

Nine Digits Is Not Creative Enough for Copyright Protection

By Noel D. Humphreys

I. Introduction

Brevity is the soul of wit, Shakespeare wrote, but no matter how witty a short phrase may be, copyright law does not prohibit copying a single, short string of characters. The Third Circuit Court of Appeals sitting *en banc*, a Sixth Circuit panel, and the Ninth Circuit all recently held that the Constitution demands, for copyright purposes, a creative work that is more than a short string of characters, and a decision from the Southern District of New York has found “the short phrase analysis” a “compelling basis” for concluding that copyright does not protect settlement prices for commodities contracts.¹



In the Third Circuit case² and the Sixth Circuit case,³ the plaintiffs sought copyright protection for parts identification numbers. In the Ninth Circuit case,⁴ the plaintiff sought protection for the word “KINGMASTER” used in connection with a chess game variant. In all three cases, the courts held that such short expressions lacked that “modicum of originality” that the Constitution requires⁵ and cited 37 C.F.R. § 202.1(a),⁶ which denies copyright registration to “words and short phrases such as names, titles and slogans, familiar symbols or designs” and the like.

The decisions do not set forth a standard for distinguishing between a “creative work” and a not-quite-creative-enough work, or between a fact and a “creative work.” Rather, the courts determined that the particular short works involved lacked sufficient creativity to warrant copyright protection. The lack of a standard for measuring the presence or absence of creativity has led to recurring attempts to suppress competition based on invoking copyright protection for short works.

II. The Parts Numbers Cases

A. *Southco*

In the Third Circuit case, plaintiff Southco assigned parts numbers to screws based on the screws’ characteristics. Each nine-digit product number represented a code that assigns a digit or group

of digits to a product characteristic, such as style, material, thread-size, or length.

Kanebridge, the accused infringer, published charts comparing Kanebridge-numbered fasteners that are interchangeable with Southco-numbered fasteners. Southco sought a court order to stop Kanebridge from advertising that Kanebridge items could be substituted for Southco fasteners, claiming that copyright law prohibited Kanebridge from using the Southco part numbers in Kanebridge promotional materials.

The district court enjoined Kanebridge from referring to Southco’s part numbers.⁷ The court held that “Southco’s time, effort, creativity and expense over the years in authoring the Numbering System must be protected because copyright law grants its statutory monopoly to protect the investment made in expressing the results of innovation.”⁸ The court cited the copyright registration of Southco product manuals as *prima facie* evidence of the registration of the part numbers and found Southco’s intricate system that assigned individual part numbers to be sufficiently imaginative and original.⁹ The court distinguished cases in which circuit courts had found that product numbers that were randomly assigned were not copyrightable.¹⁰

On appeal, a Third Circuit panel that included now–Justice Samuel A. Alito, Jr., reversed.¹¹ The panel focused on the distinction between the parts numbering system and the parts numbers themselves. Although the numbering system may be sufficiently creative, in the court’s view, rigid assignment of particular numbers in accordance with a system is not expressive. The court held that “the creative spark is utterly lacking in Southco’s part numbers” and that “these numbers are examples of works that fall short of the minimal level of creativity required for copyright protection.”¹²

On remand, Southco submitted an affidavit by a Southco engineer named Bisbing that explained the creative choices and methods inherent in the code that determined the product numbers. Unpersuaded, the district court granted Kanebridge’s motion for summary judgment on the copyright infringement claim. Consistent with Judge Alito’s opinion, the court found the Bisbing affidavit irrelevant to evaluating the creativity of the numbers themselves.

This time, Southco appealed, and a different Third Circuit panel reversed the grant of summary judgment in favor of Kanebridge.¹³ The court's opinion, written by Judge Jane R. Roth, found that Bisbing's affidavit called "into doubt the *Southco I* panel's factual conclusions about the process by which Southco assigns numbers to new fasteners."¹⁴

At Kanebridge's urging, the Third Circuit voted to rehear the case *en banc*. The *en banc* court held that Southco's parts numbers were not copyrightable. Writing for the majority, Judge Alito cited two different lines of reasoning. First, the majority (eleven of the thirteen judges) characterized the part numbers as not "original." Since Kanebridge was copying part numbers for use in comparative advertising, the majority opinion focused on whether copyright law protected the part numbers. Echoing *Southco I*, the majority distinguished between the numbering system and the specific part numbers and held that the Southco part numbers "are not protected by copyright because they are mechanically produced by the inflexible rules of the Southco system."¹⁵

