Three Theories of Copyright in Ratings

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ABSTRACT

Are ratings copyrightable? The answer depends on what ratings are. As a history of copyright in ratings shows, some courts treat them as unoriginal facts, some treat them as creative opinions, and some treat them as troubling self-fulfilling prophecies. The push and pull among these three theories explains why ratings are such a difficult boundary case for copyright, both doctrinally and theoretically. The fact-opinion tension creates a perverse incentive for raters: the less useful a rating, the more copyrightable it looks. Self-fulfilling ratings are the most troubling of all: copyright's usual balance between incentives and access becomes indeterminate when ratings shape reality, rather than vice versa. All three theories are necessary for a complete understanding of ratings.

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Vanderbilt Law School	16th[1]
Pepolino	26 (food) 19 (decor) 24 (service)[2]
United States debt	AA+[3]
Uncharted: 3	92[4]
AAPL	Buy[5]
Stony Brook University Hospital	☆ ☆ ☆ ☆ ☆ (patient survival of GI bleeds)[6]

These are all ratings, and our society is awash in them. There is no question so large or so trivial it cannot be answered by consulting a rating: Where should I go for lunch? How should a pension fund invest? Who would win in a fight: Teddy Roosevelt or Lawrence of Arabia?[7] When billions of dollars and the courses of lives can turn on ratings, it is no surprise that they are big business. Google, Fair Isaac, Moody's, *U.S. News*: these are the houses that ratings built.

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1. *Best Law Schools*, U.S. NEWS & WORLD REP., http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings (last visited Feb. 29, 2012).

2. *Pepolino*, ZAGAT, http://www.zagat.com/r/pepolino-manhattan (last visited Mar. 3, 2012).

3. NIKOLA G. SWANN, STANDARD & POOR'S, UNITED STATES OF AMERICA LONG-TERM RATING LOWERED TO 'AA+' ON POLITICAL RISKS AND RISING DEBT BURDEN; OUTLOOK NEGATIVE (Aug. 5, 2011), *available at* http://www.standardandpoors.com/ratings/us-rating-action/en/us (follow article hyperlink).

4. *Uncharted 3: Drake's Deception*, METACRITIC, http://www.metacritic.com/game/playstation-3/uncharted-3-drakes-deception (last visited Feb. 29, 2012).

5. *Apple Inc. (AAPL)*, YAHOO! FINANCE, http://finance.yahoo.com/q/ao?s=aapl (last visited Feb. 29, 2012) (listing "Buy" ratings from numerous analysts).

6. *Stony Brook University Medical Center*, HEALTHGRADES, http://www.healthgrades.com/hospital-directory/new-york-ny-nyc-suburbs-long-island/hospital-awardsHGST7AF97B36330393 (last visited Feb. 29, 2012) (follow "Gastrointestinal Bleed" hyperlink).

7. No kidding. *Deadliest Warrior: Teddy Roosevelt vs. Lawrence of Arabia* (Spike television broadcast August 24, 2011), *available at* http://www.spike.com/full-episodes/o6jub7/deadliest-warrior-teddy-roosevelt-vs-lawrence-of-arabia-season-3-ep-306. For the curious, the answer is (allegedly) Teddy Roosevelt, thanks to his excellent rating of 86 for "Calm Under Fire." *Id.*

But if ratings mania is one of the characteristic phenomena of this status-mad age, then so is ratings anxiety. Scholars pillory the *U.S. News* ratings for their effects on legal education—and yet no one can stop paying attention.[8] To speak of the "subprime" mortgage crisis is to describe it as a crisis caused by loans to people with particular credit ratings. When those loans were repackaged and sold as "investment-grade" securities, this, too, was dependent on ratings, and the credit-rating agencies were sued for their role in the ensuing meltdown.[9] Yelp was sued for allegedly shaking down the businesses it rates;[10] Google's search-ranking practices are the subject of a high-profile, high-stakes antitrust investigation.[11]

This Article starts the process of rationally reconstructing the law of ratings by asking whether they are copyrightable. The deceptively simple answer to that question is that they are not, under the "short phrases" doctrine. This long-standing copyright rule, now codified in Copyright Office regulations, holds that "[w]ords and short phrases such as names, titles, and slogans" are per se uncopyrightable.[12] Even though copyright's threshold of originality is low, some alleged "works" are still too short to step across it.[13] Every rating discussed in this Article is trivially short; it is hard to think of a better case for the application of the short phrases doctrine than an individual rating.

Thus, ratings are copyrightable, if at all, only in bulk—that is, as compilations. A compilation consists of materials "that are selected, coordinated, or arranged" to evince originality.[14] Under ordinary principles of compilation analysis, courts will need to filter out "commonplace," "expected," or "inevitable" arrangements and ratings as unoriginal.[15] They will also need to apply the merger doctrine[16] to consider the "range of possible expressions" for the rating

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8. *See, e.g.*, Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229 (2006).

9. *See, e.g.*, Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC, 813 F. Supp. 2d 871 (S.D. Ohio 2011).

10. *See* Levitt v. Yelp! Inc., Nos. C-10-1321 EMC & C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (granting motion to dismiss).

11. *See* Claire Cain Miller, *Google's New Search Results Raise Privacy and Antitrust Concerns*, N.Y. TIMES BITS BLOG (Jan. 12, 2012), http://bits.blogs.nytimes.com/2012/01/12/googles-new-search-results-raise-privacy-and-antitrust-concerns.

12. 37 C.F.R. § 202.1(a) (2012).

13. *See, e.g.*, 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 4:2 (describing short phrases rule as application of *de minimis* principles).

14. 17 U.S.C. § 101 (2006).

15. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363-64 (1991).

16. Merger is a corollary of the basic copyright doctrine that ideas are not copyrightable. "[E]ven expression is not protected in those instances where there is only one or so few ways of

given the predictions it tries to make.[17] These phrases conceal enormous practical difficulties, which courts and scholars have resolved only by importing ontological beliefs about what ratings are and normative beliefs about what ratings are for. That they have been unable to agree on how to do so is a sign of how contested those beliefs are—just like ratings themselves.

Courts have developed not one theory of ratings, but three, and all three are necessary to understand how ratings work. Sometimes the law treats ratings as statements of fact, which are either true or false. Sometimes it treats them as creative opinions, which exist independently of the world. And sometimes it treats them as self-fulfilling prophecies, which remake the world in their own image. Each explains something important about ratings, but each view is incomplete on its own.

Paying close attention to these three theories has a paradoxical pair of payoffs for copyright. On the one hand, doing so clarifies copyright's doctrinal treatment of ratings. It becomes possible to see the ratings copyright cases not as an inconsistent mess, but rather as partial explanations of a complex phenomenon. Ratings are built up from layers of facts, opinions, and prophecies; closer attention to their interplay can help courts make better decisions in ratings cases.[18]

On the other hand, close attention to these three theories of ratings raises unsettling questions about copyright's theoretical framework. The conventional utilitarian story of copyright's tradeoff between incentives and access runs into serious trouble with ratings' predictive component. Treating highly factual ratings as uncopyrightable and highly opinionated ones as copyrightable gets the incentive exactly backwards at the border: the more arbitrary (and hence less accurate) a rating is, the more willing copyright will be to protect it.

Adding self-fulfilling prophecies to the mix is like adding saltpeter to sulfur and charcoal: the combination is explosive. Instead of resolving the fact-opinion tension, thinking of ratings as prophecies blows up copyright's theoretical framework. Courts have questioned whether the production of self-fulfilling ratings requires intellectual

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expressing an idea that protection of the expression would effectively accord protection to the idea itself." Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991).

17. NYMEX, Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109, 117 (2d Cir. 2007).

18. This analysis may translate to other types of works with features similar to ratings, such as taxonomies. *See, e.g.*, ADA v. Delta Dental Plans Ass'n, 126 F.3d 977 (7th Cir. 1997) (finding copyright in a taxonomy of dental billing codes, which—like ratings—are a numerical way of organizing the world). For a fuller discussion of the similarities between taxonomies and ratings, and the problems taxonomies pose for copyright law, see generally Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575 (2005).

property incentives, but this judicial skepticism also calls into question the argument for public access to those ratings. Utilitarian copyright theory becomes wholly ambiguous when applied to ratings.

Part I recounts the history of ratings copyright. Part II uses this history to bring out the three theories of ratings—as facts, opinions, and self-fulfilling prophecies—and shows how those theories intertwine in explaining how ratings work. Part III returns to copyright, asking what a richer understanding of ratings has to say about ratings doctrine and utilitarian copyright theory. Part IV examines what others have had to say about some of the ratings cases, showing how the three theories influence their arguments. Part V reflects on the larger lessons the three theories may hold for informational law beyond copyright.

Before beginning in earnest, it will be helpful to fix a few basic concepts about ratings. A rating is an attempt to quantify quality.[19] It takes a complex and messy reality and maps it onto a single clear axis of quality. The possible scales, of course, are as varied as human imagination. Metacritic rates movies, music, TV shows, video games, and more from 1 to 100;[20] Moody's rates long-term bonds from C to Aaa;[21] the U.S. Department of Agriculture grades beef from Cull to Prime.[22] A ranking is a special case of a rating in which the scale is ordinal: first best, second best, and so on through worst.

Ratings are a kind of communication. They are messages uttered by a rater using a specified code to convey something about the rating's subject to users who act on the ratings. Even a private rating is still communicative. The hermetic wine connoisseur who keeps a notebook of her impressions is sending her future self a message about what to drink and what not to.

Ratings also necessarily have a systemic character. A rating by itself is uninteresting. What is interesting is how the subject stacks up against its peers. Not all children can be above average; a rating system that gives every movie five stars is worthless. Typically, this systemic character is expressed in the evaluative process that leads to the rating. The choices made in designing and applying the process

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19. *See, e.g.*, *Rating*, OXFORD ENG. DICTIONARY, http://www.oed.com (follow "Quick Search" hyperlink; then search "Rating"; then follow "rating, n.[1]" hyperlink) (last modified Mar. 2012) (defining "rating" as "[a]n assessment (esp. according to an established scale) of the value, performance, or contents of something offered commercially").

20. *See How We Create the Metascore Magic*, METACRITIC, http://www.metacritic.com/about-metascores (last visited Mar. 1, 2012).

