thin" copyright. *See Feist*, 499 U.S. at 349.

[110] *Feist*, 499 U.S. at 348.

[111] *See* Eleonora Rosati, *Originality in a work, or a work of originality: the effects of the Infopaq decision*, 33 EUR. INTELL. PROP. REV. 746, 750 (2011) (contrasting old English approach to categories of work with a unified approach found to works found in European law).

[112] New York Times Co. V. Microsoft Corp., 2024 WL 1953890 (S.D.N.Y.).

[113] *See* Matthew Sag, *Copyright Safety for Generative AI*, 61 HOUS. L. REV. 295, 312 (2023); *see also* Jane C. Ginsburg, *Fair Use in the US Redux: Reformed or Still Deformed?,* SING. J. LEGAL STUD. 1, 21 (2024).

jurisprudence aiming to fight epistemological relativism, post-truth, and polarization,[114] through reverence to journalism should limit the legal monopolies which may allow that industry to avoid demise, whether through analogue or algorithmic copying and possible replacement. Finally, while I agree that allowing for "generous quotation and selective copying for use and improvements" is desirable,[115] the final contours of protectable expression and infringement cannot be determined easily or "scientifically." This is, also, the great lesson of legal realist jurisprudence.[116]

IV. CONCLUSION

Professor Silbey's Article is interesting, refreshing, and ambitious in scope. It brings up difficult questions of doctrine and jurisprudence and is deeply situated in a complex philosophical context. It is also an important and most agreeable call for a strong fact-exclusion from copyright protection and for a vast public domain. Nonetheless, it does not offer easy answers in hard cases, ironically expressing the main lesson of legal realism. Perhaps, then, the Article is best interpreted as an invitation to reimagine copyright's landscape in the modern knowledge economy.

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[114] *See* Silbey, *supra* note 2, at 8.

[115] *Id.* at 89.

[116] Indeed, the Article appreciates this difficulty, noting that e.g., the merger doctrine is used to decide cases concerning manuals and catalogs, and that the doctrine can be "easily manipulated in the copyright claimant's favor." Silbey, *supra* note 2, at 90 (discussing FMC Corp. v. Control Sols. Inc., 369 F. Supp. 2d 539 (E.D. Pa. 2005)). But, again, even if the judiciary of a pluralist society should adhere to Silbey's philosophical pragmatism, which is by no means clear, it is even less sure they will.