Second, eight judges concluded that copyright law does not protect Southco's part numbers "because they are analogous to short phrases or titles of works. Since at least 1899, it has been the practice of the Copyright Office to deny registration to 'words and phrases.'"¹⁶ The Code of Federal Regulations codifies this practice,¹⁷ and the majority stressed the importance of Copyright Office policies:

We believe that the Copyright Office's long-standing practice of denying registration to short phrases merits deference. We accept the Copyright Office position and believe that it logically extends to part numbers.¹⁸

The majority quoted the government's *amicus* brief to the effect that a short phrase "typically lacks any creativity whatsoever."¹⁹ If Southco could prohibit others from using Southco part numbers, other companies that used the same numbers for parts could be prevented from using such part numbers, even on unrelated products. Copyright confers "exclusive rights" on the owner, and "any use of the number could potentially infringe the copyright," Judge Alito wrote.²⁰ "Moreover," he added "if Southco's nine-digit numbers were protected, would there be a principled basis for denying protection to a number with, say, seven or five digits? Could a company or person thereby obtain the exclusive right to use the number 4,710,202 or 47,102?"²¹ The court speculated that "the fair use defense presumably would protect the use of such numbers in most situations," but having to

demonstrate "fair use" would probably "impose an undue burden."²²

Judge Edward R. Becker, in a concurring opinion, objected to the majority's deference to the Copyright Office's rules. In his view, the majority needed a test "to identify the point at which a title or short phrase becomes a descriptive narrative."²³ In addition, he wrote, the majority opinion failed to weigh competing considerations that might pertain to deference. Judge Becker believed that the "deference" the majority afforded the Copyright Office was unwarranted because of a lack of evidence that the Copyright Office had ever considered whether part numbers were uncopyrightable as short phrases.²⁴

Judge Jane R. Roth's dissent also objected to the majority's "short phrase" analysis. "Short phrases are typically unprotectable because they are either insufficiently independent or insufficiently creative or both, but it does not make sense to state categorically that no combination of numbers or words short enough to be deemed a 'phrase' can possess 'at least some minimal degree of creativity'" as required by *Feist*.²⁵

Judges Becker and Roth both struggled with the idea that a string of numbers constitutes a "phrase." Judge Roth noted the lack of precedent for the proposition that a work abounding in creativity was nonetheless unprotected because it was too short. Instead, she noted, courts analyze whether the work involved creative originality regardless of its length.²⁶

B. ATC Distribution

In the Sixth Circuit case,²⁷ plaintiff ATC Distribution claimed that a former employee (Hester) unlawfully copied parts numbers and a parts catalogue used by ATC. Hester's new start-up company also referred to ATC parts numbers in advertisements. The district court, in an unreported decision, granted summary judgment in favor of defendants. The district court found that the parts numbers lacked the originality required for copyright protection.

ATC appealed. ATC argued on appeal that its catalogue constituted a taxonomy or creative classification scheme. If the catalogue is a taxonomy, ATC argued, the individual parts numbers express the overall taxonomy. ATC argued that the numbering scheme for the parts involved at least five different creative aspects or elements.²⁸

The Sixth Circuit panel rejected these arguments. Chief Judge Danny J. Boggs, writing for a three-judge panel, found that the parts numbers themselves lacked originality or creativity, regardless of the level of creativity that went into the organizational

scheme. The part numbers, the court found, did not express the creativity that went into the classification scheme:

ATC's allocation of numbers to parts was an essentially random process, serving only to provide a useful shorthand way of referring to each part. The only reason that a "sealing ring, pump slide" is allocated number 176 is the random ordering of sub-categories of parts, and the random ordering of parts within that sub-category. . . . [T]he particular numbers allocated to each part do not express any of the creative ideas that went into the classification scheme in any way that could be considered eligible for copyright protection.²⁹

Like Judge Alito in the *Southco en banc* decision, Judge Boggs based his decision, in part, on the idea that granting copyright protection for short works like parts numbers would limit the ability of other companies to number parts.³⁰ Judge Boggs wrote that protection for these numbers would "provide a way for the creators of otherwise uncopyrightable ideas or works to gain some degree of copyright protection through the back door simply by assigning short numbers or other shorthand phrases to those ideas or works (or their component parts)."³¹ Judge Boggs also cited the Copyright Office's rule against registration of short phrases as congruent with *Feist's* constitution-based requirements of originality and creativity.³²

In another recent decision, *R & B, Inc. v. Needa Parts Manufacturing, Inc.*,³³ a federal district court in the Third Circuit granted summary judgment to defendants on plaintiff's copyright claim for protection of parts numbers, based on the *Southco en banc* decision. In that case, Needa copied R & B's parts numbers and added a digit. Following the *Southco* court's reasoning, the court stated that, regardless of the creativity of the numbering system, the numbers themselves do not "reflect the minimal degree of creativity necessary."