21. *See* MOODY'S, MOODY'S RATING SYMBOLS & DEFINITIONS 8 (June 2009), *available at* http://www.moodys.com/sites/products/AboutMoodysRatingsAttachments/MoodysRatingsSymbolsand%20Definitions.pdf.

22. 7 C.F.R. § 54.17(b) (2012).

are what differentiate one subject's rating from another's, and one rater's ratings from another's.

Why are ratings worthwhile? The short answer is that they make markets work better by helping buyers sort the wheat from the chaff.[23] Take the rating that the Zagat Restaurant Guide gave to Pepolino's food in its most recent annual survey: 26. That's a pretty good rating; it puts Pepolino in the top 1 percent of New York City restaurants.[24] A diner who uses a Zagat guide and eats at Pepolino will be happier than one who didn't know the restaurant existed or didn't know it was good. This improved matching, in turn, creates better incentives for the future. When Zagat's readers eat at Pepolino, its chefs, staff, and owners reap the rewards of their good work over the past year. During the year to come, they'll have an incentive to keep it up, lest their rating slip and Zagat-armed diners go elsewhere. Good ratings take a market for lemons and make lemonade.[25]

I. A HISTORY OF COPYRIGHT IN RATINGS

The story of copyright in ratings follows a simple arc. A hundred years ago, courts routinely extended copyright to ratings based on the effort expended in producing them; courts were happy to assume that the ratings themselves were unoriginal facts.[26] The modern rejection of "sweat of the brow" labor-based copyright kicked the doctrinal legs out from under this approach, leading some courts to respond either by denying copyright entirely, or by treating ratings as unoriginal facts embedded in a creatively arranged compilation.[27] In a series of cases involving price guides, the U.S. Courts of Appeals for the Second and Ninth Circuits gradually transmuted this compilation theory of factual ratings into a theory that treated the ratings themselves as original—and hence copyrightable—opinions by focusing on the creative choices made in the process that generated

23. These "markets" don't have to be monetary. If a travel guide puts Central Park on its top-ten list of must-see New York destinations for tourists, the only thing the tourists have to spend is their time. So it might be more precise to say that ratings help people facing matching problems make better choices. That said, market discourse is a useful way of summarizing key ratings properties concisely.

24. *Restaurant Inspection Information*, N.Y. CITY DEP'T HEALTH & MENTAL HYGIENE, http://www.nyc.gov/html/doh/html/rii/index.shtml (last visited Mar. 1, 2012) (stating that there are 24,000 restaurants in New York City).

25. This explanation is problematic, for reasons to be made clear shortly. But it is not possible to understand the complexities of ratings without an idea of what raters are trying to accomplish with them.

26. *See infra* Part I.A.

27. *See infra* Part I.B.

the ratings.[28] In the last few years, courts have started to express serious anxiety about certain ratings based on the sense that they may be facts after all—facts created by the rater.[29]

A. Credit Reports and "Sweat of the Brow" Copyright

The first round of copyright litigation over ratings concerned credit-report books[30]: volumes of "the names of businessmen, organized by city, with an identification of the type of business and a numerical or letter code estimating the worth and credit standing of each entry."[31] For example, the book at issue in one case, the Marble and Granite Exchange Mercantile Agency's Blue Book, rated businesses' net worth on a scale of AA (for $1,000,000 and above) to P (for $1 to $600) and their credit performance from 1 for "First-Class Pay" to 5 for "Investigate Pay."[32]

These cases are notable for what they say about the ratings themselves: absolutely nothing. Today, courts might be inclined to distinguish between what are indisputably facts, such as businesses' names and addresses, and the credit ratings, which are far more ambiguously so. But the early courts were utterly uninterested by any such distinction; they uniformly and without comment treated the ratings as though they were also facts. In 1908, the U.S. Supreme Court, in *Dun v. Lumbermen's Credit Association*, referred to the "rating and other facts contained in defendants' book."[33] And in 1924, a district court likewise assumed that copyright should treat names and ratings more or less identically—each must be the product of the defendant's "[h]onest, thorough, efficient verification, by personal search," or else it will infringe.[34]

Why this unconcern? It did not matter whether ratings were facts. The work invested by the rater in producing a collection—its "sweat of the brow" as later courts would later call it[35]—was a sufficient basis for copyright against a defendant who did not make its own independent efforts. Nothing set a book of credit ratings apart

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28. *See infra* Part I.C.

29. *See infra* Part I.D.

30. *See generally* James H. Madison, *The Evolution of Commercial Credit Reporting Agencies in Nineteenth-Century America*, 48 BUS. HIST. REV. 164, 167 (1974) (discussing business and legal history of credit reporting in the nineteenth century and the turn to publication).

31. *Id.* at 173.

32. Ladd v. Oxnard, 75 F. 703, 706 (D. Mass. 1896).

33. Dun v. Lumbermen's Credit Ass'n, 209 U.S. 20, 21 (1908).

34. Produce Reporter Co. v. Fruit Produce Rating Agency, 1 F.2d 58, 61 (N.D. Ill. 1924); *see also* Cravens v. Retail Credit Men's Ass'n, 26 F.2d 833, 834 (M.D. Tenn. 1924).

35. *E.g.*, Hutchinson Tel. Co. v. Fronteer Directory Co., 770 F.2d 128, 131 (1985).

from a book of obviously factual information; a finding that the ratings were or were not facts would leave the outcome unchanged. Thus, courts could treat them as facts without concern.

Indeed, the statements of law in the credit-rating cases are all but indistinguishable from the statements in other directory cases. Here is the "classic formulation"[36] of the sweat of the brow doctrine, as seen in a 1922 dispute over a directory of names and addresses: "No one can legally take the results of the labor and expense which another has incurred in the publishing of his work, and thereby save himself 'the expense and labor of working out and arriving at those results by some independent road.'"[37]

Two years later, the court in a ratings case, *Produce Reporter Company v. Fruit Produce Rating Agency*, explained:

> If one uses another's compilation directly, without any verification, he is, of course, guilty of the pure, unadulterated, labor-saving device of copying. . . . [I]f the rating as finally made is based upon what is copied, rather than upon what is discovered by verification, . . . there has been an infringement.[38]

There was no daylight between these two explanations. Ratings were facts.

B. Feist *and Compilation Copyright*

With the passage of the 1976 Copyright Act, sweat of the brow was not long for this world.[39] By providing copyright only for "original works of authorship,"[40] the Act excluded the unoriginal fruits of substantial labor. The Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.* cemented this rule.[41] Originality, the Court explained, is the "touchstone of copyright protection,"[42] and "copyright rewards originality, not effort."[43] Indeed, it was "the most fundamental axiom of copyright law" that facts were uncopyrightable.[44]

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36. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352 (1991).

37. Jeweler's Circular Pub'g Co. v. Keystone Pub'g Co., 281 F. 83, 95 (2d Cir. 1922) (quoting Morris v. Ashbee, [1868] L.R. 7 Eq. 34).

38. *Produce Reporter Co.*, 1 F.2d at 61.

39. The last gasp of sweat-of-the-brow in a ratings case was *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 90-91 (N.D. Ill. 1982). The court held that copyright protected not just the "form of expression" but also the "fruits of the compiler's industry." *Id.* at 92.

40. 17 U.S.C. § 102(a) (2006).

41. *See Feist*, 499 U.S. at 340.

42. *Id.* at 347.

43. *Id.* at 364.

44. *Id.* at 344-45.

How far does this doctrinal logic extend to ratings? In the 1980s, courts denied copyright protection to the raw data on which ratings were based[45] and to the "research" required to discover facts.[46] One leading case, *Hoehling v. Universal City Studios*, held that a historian's theory about the cause of the Hindenburg explosion was an uncopyrightable "interpretation" of facts.[47] Taken to its logical limit, this line of reasoning would hold that a rating, as an interpretation of the facts about its subject, is per se uncopyrightable, no matter how creative, complex, or difficult the research used to obtain it.

Indeed, some cases explicitly treat ratings as facts. In *RBC Nice Bearings, Inc. v. Peer Bearing Co.*, the U.S. District Court for the District of Connecticut held that load ratings for ball bearings—the weight they could be expected to support—were uncopyrightable facts.[48] The court's merger analysis is especially revealing. It held that the plaintiff failed to show that the "range of possible variations" for the load ratings was broad enough to leave room for reasonable raters to disagree.[49] That is black letter merger doctrine, but it also assumes that a ball bearing's load rating is a fact fully determined by the metallurgical properties of steel. To similar effect is *Lowry's Reports, Inc. v. Legg Mason, Inc.*, where the parties agreed that three numbers in the plaintiff's daily stock market reports—"buying power," "selling pressure," and "short term buying power"—were uncopyrightable facts.[50] It mattered not that the numbers were the "crown jewels" of the reports and that the plaintiff computed them using a confidential algorithm.[51] Ratings as facts were not copyrightable.

Treating ratings as facts was, however, compatible with a more limited version of copyright: compilation copyright. The Copyright Act and *Feist* made it clear that a compilation, even one consisting of facts, could be copyrighted if it displayed "original selection or

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45. *See* Fin. Info. v. Moody's Investors Serv., Inc., 808 F.2d 204 (2d Cir. 1986) (holding that large collections of notecards with data on municipal bond redemptions were uncopyrightable, notwithstanding the extensive effort required to produce them).

46. Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981) ("The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if research is held to be copyrightable.").

47. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 978 (2d Cir. 1980) ("[I]nterpretations are not copyrightable as a matter of law."); *see also* Nash v. CBS, Inc., 899 F.2d 1537 (7th Cir. 1990); Randal C. Picker, Essay, *Easterbrook on Copyright*, 77 U. CHI. L. REV. 1165 (2010) (discussing *Nash*).

48. RBC Nice Bearings, Inc. v. Peer Bearing Co., 676 F. Supp. 2d 9, 22 (D. Conn. 2009).

49. *Id.* at 23; *accord* NYMEX, Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109, 117-18 (2d Cir. 2007).

50. Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 742 (D. Md. 2003).

51. *Id.* (nature of reports and numbers); *id.* at 754 (agreement that numbers were uncopyrightable).

arrangement."[52] Plaintiffs and courts learned to redo their analyses in terms of the creative aspects of a compilation's selection and arrangement of ratings. Thus, in *Eckes v. Card Prices Update*, the plaintiffs and the defendant both published baseball card price guides.[53] The plaintiffs' guide contained about 18,000 baseball card values, about 5,000 of which also bore a star designating the cards as "premium."[54] The Second Circuit avoided the question of whether the values were uncopyrightable facts; instead, it held that the list of premium cards was copyrightable as a compilation.[55]

C. Opinions and Creative Processes

Eckes also opened the door for courts to start treating ratings as something more than just facts about the world. The card prices were not the only ratings at stake in the case: whether a card is starred (premium) or unstarred (common) is itself a rating.[56] Thus, the plaintiff's "selection" of cards for the premium list was wholly determined by the star rating.[57] The holding that the list was copyrightable therefore implied that the 18,000 ratings themselves must contain some form of copyrightable originality. *Eckes* itself did not inquire further, stating only that "baseball fans would argue about" which players were most important, and that any such choice was "necessarily subjectively based."[58]

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52. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991); *see also* 17 U.S.C. §§ 101 (2006) (defining "compilation"), 103(b) (defining scope of copyright in compilations).

53. Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984). A "price" in the sense of what someone asks you to pay, or in the sense of what someone paid in the past, is not, strictly speaking, a rating. But a "price" in the sense of an estimate of what something is worth is a rating; it is a rating whose scale is denominated in dollars. The full story of copyright in prices and price estimates has yet to be told. An important and illuminating start is J. Harold Mulherin et al., *Prices Are Property: The Organization of Financial Exchanges from a Transaction Cost Perspective*, 34 J.L. & ECON. 591 (1991).

54. *Eckes*, 736 F.2d at 860.

55. *Id.* at 863 ("[The plaintiffs] exercised selection, creativity and judgment in choosing . . . which were the 5,000 premium cards.").

56. *See supra* text accompanying notes 53-54.

57. *See Eckes*, 736 F.2d at 860-63. More generally, the "selection" in any compilation can always be understood in terms of an implicit rating on a scale with two values: "worthy of inclusion" and "not worthy of inclusion." *Cf.* Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters, Inc., 945 F.2d 509 (2d Cir. 1991) (finding that a directory of businesses of interest to Chinese-Americans displayed originality in selection).

58. *Eckes*, 736 F.2d at 863. Notably, when discussing proof of copying, the court cited the "inadvertent[]" absence of the 1963 Topps Bill Virdon rookie card from both premium lists. *Id.* at 864. As the court explained, "some baseball cards would appear as premium on any baseball card collector's list," and "[i]t appears undisputed that the Virdon card would qualify as premium." *Id.* at 863, 864. Thus, as *Eckes* recognized, the process is subjective, but not wholly so. *See infra* Part II.B.

The Second Circuit took this idea and ran with it in *CCC Information Services v. Maclean Hunter Market Reports, Inc.*[59] Maclean Hunter publishes the Red Book, a used-car price guide.[60] It gives predicted estimates of prices for used cars based on model, age, mileage, condition, geographic location, and other factors.[61] CCC created a computerized service for users to look up Red Book values.[62] The Second Circuit held for Maclean Hunter, finding originality in the Red Book's taxonomic choices: its geographical distinctions, use of 5,000-mile increments, inclusion of particular features, and so on.[63] This part of the opinion is compatible with a belief that the values themselves were uncopyrightable facts arranged in a copyrightable compilation.

But *Maclean Hunter* also went further: it held that the Red Book's values were copyrightable opinions.[64] As best-guess estimates, they were "neither reports of historical prices nor mechanical derivations."[65] In a significant turn, the court focused on the process used to come up with the prices: they were based "not only on a multitude of data sources, but also on professional judgment and expertise," involving the weighing of "fifteen considerations."[66] The Red Book's prices were original because they were the outputs of a creative process.

This move set up an immediate problem for the court: why weren't the prices uncopyrightable as "interpretations" of factual data?[67] The court addressed this question under the heading of merger, asking whether Maclean Hunter's specific prices merged into the idea of pricing particular cars. Here, the court deployed a distinction between "building-block" ideas that "undertake to advance the understanding of phenomena" and "soft" ideas that are "infused with the author's taste or opinion."[68] It held that the Red Book's prices were the latter, because they were "approximative," they "explain[ed] nothing, and describe[d] no method, process or

59. CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61 (2d Cir. 1994).

60. *Id.* at 63.

61. *Id.* at 63-64.

62. *Id.* at 64.

63. *Id.* at 67. Here, the selection and arrangement did not really involve ratings, except perhaps negatively, in the claim that any features not included were not likely to significantly affect a car's value. *See id.*

64. *Id.* at 72-73.

65. *Id.* at 67.

66. *Id.*

67. *Cf.* Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980).

68. *Maclean Hunter*, 44 F.3d at 71-72.

procedure," and left final valuation up to the reader.[69] This language marked a definitive turn from ratings-as-facts to ratings-as-opinions.

The Ninth Circuit then found that ratings *qua* ratings were copyrightable as opinions in a case involving competing price guides, *CDN Inc. v. Kapes*.[70] Unlike in *Eckes* and *Maclean Hunter*, the plaintiff did not allege that the defendant had copied its selection and arrangement, only the prices, so the outcome turned on whether the prices themselves were copyrightable.[71] The court found that they were copyrightable by focusing on the process CDN followed to generate them.[72] As it explained:

> What is important is the fact that both Maclean and CDN arrive at the prices they list through a *process* that involves using their judgment to distill and extrapolate from factual data. It is simply not a *process* through which they discover a preexisting historical fact, but rather a *process* by which they *create* a price which, in their best judgment, represents the value of an item as closely as possible. . . . This *process* imbues the prices listed with sufficient *creativity* and originality to make them copyrightable.[73]

On *Kapes*'s theory, ratings are "creative" in two senses. First, they are the results of creativity: raters make an independent judgment using subjectivity and expertise. Second, they are acts of creation: raters make something that has not existed before.

Courts following this approach ask about the choices made by the rater in deciding which data to look at, how to weight it, which algorithms to use, when to override the algorithm, and to what extent those choices are dictated by industry standards or market realities.[74] Where the courts find "professional judgment" and "creativity" in a rating, they will treat it as a copyrightable opinion, even against a plaintiff who would prefer that it be treated as a fact so as to avoid copyright preemption.[75]

The apotheosis of this approach is the US District Court for the District of Colorado's opinion in *Health Grades, Inc. v. Robert Wood*

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69. *Id.* at 72-73.

70. CDN Inc. v. Kapes, 197 F.3d 1256, 1260-61 (9th Cir. 1999).

71. *Id.* at 1259 ("Rather, the issue in this case is whether the prices themselves are sufficiently original as compilations to sustain a copyright."). Doctrinally and taxonomically, the court is confused: the prices may be original, and they may be elements of a compilation, but they are not themselves compilations, which are defined as the "collection and assembling of preexisting materials." *See* 17 U.S.C. § 101 (2006). A rating may be derived from other materials, but unlike a compilation, it is not composed of them. The important part of *Kapes*'s holding is the clear statement that prices can be original. *Kapes*, 197 F.3d at 1259.

72. *Kapes*, 197 F.3d at 1260.

73. *Id.* at 1261 (emphasis added).

74. *See* NYMEX, Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109 (2d Cir. 2007); BanxCorp v. Costco Wholesale Corp., 723 F. Supp. 2d 596 (S.D.N.Y. 2010); *cf.* Mulherin, *supra* note 53.

75. Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491, 503 (D. Md. 2010).

Johnson University Hospital, Inc.[76] Health Grades rates doctors and hospitals; it uses secret statistical techniques to assign them one, three, or five stars, and to create various "best of" lists.[77] Robert Wood Johnson (RWJ), a hospital in New Jersey, started issuing press releases touting its ratings.[78] Health Grades sued.[79] The court held that Health Grades' ratings were the "product of a creative and original process that is informed by Health Grades' judgment and choices."[80] RWJ had argued that the idea and the expression in the ratings had merged, and also that ratings like "☆ ☆ ☆ ☆ ☆" were uncopyrightable "short phrases."[81] The court, however, was unpersuaded.[82] It wrote: "Health Grades has not, however, asserted copyright infringement based on RWJ's copying of only these short titles or phrases, but rather on its copying of five star ratings and clinical excellence designations specifically attributed to Health Grades that are the product of Health Grades' rating and award system."[83]

Thus, according to *Health Grades*, a sufficiently creative process yields copyrightable ratings.[84]

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76. *See* Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc., 634 F. Supp. 2d 1226 (D. Colo. 2009).

77. *Id.* at 1234.

78. *Id.* at 1231.

79. *Id.* at 1230. The case is also notable because RWJ was not a competing rater, but rather, the rated party itself. *See id.* Suits against the rated party are rare, but they do happen. It is a natural consequence of any business model in which individual clients pay for access to the ratings and each rated party deals with a large number of clients. In these cases, highly rated parties will want to trumpet their good ratings, but the rater cannot afford to allow this process to unwind too far, or clients will be able to learn all they need to without paying. *See, e.g.*, Consumers Union v. Gen. Signal Corp., 724 F.2d 1044 (2d Cir. 1983) (denying preliminary injunction against quoting from positive *Consumer Reports* review); Angie's List, Inc. v. Ameritech Publ'g, Inc., No. 1:07-cv-1630-SEB-JMS, 2010 WL 2521722 (S.D. Ind. June 15, 2010) (denying motion to dismiss trademark infringement claims by Angie's List against publisher of telephone directory containing advertisements by businesses touting their "Super Service Award" ratings).

80. *Health Grades*, 634 F. Supp. 2d at 1235. Following CDN Inc. v. Kapes, 197 F.3d 1256 (9th Cir. 1999), the court further confused matters by referring to the ratings as "original factual compilations protected by copyright." *Health Grades*, 634 F. Supp. 2d at 1235. Once again, the holding that a rating is itself a compilation is like nails on a chalkboard for a copyright scholar. *See* PATRY, *supra* note 13, § 4:50 (calling Health Grades "[i]nstructive, although not for its result").

81. *Health Grades*, 634 F. Supp. 2d at 1237.

82. *See id.* at 1237-38.

83. *Id.*

84. *See id.* at 1235 (noting that an original process "imbues the prices listed with sufficient creativity and originality to make them copyrightable" (quoting *Kapes*, 197 F.3d at 1261)).