III. The KINGMASTER Case

Plaintiff Ronald Planesi claimed to have originated the word "KINGMASTER" in 1984 in connection with a six-person board game that is a variant on chess. He apparently registered the name and the game instructions with the Copyright Office, but he did not seek to register KINGMASTER as a trademark. Planesi brought suit, *pro se*, in 2003 against a fishing tackle maker (Penn Fishing), the Southern

Kingfish Association, a cable television production company, and a maker of electronic board games, all of which used the name KINGMASTER in connection with products or services. Planesi asserted that copyright law provided him a remedy against defendants' uses of the name KINGMASTER which, he claimed, had damaged him.

In September 2004, relying on facts determined by a magistrate judge, the district court held that KINGMASTER was not copyrightable, finding that this "one word title" is "simply too short and insubstantial" to warrant copyright protection.³⁴

Planesi appealed. His appellate brief focused on the need for governmental policy to foster creativity and argued that the court should protect the word KINGMASTER "especially when directly connected to substantial works of original nature."³⁵ Penn Fishing argued that extending copyright protection to words, names, titles, and concepts would discourage creativity because authors would face "the insurmountable task of ensuring that the title or name is not used in any other work."³⁶

The Ninth Circuit, in a memorandum opinion, stated that the district court had "properly dismissed" Planesi's claim, citing the Copyright Office regulations. The word KINGMASTER was not a literary work, in the court's view. Planesi's copyright registration of the rules for his chess variant did not transform the game's name into a copyrightable work. Planesi's claim illustrates that extending copyright protection to a short string of characters has the potential to confer to a copyright holder undue power to prevent use of words, phrases, or slogans by others.

IV. Other Circuits

The concept of copyright protection for words or short phrases reached both the First Circuit and the Second Circuit in the 1990s. In a dispute over the words "Retail Plus" used as the name of an insurance policy, a First Circuit panel wrote: "It is a basic proposition of copyright law that mere words and short phrases, even if they occur in a copyrighted work, do not themselves enjoy protection against copying. The non-copyrightability of titles in particular has been authoritatively established."³⁷

Another First Circuit case involved allegations of a more substantial pattern of copying than the mere copying of one or two words. That case, *CMM Cable Rep. Inc. v. Ocean Coast Properties*,³⁸ involved competing radio promotions that used employment-oriented terms. CMM developed and marketed radio promotions, working with only one outlet in a market. CMM declined to sell an employment-oriented pro-

motion to radio station WPOR because CMM already had a client in the market. WPOR went ahead with a similarly formatted call-in promotion. WPOR used employment imagery and terms such as “payday,” “punch in,” “go on the clock,” and “begin earning \$25 an hour.”³⁹ Citing the Copyright Office regulation, among other bases, the district court granted summary judgment (on most of the claims) in favor of WPOR, in part because words and slogans are not subject to copyright protection.⁴⁰

Both parties appealed on a variety of issues. On CMM’s claim that WPOR had infringed a CMM-owned copyright, the First Circuit considered whether CMM held a valid copyright interest in the language in question. As the panel noted: “It is axiomatic that copyright law denies protection to ‘fragmentary words and phrases’ and to ‘forms of expression dictated solely by functional considerations’ on the grounds that these materials do not exhibit the minimal level of creativity necessary to warrant copyright expression.”⁴¹ The cases that CMM cited in support of its argument, the court wrote, “stand for, or otherwise support, the proposition that copyright protection simply does not extend to ‘words and short phrases, such as names, titles and slogans.’”⁴²

The court held that the disputed phrases were not copyrightable, although the panel affirmed that the brochure, published advertisements, and scripts in which such phrases appeared could receive copyright protection when considered as a whole. The panel wrote:

While the parties are essentially operating the same promotion, and while WPOR may well have decided to “copy” the ideas underlying CMM’s promotion, WPOR’s supporting materials do not constitute actionable copying to the extent that the similarities arise from uncopyrightable elements, such as the original employment metaphor or de minimis phraseology, or involve standard “how to” features of a direct mail radio promotion.⁴³

In *Arica Institute, Inc. v. Palmer*,⁴⁴ the plaintiff Arica Institute, Inc., a not-for-profit educational institution, published in various training manuals, books, and journals assertions that its founder, Oscar Ichazo, “discovered” the personality traits described in the “enneagram” (a diagram consisting of a nine-pointed star inside a circle) as scientifically verifiable and objective facts of human nature. Arica claimed that defendants Helen Palmer and Harper & Row, the

author and publisher, respectively, of a book on the enneagram, infringed its copyrights based on alleged copying of numerous words and phrases from the copyrighted materials, reproduction of seven Ichazo enneagrams, and appropriation of Ichazo’s decision to attach “ego fixation labels” to the enneagram figure.