D. Judicial Skepticism

Even as courts have grown increasingly expansive in finding that ratings are original creations, they have also grown increasingly uncomfortable with ratings' creative potential. They have become concerned that perhaps ratings are facts after all—not facts that preexisted the rater, but rather facts that the rater imposes upon the world.

There are hints of this idea in *Eckes* and *Maclean Hunter*.[85] The district court in *Eckes* suggested that "since the plaintiffs' work is regarded as the authority in the field, it is entirely possible that the prices in their publication not only reflect market prices, but in fact can determine market prices."[86] Thus, some similarities might reflect the plaintiffs' influence, rather than prove copying.[87] In *Maclean Hunter*, the plaintiff's values allegedly became facts in a more explicit way: several states required use of Red Book values in computing insurance payments.[88] In those states, it didn't matter what auto dealers and consumers were paying for used cars; if the Red Book and another guide each said that the price of Delia's wrecked Corolla was $500, the insurance company would need to cut her check for at least that much.[89] This argument led the district court to hold that the prices had entered the public domain.[90] The Second Circuit disagreed and held that incorporation into public law is not enough, without more, to strip a work of copyright.[91]

Some more recent cases have also wrestled with the idea that a sufficiently authoritative price estimate can, for all intents and purposes, become the price. The court in *BanxCorp v. Costco Wholesale Corp.* explained that "the more acceptance a financial

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85. *See infra* text accompanying notes 86-91.86. Eckes v. Suffolk Collectables & C.P.U., 575 F. Supp. 459, 464 (E.D.N.Y 1983), *rev'd sub nom*. Eckes v. Card Prices Update, 736 F.2d 859, 864 (2d Cir. 1984).

86. Eckes v. Suffolk Collectables & C.P.U., 575 F. Supp. 459, 464 (E.D.N.Y 1983), *rev'd sub nom*. Eckes v. Card Prices Update, 736 F.2d 859, 864 (2d Cir. 1984).

87. *Id.* On appeal, the Second Circuit did not consider the legal implications of this possibility because it held that it was unproven as a factual matter whether the guide really had such influence. *Card Prices Update*, 736 F.2d at 864.

88. CCC Info. Servs. Inc., v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 64 (2d Cir. 1994).

89. *See, e.g.*, CONN. GEN. STAT. § 38a-353(a) (2011) (mandating minimum value of average of two approved guides).

90. *Maclean Hunter*, 44 F.3d at 64.

91. *Id.* at 73-74. On the issue of the copyright in works incorporated into law, see, e.g., Veeck v. S. Bldg. Code Cong. Int'l, Inc. 293 F.3d 791 (5th Cir. 2002) (en banc); Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291 (2005); Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193 (2007).

measure obtains (i.e. the more successful it is), the more 'fact-like' it becomes."[92] And in *New York Mercantile Exchange v. IntercontinentalExchange*, the plaintiff required commodities traders to post margin according to the prices it promulgated.[93] Even if its prices were "wrong" in some abstract Platonic sense, traders needed to value their open positions accordingly.[94] The Second Circuit held that under these circumstances, the plaintiff did not need copyright's incentives to create its prices.[95]

The most stunning example of judicial skepticism of ratings is the Second Circuit's recent opinion in *Barclays Capital Inc. v. Theflyonthewall.com*.[96] The plaintiffs were investment brokers who provided favored clients with detailed stock reports sometimes running to hundreds of pages.[97] Some of these reports contained ratings for particular stocks (e.g., a 1, 2, or 3 to indicate whether stock was expected to beat, match, or fall short of comparable stocks over the next year).[98] And some of these reports were "actionable"—for example, downgrading a stock's rating—in that they were likely to lead a client to change its stock holdings immediately.[99] Theflyonthewall.com (Fly) posted the actionable ratings to its website and various subscription services.[100] The brokers sued for hot news misappropriation.[101]

The district court found misappropriation,[102] but the Second Circuit reversed in an opinion that also casts grave doubt on copyright protection of influential ratings.[103] In the majority's view, Fly was "collecting, collating and disseminating factual information—the *facts* that Firms and others in the securities business have made

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92. BanxCorp v. Costco Wholesale Corp., 723 F. Supp. 2d 596, 605 n.7 (S.D.N.Y 2010).

93. NYMEX, Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109, 110-12 (2d Cir. 2007).

94. *Id.* at 115.

95. *Id.* at 118.

96. Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876 (2d Cir. 2011).

97. *Id.* at 880-81.

98. *See* Barclays Capital Inc. v. Theflyonthewall.com, Inc., 700 F. Supp. 2d 310, 316 n.5 (S.D.N.Y. 2010).

99. *Id.* at 316.

100. *Id.* at 323-25.

101. *Id.* at 313. They also brought claims of copyright infringement for verbatim copying of a handful of reports. *Id.* at 327. Fly claimed fair use, but eventually conceded infringement, costing it $12,750 in statutory damages (the statutory minimum), *id.* at 329, and $200,000 in attorneys' fees (for needlessly contesting infringement). *See* Barclays Capital Inc. v. Theflyonthewall.com, Inc., No. 06 Civ. 4908(DLC), 2010 WL 2640095 at *1 (S.D.N.Y. June 30, 2010). It appears that these were instances of sloppiness, rather than core components of Fly's business model.

102. *Theflyonthewall.com*, 700 F. Supp. 2d at 345-47.

103. *See* Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 877 (2d Cir. 2011).

recommendations."[104] And the majority was quite clear that these were not "facts" in the usual *Feist*-ian sense. Instead, the facts were "something [the Firms] create using their expertise and experience rather than acquire through efforts akin to reporting."[105] The majority repeatedly emphasized Fly's bona fides as a news medium, writing, "[t]he Firms are making the news; Fly . . . is breaking it,"[106] and compared Fly's activities to a newspaper reporting on political endorsements by other newspapers.[107] Judge Raggi's, concurring opinion called the ratings "uncopyrightable opinions" and cited *Hoehling v. Universal Pictures*, the case that held "interpretations" of fact uncopyrightable.[108]

The majority's view of why the ratings were facts is partially rooted in a pair of remarkable footnotes in a section of its opinion labeled "Moral Dimensions."[109] Footnote twenty-eight pointed out, with support in the record: "It may nonetheless be worth noting the peculiar nature of the Recommendations insofar as they tend to be self-fulfilling prophecies. Irrespective of the quality of a particular report and Recommendation, the Recommendation alone is likely to move the market price of a security in the short term."[110]

Footnote twenty-nine then brought out the implications of this point.[111] If the "bare fact" of a rating's promulgation could move a stock,[112] then in part, that was what the brokers' clients were paying for: advance notice of market-moving interventions. But if so, the implications were disturbing.

> If construed broadly, the "hot news" misappropriation tort . . . would ensure that the authorized recipients of the Recommendations would in significant part be profiting because of their knowledge of the fact of a market-moving Recommendation before other traders learn of that fact. In that circumstance, the authorized recipient upon whose commissions the Firms depend to pay for their research activities would literally be profiting at the expense of persons from whom such knowledge has been withheld who also trade in the shares in question ignorant of the Recommendation.[113]

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104. *Id.* at 902 (emphasis added).

105. *Id.* at 903.

106. *Id.* at 902.

107. *Id.* at 904 n.38.

108. *Id.* at 907 (Raggi, J., concurring) (citing Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 978 (2d Cir. 1980)).

109. *Id.* at 894-96 (majority opinion).

110. *Id.* at 896 n.28. This assertion had support in the record. *See id.* (citing Barclays Capital Inc. v. Theflyonthewall.com, Inc., 700 F. Supp. 2d 310, 322 (S.D.N.Y. 2010) (discussing short-term market-moving effect of a 2006 Merrill Lynch recommendation to buy General Motors stock)).

111. *Id.* at 896 n.29.

112. *Id.*113. *Id.*

113. *Id.*

Although the majority explained that these observations did not "affect[] [their] analysis," they nonetheless explained that the brokers were asking them to "use state tort law and judicial injunction to enable one class of traders to profit at the expense of another class based on their court-enforced unequal access to knowledge of a fact."[114] This view comes close to a condemnation of the brokers' business model for their ratings. It also comes close to a condemnation of ratings themselves.

II. WHAT ARE RATINGS?

As this history of ratings shows, courts don't have a single clear theory of whether ratings are copyrightable, because they don't have a single clear theory of what ratings are. The cases move among three distinct and incompatible theories of ratings: that they are facts, opinions, or self-fulfilling prophecies. This Part introduces the three theories, shows just how profoundly they differ, and then explains why all three of them are necessary to understand ratings.

A. Three Theories

The first theory of ratings is that they aspire to be facts. Some doctors are safer than their peers (☆ ☆ ☆ ☆ ☆); some restaurants' kitchens are cleaner (A). Some movies are worth seeing (thumbs up); others are not. Some consumers and countries pay their bills on time (810 or AAA), others pay late, and still others not at all. If you have a 2003 Upper Deck Derek Jeter card, you should expect to get about $6 for it, not $60.

The factual theory is the most straightforward. It drives the old credit-rating cases like *Lumbermen's Credit* and *Produce Reporter Co.*, which treat a business's creditworthiness much like they treat its total assets or its address, and which locate any copyright in the rater's sweat of the brow.[115] Under modern doctrine, facts are categorically excluded from copyright, which explains cases like *RBC Nice Bearings* and *Legg Mason*.[116] The factual theory goes a long way in explaining the influence of compilation reasoning in more recent cases—it searches for originality in the choice of subjects and the ordering of ratings, rather than in the ratings themselves.

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114. *Id.*

115. *See supra* Part I.A; *see also* Dun v. Lumberman's Credit Ass'n, 209 U.S. 20 (1908); Produce Reporter Co. v. Fruit Produce Rating Co., 1 F.2d 58 (N.D. Ill. 1924).

116. *See supra* Part I.B; *see also* RBC Nice Bearings, Inc. v. Peer Bearing Co., 676 F. Supp. 2d 9 (D. Conn. 2009); Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737 (D. Md. 2003).

The second theory is that ratings are opinions. This author gave *Street Fight* five stars out of five on Netflix. But user "thepraetorians" gave it one star out of ten on IMDB, calling it "[t]oo one-sided."[117] *De gustibus non est disputandum*. On this view, rating is inherently subjective, and a good rating is something like a Pauline Kael film review: a rich, opinionated, and complicated expression of a well-informed observer.[118]

This is the most common modern theory of ratings. If they are creative opinions, then the *Bleistein* nondiscrimination principle implies that they are copyrightable on the same terms as any other creative expression.[119] *Maclean Hunter* was the first case to embrace this theory fully; *Kapes* the first to rely solely on it.[120] This theory frequently locates the relevant creativity in the design of the ratings process; *Health Grades* shows that the logic of this reasoning makes ratings copyrightable as soon as they cross the *de minimis* threshold, rather than being copyrightable only as part of an original compilation.[121]

The third theory is that ratings are self-fulfilling prophecies. A credit downgrade makes a country less able to pay its bills. The students whose LSAT scores shape a law school's *U.S. News* ranking themselves choose which school to attend on the basis of its ranking. A new price target from an analyst will move a stock because everyone expects everyone else to react to the recommendation, and everyone expects everyone else to expect to react, and so on *ad infinitum*—even if no one actually reacts to the substance of the recommendation itself.

This is the animating theory of *Theflyonthewall.com*, which uses the phrase "self-fulfilling prophecies" in explaining why the analysts' ratings were "news."[122] It also helps drive the result in *BanxCorp* and *NYMEX*, for similar reasons.[123] Although *Eckes* and

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117. thepraetorians, Comment to *Reviews & Ratings for Street Fight*, IMDB, (July 23, 2005), http://www.imdb.com/title/tt0457496/reviews?start=10.

118. *See generally* BRIAN KELLOW, PAULINE KAEL: A LIFE IN THE DARK (2012) (discussing Kael's life and reviews).

119. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903) ("It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."). *See generally* Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303 (1991) (discussing influence of *Bleistein*).

120. *See supra* Part I.C.

121. *See supra* Part I.C.

122. Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 896 n.28 (2d Cir. 2011).

123. *See* NYMEX, Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109, 118 (2d Cir. 2007) (stating that the plaintiff's "exchange requires settlement prices to clear contracts"); BanxCorp v. Costco Wholesale Corp., 723 F. Supp. 2d 596, 603 (S.D.N.Y 2010) (considering "degree of consensus" about prices).

Maclean Hunter found price guides copyrightable, they took seriously the allegations that the copyright owner's valuations were so authoritative as to call their copyrightability into question.[124] These cases share an intuition that self-fulfilling ratings aren't the sort of thing intellectual property law should protect.

Let us compare the theories. If ratings are facts, then they are discovered; the rater's job is to investigate the world to learn the true facts about the subject.[125] If ratings are opinions, then they are created; the rater's job is to produce a personal evaluation of the subject. If ratings are self-fulfilling prophecies, then they are imposed; the rater's job is to provide a vision so compelling it will be universally accepted. The *telos* of a rating-as-fact is truth; the *telos* of a rating-as-opinion is authenticity; the *telos* of a rating-as-prophecy is power.

The theories also make radically different claims about whether ratings can be "true" or "false." Treating ratings as statements of fact immediately implies that they can. To say that a ball bearing has a load rating of one hundred pounds is to make a statement that is false if the bearing gives way under a load of fifty pounds. If ratings are opinions, then they cannot be true or false. Some people love splatter horror films, others don't. Even if the movie-going public disagrees, that doesn't make a critic's C-minus review of *Chainsaw Stockbrokers* wrong. And to ask whether a prophetic rating is "true" is beside the point—whatever reality allegedly preexisted the rating becomes irrelevant once the rating displaces it. We have arrived back where we started, but the causal arrow between reality and rating is reversed.[126]

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124. *See supra* Part I.

125. Saying that ratings are "facts" in this sense, of course, does not mean that this is an accurate philosophical account of facts. *See generally* Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007) (discussing problems with correspondence theory). There are severe problems with the correspondence theory of facts, according to which there are things called "facts" in the world that preexist the people who report them. *See id.* at 51-52. Even two chemists looking at the same burette may report different readings, and even a statement about the temperature involves a slew of social commitments about what a "temperature" is and how to measure it. *See id.* at 88-92. A weaker form of the fact theory of ratings would say only that ratings are "facts" in the same sense as temperatures or other things that copyright law indisputably treats as facts, notwithstanding the objections to the correspondence theory. *See generally id.*

126. *See, e.g.*, *id.* at 70 (discussing how people "use numeric valuations as facts").

B. Aspects of Ratings

The three theories of ratings are all correct—and all three are wrong. If one is sometimes better than the others at explaining particular ratings, it is not because the world of ratings comes neatly divided into ratings that are facts, opinions, or self-fulfilling prophecies, but rather because every rating partakes of all three in varying measure. To understand ratings, it is necessary to understand which aspects of a given rating are better explained by one theory or another, rather than using the theories to make a ternary classification of the rating as a "fact" or "opinion" or "self-fulfilling prophecy." This section will anatomize ratings to show the interplay of the three theories.

Fact theory correctly explains ratings' extensive reliance on factual data. This is particularly obvious with the credit report books, which depended on mountains of reports from correspondents about particular businesses. Price guides are similarly dependent on extensive information about past transactions. *RBC Nice Bearings* provides an extreme example of a rating whose factual inputs are utterly central to the rating.[127] But even ratings with an obviously dominant subjective component, such as *Publishers Weekly*'s choices of which reviews to star, depend on empirical observation: a book review by someone who hasn't read the book isn't meaningfully a "review."

On the other hand, opinion theory emphasizes that some ratings are based on irreducibly subjective aesthetic and value judgments. It may be a near-universal belief that food should not taste of rotting garbage, but beyond that, any judgment of quality necessarily contains claims about which reasonable eaters can disagree. That said, it is a fact what a particular rater's subjective reaction to something is—this author would be lying if he said he liked the J.J. Abrams *Star Trek* reboot. The subjective-quality aspect of ratings, of course, includes not just judgments about what is best for the rater, but also about what is best. Movieguide scores movies from −4 (abhorrent) to +4 (exemplary) based on their conformity to a "traditional view of the Bible and Christianity."[128] These are value judgments other traditional Christians are expected to share, not purely individual reactions.

When it comes to a rating's outputs, the fact theory correctly emphasizes ratings' predictive purpose. Personal credit ratings

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127. *See supra* Part I.B. *See generally* RBC Nice Bearings, Inc. v. Peer Bearing Co., 676 F. Supp. 2d 9 (D. Conn. 2009) (discussing load ratings for ball bearings).

128. *What the Ratings Mean*, MOVIEGUIDE (Oct. 30, 2008), http://www.movieguide.org/c/info/subscriber-services.html.

attempt to predict whether a person will repay her debts. Either she will or she won't, and when she does or does or doesn't, that will be a fact. The market-improvement purpose of ratings is incomprehensible without this correspondence with observed reality. Indeed, even highly subjective questions can still be objective from the perspective of someone trying to give useful advice. Taste in food is necessarily subjective, but readers still find a Zagat guide helpful in predicting which restaurants they will like. The Netflix Prize, in which contestants tried to predict most accurately the subjective ratings Netflix users would give movies, had a completely objective win condition: closest statistical correspondence to Netflix users' ratings.[129]

In contrast, the opinion theory points out that beliefs about facts are just that: beliefs.[130] In particular, the future is always unknowable until it happens: no matter how many tests a batch of ball bearings has undergone, the only way to know how much weight a given bearing will support is to load it until it fails. Until then, there are no facts, only opinions about what will happen.

"Opinion" can therefore have two very different meanings. One is a subjective reaction to an inherently subjective matter—what are the ten most awesome sports cars of all time? The other is a subjective guess at how best to predict what will be objectively true in the future—what is the probability that this structured debt instrument will repay its investors? Both are subjective, but differently so—the former conceals a value judgment, and the latter does not.[131] Subjective reactions are differences of values that law must take as given; the opinion theory values this diversity for its own sake. In contrast, the opinion theory values subjective guesses as a form of instrumental diversity: having more than one belief about the world tends to make it more likely that someone will be right.

Next, consider what the theories say about the rating process. The choice of process—including both the computational algorithms and the human information flow involved—expresses an opinion about the best overall way to make a set of predictions. That is, it's not an opinion about a specific rating, but rather a meta-opinion about a general class of ratings. Of course, in the process of applying the

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129. *See The Netflix Prize Rules*, NETFLIX PRIZE, http://www.netflixprize.com/rules (last visited Mar. 2, 2012).

130. *See* Alan L. Durham, *Speaking of the World: Fact, Opinion and the Originality Standard of Copyright*, 33 ARIZ. ST. L.J. 791, 831 (2001).

131. *Cf.* PATRY, *supra* note 13, § 4:50 (describing *Kapes* and *Maclean Hunter* as mistaken applications of the "fact/value distinction"). In Patry's view, price estimates are inherently factual statements, not "moral or ethical statements of belief." *Id.*; *cf.* Dan L. Burk, *Method and Madness in Copyright Law*, 2007 UTAH L. REV. 587, 607 (distinguishing "objective message about the physical world" from "subjective message about the experience of being human").

system to produce a given rating, it may be necessary to make further judgment calls or subjective statements of quality, and these will introduce specific opinion to the mix.[132]

But within this opinion-driven framework, there is a further aspect of a ratings process that is strongly factual. Just as it is a fact whether a subjective individual rater holds a particular opinion of the subject, it is also a fact that a rater applied a given process to produce a given rating. If the Zagat guide gives Pepolino an 11 in retaliation for Nina Zagat's run-in with an off-duty waiter, readers would feel comfortable calling the 11 a lie, because Zagat holds out to the world that its published numerical ratings are actually the ones derived by applying its "special formula"[133] to the reviews it receives. The formula may be confidential, opinionated, and based on opinionated data, but its actual application is a factual matter.[134]

So far, the discussion has involved only the fact and opinion theories, not the prophetic theory, because the prophetic theory comes later in time. Fact and opinion speak to the production of the rating, but self-fulfilling prophecy speaks to its reception: how people act on it and react to it. Like the fact theory, it posits a correlation between rating and reality, but here the question is whether reality corresponds with the rating by the time its predictions have come due. There are four effects worth considering.