The district court treated the claim relating to copying of the words in the enneagram labels as an attempt to protect concepts that Ichazo himself described as facts of human nature that he had discovered, which the court treated as a concession that it was non-copyrightable subject matter. The court also found with respect to the alleged copying of words and phrases that “of the approximately 250 instances of alleged copying where access was found, all but twenty or so refer to single words or short phrases which do not exhibit the minimal creativity required for copyright protection.”⁴⁵ The court determined that the balance of plaintiff’s infringement claims were subject to a valid fair use defense and granted summary judgment for the defendants. On appeal, the Second Circuit affirmed.⁴⁶

V. Settlement Prices Case

In *New York Mercantile Exchange, Inc. v. Intercontinentalexchange, Inc.*,⁴⁷ NYMEX brought a copyright infringement action in the Southern District of New York against a company that facilitated derivatives trading based on NYMEX’s daily settlement prices. Initially, the Copyright Office rejected NYMEX’s application for registration of the settlement prices. Thereafter, NYMEX registered a database as a compilation without claiming protection for the settlement prices. Judge John G. Koeltl granted summary judgment to the defendants on two grounds. First, however artfully determined, he concluded that settlement prices were facts that cannot be distinguished from the expression of the fact in dollars. Second, “[t]he reasoning in *ATC Distribution* and *Southco II* denying copyright protection for parts numbers applies with equal force to NYMEX settlement prices.”⁴⁸ Like Judges Alito and Boggs, Judge Koeltl feared that copyright protection for a string of numbers would adversely affect the public interest: “If a NYMEX settlement price in dollars constituted copyrightable subject matter, public conduct would be limited, regardless of the use of the price and regardless of the context.”⁴⁹

VI. Modes of Analysis

A. What Is Creativity?

The cases discussed above stand for the proposition that copyright law does not protect short phrases or words that lack creativity. However, the cases

do not articulate a benchmark for measuring the presence or absence of creativity in small expressions. The *Planesi*, *Southco*, and *ATC* courts would have benefited from a test for determining what creativity is. As Judge Becker wrote in dissent in *Southco*, copyright law needs a boundary between an “original work of authorship” and a work that is too insubstantial to be an “original work of authorship”⁵⁰ and between a fact and an “original work of authorship.”

The Supreme Court in *Feist* did not establish a test for differentiating between a fact and an “original work of authorship.” The Court deemed phone numbers and addresses to be facts. It did not need a jury to distinguish a fact from an original work of authorship, but it did not explain the test for determining the difference. “It is this bedrock principle of copyright that mandates the law’s seemingly disparate treatment of facts and factual compilations. ‘No one may claim originality as to facts.’ This is because facts do not owe their origin to an act of authorship.”⁵¹

Similarly, the “short phrase” rule is somewhat arbitrary. Judge Becker labeled it a rule of thumb.⁵² Both the concurring and the dissenting judges in *Southco* opined that the court should make its own inquiry into the creativity of the parts numbers without relying on the Copyright Office rule. Plaintiffs *Southco* and *ATC* argued that their parts numbers reflected considerable creativity because the numbering systems from which they derived manifested creativity. The *Southco* majority cited the government’s *amicus* brief for the proposition that a short phrase “typically lacks any creativity whatsoever,”⁵³ but neither the government nor Kanebridge provided evidence that *Southco*’s parts number system was “typical,” as Judge Becker noted in his concurrence. He struggled with the problem: “In order for any test that purports to distinguish between short phrases and copyright compositions to be viable it would have to identify the point at which a title or short phrase becomes a descriptive narrative.”⁵⁴ “Put differently,” he stated,

the problem in this case is whether the *Southco* parts numbers are words, short phrases or titles, or whether they are instead a compilation of data, a system of classification or something else. Indeed, the part numbers seem to fall into the gray area between a short phrase and a more extensive work.⁵⁵