First, the purpose of a rating is to enable its users to cut off their own investigations early—to leave aside some information and rely instead on the rating. It must be understood that this is the point of a rating. Its value to users consists in its information-cost savings, which is just another way of saying that rating users deliberately choose to remain ignorant of some potentially relevant information.

Second, ratings themselves are inherently reductive. They compress the complexity of the universe into a single value. The rating's creator must choose what to ignore. It must choose what not to investigate, and what to investigate but then disregard. It must choose how to measure complex phenomena, how to weigh conflicting

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132. In some cases, fact theory's emphasis on accurate predictions will emphasize that some opinions about a good choice of process are reasonably plausible, and others are not. This author would not want to measure ball bearing load ratings by chewing them. But this is not to say that Steve Steeljaw, who performs chew tests, does not hold the opinion that it is a good testing methodology—only that Steve's opinion is self-evidently silly.

133. *What do Zagat Ratings Mean?*, ZAGAT, http://support.google.com/zagat/bin/answer.py?hl=en&answer=1705271 (last visited Mar. 2, 2012).

134. When the process itself incorporates individual discretionary and subjective elements, there may be particularly difficult boundary cases. *Cf.* James Grimmelmann, *Some Skepticism About Search Neutrality*, *in* THE NEXT DIGITAL DECADE 435, 456-58 (Berin Szoka & Adam Marcus eds., 2010) (questioning distinction between manual "manipulation" of search results and changing the search algorithm itself).

values, and how to predict an inherently unknowable future. This, again, is the value of the rating: it uses human expertise to turn a messy reality into usable information. But it also necessarily means that ratings diverge from the underlying world.[135] The only completely accurate rating system is the world itself; all human ratings are approximations, some better, some worse.

Third, ratings serve as focal points for coordination by their users. If Delia drives her junker of a Corolla onto the lot of a used-car dealer, the negotiations over the price are likely to start at the value pulled from the Red Book or one of its competitors. This, again, is part of the point. The car-price guides help make a market possible by distributing price information. And tendency of users to rely on the ratings can give rated entities an incentive to clean up their act.[136] But it also means that the coordination function will guarantee the rating's use even if it's inaccurate, indeed, even if it's known to be inaccurate.[137] The rating is the street lamp in a drunken key-hunt.

Fourth, law sometimes requires the use of ratings. When it does, the rating is deemed true as a matter of law. If insurance companies are required to pay at the value given by a car-price website, then any price posted on the website immediately becomes a market price. The Securities and Exchange Commission and state regulators require some investors to buy only highly rated securities; giving a bond an "investment grade" rating makes it into a "safe" investment by regulatory fiat.[138]

Thus, the three theories interweave to describe a rating:

1. External data about the subject are facts.
2. Tastes and values are opinions, but it is a fact whether the rater actually holds them.

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135. *See* Malcolm Gladwell, *The Order of Things: What College Rankings Really Tell Us*, NEW YORKER, Feb. 14, 2011, http://www.newyorker.com/reporting/2011/02/14/110214fa_fact_gladwell (discussing the arbitrary nature of choices made in college and other rankings).

136. Sometimes metaphorically (think of the Zagat Survey) and sometimes literally (think of New York's letter grades for restaurant hygiene). *See generally* N.Y. DEP'T HEALTH & MENTAL HYGIENE, RESTAURANT GRADING IN NEW YORK CITY AT 18 MONTHS 3 (2012), *available at* http://www.nyc.gov/html/doh/downloads/pdf/rii/restaurant-grading-18-month-report.pdf (finding that "many key violations were less prevalent at 18 months [after requiring restaurants to post their inspection grades] than in the year prior to grading").

137. *See, e.g.*, Diane Ravitch, *No Student Left Untested*, NYR BLOG (Feb. 21, 2012), http://www.nybooks.com/blogs/nyrblog/2012/feb/21/no-student-left-untested (criticizing use of test-score-based teacher ratings in decisions to fire effective teachers with "ineffective" ratings); Gary Rubinstein, *Analyzing Released NYC Value-Added Data Part 2*, TEACH FOR US (Feb. 28, 2012), http://garyrubinstein.teachforus.org/2012/02/28/analyzing-released-nyc-value-added-data-part-2 (demonstrating that New York City teacher ratings fail basic tests of reproducibility).

138. *See generally* Frank Partnoy, *The Siskel and Ebert of the Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L. Q. 619 (1999) (listing examples of state and federal incorporation of credit ratings into law).

> 3. It is a fact whether a rating's testable predictions are ultimately correct, but an opinion as to what will happen before it actually does.
> 4. Contestable choices made in designing and applying a process are opinions, but what process the rater actually followed is a fact.
> 5. Ratings can be self-fulfilling prophecies because users do not check their accuracy, because the rater itself throws information away, because ratings serve as focal points for coordination, or because the law deems them to be correct.

III. COPYRIGHT IN RATINGS RECONSIDERED

This Part asks what the theories of ratings detailed in Part II have to say about copyright. It reexamines the doctrinal bona fides of some of the cases discussed in Part I, and in the process, sketches what the three theories of ratings have to say about the conventional utilitarian story of copyright as a tradeoff between authorial incentives and public access.[139]

A. External Data

In incentive-theoretic terms, there are two justifications usually given for the rule that facts are uncopyrightable. The first, and less persuasive, is that there is no particular need for an incentive to discover facts, since they already exist. But the early credit-rating cases amply illustrate just how much work goes into researching ratings. Here is how the district court described the defendant's credit-rating book in *Lumbermen's Credit*:

> There are in respondents' reference book more than 60,000 names. The evidence shows that there are on hand more than 1,000,000 reports, replies to inquiries, etc. It further appears that defendants receive large numbers of newspapers, magazines, trade journals and bulletins; that they use traveling men, lumber dealers, agents, lawyers, justices of the peace, mercantile associations, railroad companies and the clippings sent out by a number of clipping bureaus. At times defendants' mail reaches approximately 2,000 pieces of mail per day. A large force of employees and large offices are required in the management of the business.[140]

Such extensive effort is typical. The plaintiff in *Produce Reporter Co.* spent at least half a million dollars a year—in 1924 dollars—to compile its information about produce dealers.[141] That is

139. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (noting the "difficult balance" between incentives and access).

140. Dun v. Lumbermen's Credit Ass'n, 209 U.S. 20, 21-22 (1908).

141. Produce Reporter Co. v. Fruit Produce Rating Co., 1 F.2d 58, 58 (N.D. Ill. 1924).

antihistamine money: not to be sneezed at. Companies in the business of rating would not go to such effort and expense unnecessarily; even gathering facts can be hard and expensive work.

Instead, the more convincing argument against copyright in ratings-as-facts comes from the access side of the ledger. There are compelling public policy reasons for a robust public domain in facts: it promotes democratic political debate, ensures a common foundation for scientific inquiry, and assists in making public participation in society more egalitarian. In a liberal society, everyone is entitled to their own opinions, but no one is entitled to own the facts. This enhanced need for access to "building block" facts overrides the argument for incentives to gather them, neatly disposing of any claim to copyright in the masses of raw data on which ratings depend.

That said, some courts may be too quick to assume that ratings simply report on observations made about the world. *Legg Mason* may be one such case.[142] It is not obvious where one would go to observe "short-term-buying-power"[143] in the wild, but the parties treated it as a fact, and the court didn't bat an eye.[144] At the very least, it seems like an interpretation of facts, rather than a fact as such—but if so, then unoriginality is no longer a convincing explanation of why it is uncopyrightable.[145]

B. Tastes and Values

What about the subjective tastes and values that also go into a rating? If ratings are the "personal reaction of an individual upon nature,"[146] then copying even a small sample of them is still copying something genuinely original. The rater's process looks like a novelist's: she observes the world, then produces something indisputably "one [wo]man's alone."[147]

Here, the access argument against copyright falls away. Since these subjective beliefs, by definition, cannot preexist the rater, there is no risk that granting copyright will withdraw them from the public domain. The public never has less of the rater's subjectivity after the rating than it had before.

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142. *See* Lowry's Reports, Inc. v. Legg Mason, Inc. 271 F. Supp. 2d 737 (D. Md. 2003).

143. *Id.* at 742.

144. *Id.* at 754.

145. *Cf.* Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 978 (2d Cir. 1980) (holding interpretations uncopyrightable because others need "broad latitude" to "make use of historical subject matter," rather than because interpretations are facts).

146. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).

147. *Id.*

This reasoning drives *Maclean Hunter*, which distinguished between hard ideas "that undertake to advance the understanding of phenomena or the solution of problems" and soft ideas that are "infused with the author's taste or opinion."[148] The former are so closely bound up with the world as to provide a serious risk that copyright would inhibit scientific progress. *Kregos v. Associated Press*, on which *Maclean Hunter* draws, gave the example of a doctor's list of symptoms for a diagnosis.[149] If that list is meant as "a useful identifier of the disease," then merger will kick in to deny a copyright that could otherwise prevent other doctors from writing about the disease and its treatment.[150] *Maclean Hunter*, by consigning ratings to the second, softer category of ideas, purports to avoid this risk.[151] As long as they really are subjective, ratings "do not materially assist the understanding of future thinkers," and thus the need for access is no more pressing than it would be in a run-of-the-mill copyright case.[152]

But this reasoning creates a puzzle on the incentive side. If ratings are just "subjectively based," what good do they do society that justifies a grant of copyright?[153] If Delia doesn't like the trade-in value a used car dealer quotes her from the Red Book, it doesn't seem like a satisfying comeback to say, "Well, that's just Maclean Hunter's *opinion*."[154] Nor is the Red Book a particularly entertaining read—the number of people who enjoy it on an aesthetic level is probably quite small. The ratings in the Red Book are and are intended to be useful; no one would buy it if they weren't.

Maclean Hunter and the cases that depend on it have conflated the two basic kinds of opinions. They have mistaken opinions intended to be useful—such the best way to predict car prices—for opinions "infused with the author's taste."[155] That *Maclean Hunter* did so while claiming to distinguish precisely these two kinds of opinions is especially discouraging: it's a fine test indeed whose own proponents cannot apply it correctly.

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148. CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 71 (2d Cir. 1994).

149. Kregos v. Associated Press, 937 F.2d 700, 707 (2d Cir. 1991).

150. *Id.*

151. *Maclean Hunter*, 44 F.3d at 72-73.