Judge Roth, dissenting in *Southco*, pointed out that short expressions that are not names, titles, or

slogans may not be covered by the Copyright Office’s regulation.⁵⁶ She proposed that the court’s task should be to determine whether the string of characters used as a part number is both creative enough and not a “name, title or slogan” described by the Copyright Office rule. She concluded: “However, the majority is incorrect insofar as it contends that *Southco*’s part numbers, even if quite creative, are unprotected simply because they are short.”⁵⁷

B. The Purpose of Copyright Law

The Constitution creates in Congress the power to establish copyright rights to “promote the progress of science and the useful arts.”⁵⁸ However, none of these cases discussed in this article examines whether one ruling or another would “promote” any “progress” at all. In *Southco*, *ATC*, and *NYMEX*, the courts expressed concern that, if plaintiff prevailed, competition would be stifled because other parties potentially would be prohibited from using particular numbers or strings of numbers. These cases suggest that courts are sensitive to the balance of the public’s need for language and expression and the public’s need for innovation. Judge Roth referred to this balance as the “two contradictory imperatives” of “protection and dissemination.”⁵⁹ The courts might have cast that sensitivity as promotion of progress of the useful arts, but the courts did not express the idea in those terms.

Plaintiffs and defendants could have presented evidence to show that a particular position tended to promote progress of some sort. Litigants have argued this approach but without much evidence. *Planesi* argued that he needed the motivation of strong copyright protection to trigger his own particular genius. On the other hand, the government’s *amicus* brief in *Planesi*, relying on *Feist*, also focused on creativity.⁶⁰ Emphasizing the constitutional mandate “to promote the progress of science and the useful arts,” the government argued that protecting one word does not encourage or motivate the kind of creativity for the public benefit that the Constitution’s framers had in mind.⁶¹ The government relied on *Sony*⁶² for the proposition that “progress” means “to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow public access to the products of their genius after the limited period of exclusive control has expired.”⁶³ However, the litigants apparently had no evidence to adduce as to the impact on the progress of the useful arts if *Planesi* stopped a fishing tackle company from using KINGMASTER on its fishing equipment.

In the *en banc* proceeding in *Southco*, the Department of Justice’s *amicus* brief argued for the importance of creativity and originality to the balance

between an exclusive right to use and benefit from an author's works for a limited time, on the one hand, and promotion of "the progress of science and the useful arts," on the other.⁶⁴ Short phrases, the government argued, typically lack "any creativity whatsoever," and granting Southco copyright protection would deny the public "ordinary access to a string of numbers." Judge Alito was receptive to this argument. But the government ultimately placed reliance on the courts' judgment as to the amount of creativity inherent in a string of numbers and the propensity of a particular balance to foster creativity.

VII. Conclusion

Several recent decisions support the idea that copyright law does not protect short words and phrases. These recent cases demonstrate that plaintiffs who want to use copyright law to protect numbered expressions of ideas will have to overcome the barrier that courts typically regard short expressions, especially expressions consisting of numbers, as lacking creativity. So far, however, those who claim copyright protection for short expressions have no legal test to establish that sufficient creativity is present to justify the protection they seek.