152. *Id.* at 71.

153. *Id.* at 71 n.21 (quoting Eckes v. Card Prices Update, 736 F.2d 859, 863 (2d Cir. 1984)).

154. *See* Dennis S. Karjala, *Copyright and Creativity*, 15 UCLA ENT. L. REV. 169, 192 n.95 (2008) ("The social goal is not to have a variety of esthetically pleasing guesses about these numbers but rather to have as close an approximation as possible to the actual value . . . .").

155. *See, e.g.*, Durham, *supra* note 130, at 840 (questioning theory used in *Kregos* and adopted by *Maclean Hunter*).

C. Predictions

Predictions about future events are both facts and opinions as they attempt to describe accurately what will happen, but they express contestable opinions until it does happen. Copyright doctrine would suggest that ratings are copyrightable not as descriptions, but only as expressions of opinion.[156] This pair of uncontroversial-sounding propositions creates serious trouble at the borderline between the two categories. The better a rating—because it is more accurately predictive—the less copyright will be willing to protect it.[157]

Assume that Netflix could predict with complete accuracy how much its users will like any movie. These ratings would be purely factual and hence uncopyrightable. But suppose that Netflix's algorithm were measurably worse—for example, because Netflix employees were occasionally instructed to let off steam by adjusting ratings up and down based on random whimsy. These sabotaged ratings would be less accurate and less useful, but more copyrightable. They would be "infused with the author's taste or opinion," and hence immune from merger.

Ratings-as-opinions showers its favors on ratings that are measurably worse: it encourages raters to exaggerate the difficulty of the rating task and to eschew simple techniques. That's an incentive all right: a bad one. The problem here is that copyright is not well engineered to encourage the creation of objectively useful works, as opposed to subjectively expressive ones.[158] The complicated abstraction-filtration-comparison test for computer software[159] and the tortured compilation reasoning that courts use in map cases show how much doctrinal violence it takes to bend copyright to a useful purpose.[160] There is nothing special regarding ratings in this respect—copyright is simply not a good tool for the job.

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156. *See supra* Part I.B-C.

157. *See* Burk, *supra* note 131, at 594 (criticizing *Maclean Hunter* because "the supposedly 'original' aspects of the values . . . were the kind of 'choices' dictated by the desire for accuracy"); *id.* at 595 (noting that "in the Second Circuit . . . they have decided that some facts aren't factual").

158. *See, e.g.*, Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1150 (1998) (discussing functional computer programs as a problematic case for copyright).

159. *See, e.g.*, Computer Assocs. Int'l., Inc. v. Altai, Inc., 982 F.2d 693, 704 (2d Cir. 1992).

160. *See, e.g.*, Mason v. Montgomery Data, Inc., 967 F.2d 135, 141 n.10 (5th Cir. 1992) (finding originality in mapmaker's "judgment" about where survey lines were located).

D. Processes

Courts have attempted to evade this theoretical and doctrinal problem by embracing the process theory.[161] Treating ratings as the outputs of creative processes seems to offer a satisfying way of harmonizing ratings' value with copyright. It perceptively focuses on the hard and contested part of ratings—creating and applying a rating process—and attempts to describe it in a way that matches what copyright is looking for. Unfortunately, the resulting test is both doctrinally and theoretically unsound.

A rating process by itself is uncopyrightable, and the Copyright Act could not be more explicit on the point: "[i]n no case does copyright protection . . . extend to any . . . procedure, process, system, [or] method of operation."[162] One could respond to this objection by arguing that courts are protecting an original work produced using the process, not the process itself. But applying an original and creative process does not guarantee that what emerges will be original and creative.[163] A photographer who takes a picture of Mount Fuji with the lens cap on has not succeeded in creating a copyrightable work. There is no "distinguishable variation" between her all-black print and any other all-black image of the same dimensions.[164] She may have made countless creative choices, conscious and unconscious, in composing and taking the shot. But the resulting "work" does not reflect any of those choices; it bears no authorship whatsoever. So too with "☆☆☆☆☆": by itself it is unoriginal.[165] Creativity only counts for copyrightability purposes if it translates into perceptible original expression in the resulting work.[166]

In theoretical terms, the problem with the creative-process theory is not perversity but supreme indifference. If any rating

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161. *See supra* Part I.C. The argument that one could claim a copyright in the fact (read: uncreative labor) of having followed a given process is such an obvious nonstarter after *Feist* that it is never made.

162. 17 U.S.C. § 102(b) (2006).

163. *Cf.* PATRY, *supra* note 13, § 4:50 (arguing that *Kapes* and *Maclean Hunter* "confus[e] judgment with originality"). There is an analogy here to computer-generated works. If ratings were copyrightable solely because they came from an original process, then .doc files would be copyrightable solely because they were produced by Microsoft Word, regardless of what the files actually contained. *Cf.* Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185 (1986) (arguing that authorship in such works is contributed by the user, not the programmer).

164. Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159, 161 (2d Cir. 1927); *see also* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 492 (2d Cir. 1976) (requiring "genuine difference" to make a work copyrightable).

165. *See* Hughes, *supra* note 18, at 630.

166. *See also*, Burk, *supra* note 131, at 598 ("Protecting the end product . . . effectively protects the method by which that end-product was generated . . . .").

resulting from a minimally creative process is copyrightable, then copyright encourages raters to come up with their own minimally creative processes—regardless of whether the creativity in those processes has any detectable influence on the ratings themselves. Perhaps the plaintiff in *RBC Nice Bearings* should have had its engineers write a haiku on each test report, then carefully erase it before proceeding to enter the numbers in the spreadsheet of bearing load data. By the reasoning of *Health Grades*, that would have made for a sufficiently "creative and original" process to make the resulting ratings copyrightable.[167] It would not, however, have done society any good.

E. Reception

The cases that treat ratings as self-fulfilling prophecies are cases about power. They share the sense that the copyright owner is somehow in a position to dictate to others that they must use its rating.[168] Such ratings are examples of what Justin Hughes calls "social facts": instances in which "original expression becomes the basis for universally accepted propositions of the form, 'this is X,' 'that is Y,' 'A is B' that seem to have truth values."[169] The rater can afford to be indifferent to the ratings' accuracy (thereby showing that the ratings are not discovered facts), and users are indifferent to the ratings' expressive value (thereby showing that the ratings are not creative opinions). The plaintiff tends to win when the court thinks that people have a meaningful alternative to using its ratings, and to lose when the court thinks that people must pay more attention to the ratings than to their purported subjects. That is, the rating's copyrightability turns on whether it is "universally accepted," to use Hughes's phrase.

This tendency is most obvious in *NYMEX*, where the plaintiff exchange required traders to use its prices when providing margin capital.[170] But in any price case, the rating's coordination function

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167. Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc., 634 F. Supp. 2d 1226, 1235 (D. Colo. 2009). *Health Grades* held that star ratings had "the minimal degree of creativity necessary to warrant copyright protection" because they were "the product of Health Grades' rating and award system." *Id.* at 1237-38.

168. This idea finds support in the cases on standards and interoperability. *See, e.g.*, Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 820-22 (1st Cir. 1995) (Boudin, J., concurring) (arguing that a hierarchy of commands in a computer program is uncopyrightable because customers should not be "captives" of the first company to use it); Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 709-10 (2d Cir. 1992) (holding that portions of a computer program dictated by "external factors," such as compatibility with other programs, are uncopyrightable)

169. Hughes, *supra* note 125, at 90.

170. NYMEX, Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109, 110-11 (2d Cir. 2007).

will be important: the market-maker's job is to create prices at which trades will happen, which means it succeeds precisely when traders adopt the values it suggests. Is the Card Price Guide "the authority" because it is widely followed, or is it widely followed because it is "the authority"? *Theflyonthewall.com* refers to the "bare fact" of the brokers' recommendations;[171] it might equally well have referred to the "brute force" that the brokers and their clients can exert on the market.

This is the source of CCC's argument in *Maclean Hunter*: that state laws require the use of the Red Book's values.[172] One need not embrace the idea that the Red Book has become a kind of privately drafted legislation to believe that it might owe its success to factors other than its quality. States have given the Red Book a franchise to be an arbiter of record for used car valuations. Indeed, on a day-to-day level, the Red Book is now no longer particularly accountable to its clients. It doesn't matter whether the prices are "accurate," not when the law requires them. Indeed, if the law sets insurance payments at Red Book levels, the Red Book prices will have a hydraulic effect on the rest of the used-car market, which will show a greater tendency to converge on Red Book prices.

Theflyonthewall.com's holding is couched in access terms. Treating Fly as a media defendant reporting the news only makes sense if it is reporting news worth reporting. Thus, this framing accepts that there is a special public interest in knowing that analysts have made recommendations. It's hard to say that the public has a compelling interest in unfettered access to the full details of hundred-page analyst reports—but it sounds more plausible that there is such an interest in access to the top-line rating that each report contains.

But *Theflyonthewall.com* also depends on a point about incentives. In the court's view, the brokers are publicly touting a stock just after telling their clients to stock up on it.[173] At that point, purely because of the Wall Street herd mentality, the brokers' ratings become reality in the short run, and the brokers' clients make a quick profit, whether or not the rating was justified in the slightest. The court is hesitant to use its power to help the brokers enforce the lead time they give their clients; that is, it is hesitant to make the brokers the beneficiaries of intellectual property's incentives. If this is an

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171. Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 896 n.29 (2d Cir. 2011).

172. *See* CCC Info. Servs. Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 64 (2d Cir. 1994); *supra* text accompanying notes 88-91.

173. *Theflyonthewall.com*, 650 F.3d at 896 n.29.

immoral and inefficient business model, as the court seems to be thinking,[174] the point undercuts the incentives argument for copyright, not just the access argument against it.[175]

Theflyonthewall.com, then, has tapped into our deep societal anxiety about ratings, an anxiety that is the uncanny reflection of our deep societal attraction to ratings. The Zagat guides were once the "sine qua non of restaurant guidebooks" and "all that mattered to restaurateurs."[176] Google can "destroy businesses with a single algorithmic change" by lowering their search rankings.[177] Bad ratings can close a restaurant, end a consumer's chance for a mortgage, kill a movie on opening weekend, or send a country into an economic crisis. The power to rate is the power to destroy.