Endnotes

1. *New York Mercantile Exchange, Inc. v. Intercontinentalexchange, Inc.*, 389 F. Supp. 2d 527 (S.D.N.Y. 2005).
2. *Southco, Inc. v. Kanebridge Corporation*, 390 F.3d 276 (3d Cir. 2004), *cert. denied*, 126 S.Ct. 336 (2005).
3. *ATC Distribution Group Inc. v. Whatever It Takes Transmissions & Parts Inc.*, 402 F.3d 700 (6th Cir. 2005) ("ATC"), *reh'g en banc denied*, <http://www.ca6.uscourts.gov/opinions.pdf/05a0149p-06.pdf>.
4. *Planesi v. Peters*, 2005 WL 1939885 (9th Cir. Dec. 16, 2004); *cert. denied*, 126 S. Ct. 1182 (2005).
5. *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340, 351 (1991).
6. 37 C.F.R. § 202.1 states in part: "The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:
 "(a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents"; "While this Copyright Office regulation 'does not have the force of statute,' it is a fair summary of the law." *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959).
7. The district court's initial order appears at 2000 WL 21257 (E.D. Pa. Jan. 12, 2000).
8. Memorandum and Order dated Jan. 12, 2000, at 18, *available at* <http://www.paed.uscourts.gov/documents/opinions/00D0032P.pdf>.
9. Memorandum and Order dated January 12, 2000, at 6, <http://www.paed.uscourts.gov/documents/opinions/00D0032P.pdf>.
10. *Toro Co. v. R&R Prods. Co.*, 787 F.2d 1208 (8th Cir. 1986); *Mitel, Inc., v. Iqtel, Inc.* 124 F.3d 1366 (10th Cir 1997).
11. *Southco, Inc. v. Kanebridge Corporation*, 258 F.3d 148 (3d Cir. 2001).
12. *Id.* at 152.
13. *Southco, Inc. v. Kanebridge Corporation*, 324 F.3d 190 (3d Cir. 2003).
14. *Id.* at 197.
15. 390 F.3d at 285.
16. *Id.*
17. 37 C.F.R. § 202.1(a).
18. 390 F.3d at 286.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 289.
24. *Id.* at 290.
25. *Id.* at 298.
26. *Id.*
27. *ATC*, at 704.
28. *Id.* at 706. The five creative elements are (1) deciding what kind of information to convey in part numbers; (2) predicting future developments in the industry and deciding how many slots to leave open in a particular category for such developments; (3) deciding whether a particular part fits within a particular existing category or calls for a new category; (4) "designing the part numbers"; and (5) devising the overall taxonomy.
29. *Id.* at 709.
30. *Id.*
31. *Id.*
32. *Id.* at 710.
33. 2005 WL 2033389 (E.D. Pa. 2005).
34. The lower court's decision is not reported, apparently. A party shared a copy. Westlaw collected certain briefs of the parties. Planesi's Ninth Circuit brief dated November 4, 2004, in case No. 04-16936 is available at 2004 WL 2919557. The Register of Copyrights' brief dated December 16, 2004, appears at 2004 WL 3140392.
35. 2004 WL 2919557, at 29.
36. 2004 WL 3167465, at 13.
37. *Arvelo v. American International Insurance Company*, 66 F. 3d 306 (1st Cir. 1995 (Table)), 1995 WL 561530.
38. 97 F.3d 1504, 1519 (1st Cir. 1996) ("It is axiomatic that copyright law denies protection to 'fragmentary words and phrases' and to 'forms of expression dictated solely at functional considerations' on the grounds that these materials do not exhibit the minimal level of creativity necessary to warrant copyright protection.") (holding unprotectable "if you're still 'on the clock' at quitting time" and "clock in and make \$50 an hour").
39. *CMM Cable Rep. Inc. v. Ocean Coast Properties*, 888 F. Supp. 192, 198 (D. Mass. 1995).
40. 888 F. Supp. at 198.
41. 97 F.3d at 1519.
42. *Id.* at 1520.

43. *Id.* at 1522.
44. *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067 (2d Cir. 1992).
45. 970 F.2d at 1072.
46. *Arica Institute, Inc. v. Palmer*, 761 F. Supp. 1056 (S.D.N.Y. 1991).
47. 389 F. Supp. 2d 527 (S.D.N.Y. 2005).
48. *Id.* at 544.
49. *Id.*
50. 17 U.S.C. § 102(a).
51. *Feist*, 499 U.S. at 347.
52. *Southco*, 390 F.3d at 290.
53. *Id.* at 286.
54. *Id.* at 289.
55. *Id.* at 289-90.
56. *Id.* at 295.
57. *Id.* at 300.
58. Art. I, sec. 8.
59. 390 F.3d at 291.
60. 2004 WL 3140392, at *8.
61. *Id.*
62. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1984).
63. A recent article argues that “progress” in the copyright sense would be understood in a way that better corresponds to the framers’ intent if copyright law emphasized “dissemination” or “spread” of knowledge rather than improvement upon what went before. See Maria Pollack, “The Democratic Public Domain: Reconnecting the Modern First Amendment and the Original Progress Clause (a.k.a Copyright and Patent Clause),” 45 *Jurimetrics J.* 23-40 (2004).
64. Brief *amicus curiae* of the United States of America, 2000 WL 33982403 (2000), at <http://www.usdoj.gov/atr/cases/f201000/201034.htm>.

Noel D. Humphreys is counsel to Connell Foley, LLP, Roseland, NJ, and a member of the Executive Committee of the Intellectual Property Section. Peter J. Pizzi, Kristin Rinaldi, and Julianne Barrow assisted in the preparation of this article.

Reprinted with permission from the Intellectual Property Law Section Newsletter, *Bright Ideas*, Spring/Summer 2006, published by the New York State Bar Association, One Elk Street, Albany, New York 12207.