It's not so clear, however, that pulling the only lever the court has to pull—withholding intellectual property protection—will improve matters. Fly's service was available through subscription on its website, on Bloomberg terminals, and through various other licensing agreements.[178] In other words, it, too, is profiting from unequal access to the recommendations.[179] If one accepts footnote twenty-nine's dog-eat-dog view of the financial world,[180] then Fly's subscribers aren't just chumps at the mercy of the brokerages—they're on the prowl looking for some chumps of their own.

All of which is to say that the *Theflyonthewall.com* court's skepticism is far more corrosive to copyright theory than it realizes. The court cogently explains why the self-fulfilling prophecy theory of ratings potentially undercuts the argument for using intellectual property incentives to encourage their creation.[181] But, for exactly the same reason, the peculiar nature of ratings also potentially undercuts the argument for promoting public access to them. If their creation is bad for society, then so too is their dissemination. Both halves of the standard copyright story fall apart, not just one. The idea of ratings as self-fulfilling prophecies doesn't resolve the tension between treating them as facts and treating them as opinions; it destabilizes the entire theoretical framework within which that tension exists.

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174. *See id.* (arguing that the Firms' clients "would literally be profiting at the expense of" traders from whom knowledge of the recommendations has been withheld).

175. *See* Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 923 (2010).

176. *Nina Zagat*, GAWKER (Feb. 3, 2008), http://gawker.com/550458/nina-zagat.

177. *How Google is Destroying Small Business & Jobs*, SAVINGSMALLBUSINESS.ORG, http://www.savingsmallbusiness.org (last visited Mar. 7, 2012).

178. *Theflyonthewall.com*, 650 F.3d at 883.

179. *See id.*

180. *See id.* at 896 n.29; *supra* text accompanying notes 112-114.

181. *See supra* Part I.D (discussing *Theflyonthewall.com*).

IV. A WORD FROM THE SCHOLARS

Although no one has written at length about copyright in ratings as such, three scholars have given the price-guide cases close attention in ways that are relevant to this Article's taxonomy: Alan L. Durham,[182] Michael Steven Green,[183] and Justin Hughes.[184] They recognize that these valuations are a particularly problematic category of "facts" because the valuations seem, at least in part, to be created by the rater rather than discovered in the world. These scholars are right that something strange is going on here in copyright's ontology, and the theories of ratings show why. Like other ratings, valuations straddle the categories of facts, opinions, and self-fulfilling prophecies—and scholars' explanations for how copyright law should treat them depend on how they resolve the valuations into one category or another.

Alan L. Durham argues that all facts are "infused with opinion" because even a population statistic will vary based on the census taker's methodology.[185] In effect, this is a critique of the process theory; he demonstrates that even a highly creative process can still yield things that are indisputably "facts" for copyright purposes.[186] In his view, copyright is justifiably unwilling to protect these facts, not because they are free of highly subjective beliefs, but because it would give a "monopoly on its insights" about the world, which is not copyright's job.[187] He finishes by recognizing *Maclean Hunter*'s distinction between expressive and descriptive opinions,[188] endorsing it as the line between the copyrightable and the uncopyrightable.[189]

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182. Durham, *supra* note 130, at 825-31; Alan L. Durham, *Speaking of the World: Fact, Opinion and the Originality Standard of Copyright*, *in* INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS 133, 161-72 (Robert F. Brauneis ed., 2009).

183. Michael Steven Green, *Copyrighting Facts*, 78 IND. L.J. 919, 962-63 (2003) [hereinafter Green, *Copyrighting Facts*]; Michael Steven Green, *Two Fallacies About Copyrighting Factual Compilations*, *in* INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS, *supra* note 182, at 109, 119 [hereinafter Green, *Two Fallacies*].

184. Hughes, *supra* note 125, at 68-77; Justin Hughes, *Created Facts and Their Awkward Place in Copyright Law*, *in* INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS, *supra* note 182, at 186, 203-09; *see also* Burk, *supra* note 131, at 593-97; Karjala, *supra* note 154; David McGowan, *Copyright and Convergence: A Pragmatic Perspective*, *in* INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS, *supra* note 182, at 233, 258-62.

185. Durham, *supra* note 130, at 838-39.

186. *See id.* at 822-25 (discussing conjectures about history, such as why the *Hindenburg* caught fire).

187. Durham, *supra* note 182, at 172.

188. *Id.* at 844-45 (contrasting a musicologist's list of authentic J.S. Bach pieces with an encyclopedist's collection of interesting trivia).

189. *Id.* at 844-47.

Michael Steven Green's view is the opposite of Durham's; he argues that *Maclean Hunter*'s valuations were facts because "[t]hey were representations of the world that were to be taken as correct, not fiction that could be appreciated independently of its truth."[190] This approach focuses not on the production of the values, but on their presentation. They were facts because they were held out as descriptive claims about the world.[191] He focuses on the usefulness of predictive ratings, which, of course, is a characteristically fact-like way of looking at them. But unlike Durham, Green approves of copyright in price estimates, because "extensive judgment [is] required."[192] Therefore, he implicitly embraces process theory. Unlike the courts, however, Green thinks the creative process produces an original "collective fact" rather than making any individual rating original.[193] On his view, any individual selection or arrangement decision in a rating book or other factual compilation can always be described as a "fact," but the totality of those decisions produces a work that as a whole displays originality.[194]

Interestingly, both Durham and Green flirt with the idea that broad social acceptance may be central to some works' value, as the self-fulfilling prophecy theory of ratings suggests. Durham mentions in passing the idea that price guides could be "self-fulfilling prophecies" that "create the demand for certain cars or coins" and appears to suggest that this might mean they were "create[d]" and to that extent might justify a copyright.[195] On the other hand, Green, in a discussion of novel theories (his example is Einstein's theory of relativity), says their "value to any individual depends upon others accepting it."[196] To him, this argues against a copyright, since copyright could inhibit the very process of acceptance that gives these theories their value.[197]

Justin Hughes is the scholar who has most fully explored the idea that "evaluations" such as ratings "can become so widely accepted

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190. Green, *Copyrighting Facts*, *supra* note 183, at 962.

191. *See id.* Green's concept of "fact" is quite capacious: he argues, for example, that "it is a fact that bean curd and bean sprout shops are of interest to the Chinese-American community." Green, *Two Fallacies*, *supra* note 183, at 120.

192. Green, *Two Fallacies*, *supra* note 183, at 119. More specifically, Green sees the rater's judgment as being important in rebutting arguments that the same set of ratings could be generated by two parties independently. *Id.* at 124. On this view, a process sufficiently original to give distinguishably different results than other raters' processes results in an original set of ratings.

193. Green, *Copyrighting Facts*, *supra* note 183, at 961-63.

194. Green, *Two Fallacies*, *supra* note 183, at 115-18.

195. Durham, *supra* note 130, at 842.

196. Green, *Copyrighting Facts*, *supra* note 183, at 955-56.

197. *Id.*

and so relied upon for substantial nonexpressive [sic] activities that they become social facts."[198] He argues that copyright treats these created facts as uncopyrightable only when they become "widely accepted by the relevant community"—or, in this Article's terminology, they have become self-fulfilling prophecies.[199] But he doesn't like this analysis, because it might cut off the incentive to create these works in the first place.[200] Instead, he proposes a form of merger analysis that would "dial back" copyright to a compulsory license when an expressive-but-useful work has achieved such social currency.[201]

These scholars' analyses have two things in common. First, they all recognize the validity of multiple theories but find one more compelling than its rivals. Durham embraces the fact theory: he sees the role that opinion plays in generating ratings, but thinks that copyright can't afford to recognize it, for what he openly admits are policy considerations.[202] Green prefers opinions: he would treat collections of ratings as copyrightable because of their subjectivity, even though they make fact-like claims about the world.[203] And Hughes endorses the prophetic theory: he sees the principal limit on ratings copyright as coming from how "human-created facts function in the social discourse."[204]

Second, policy considerations bulk large for them all. In a later-added postscript, Durham is explicit that the uncopyrightability of "opinionated facts" rests on a policy judgment about the need for public access.[205] Green's view that they are copyrightable rests on their social value, qualified only by a concern about transaction costs.[206] Hughes's proposal to modify the merger doctrine requires courts to engage in an ex ante/ex post assessment of the effects of its holding on raters' business models, because he fears that in some cases valuable creative facts might not be brought into existence without copyright.[207]

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198. Hughes, *supra* note 125, at 68.

199. *Id.* at 84.

200. *Id.* at 93-94.

201. *Id.* at 105-07.

202. Durham, *supra* note 130, at 847-48. Unfortunately, he does not follow up on the idea.

203. Green, *Copyrighting Facts*, *supra* note 183, at 949-51, 961-63.

204. Hughes, *supra* note 125, at 45.

205. Durham, *supra* note 182, at 181-85.

206. Green, *Two Fallacies*, *supra* note 183, at 127-32.

207. Hughes, *supra* note 125, at 98-107. This Article adds to his analysis the observation, inspired by *Theflyonthewall.com*, that these social facts can be social bads as well as social goods, which upends the standard argument from incentives. Another scholar, David McGowan, would avoid the classification question entirely by switching from originality to the purely economic

The problem here is that policy cannot bear the weight these scholars would put on it, or at least not yet. *Theflyonthewall.com* shows why we cannot simply reason about raters' incentives and public access to ratings—we do not in general know whether ratings are good or bad for society. That's not a question that intellectual property law is equipped to answer on its own. It depends on all of the other legal problems with ratings: whether and when they are fraudulent, or defamatory, or collusive, or objectionable in one of the many other ways that ratings can be. In short, we need to know how ratings can go wrong before we can decide whether to grant rights in them.

V. ON BEYOND COPYRIGHT

Ratings matter to law, and law has two basic goals for them. The first is to encourage their production; the second is to hold them accountable. Providing proper incentives to create information is the domain of intellectual property law; ensuring the quality of information takes place at the tricky frontier where tort law meets the First Amendment.[208] These bodies of law are the spurs and the reins of rating, respectively. Intellectual property asks whether copying ratings is wrong; fraud and defamation ask whether ratings themselves are wrong.[209]

And yet these bodies of law are almost never in conversation with each other. The copyright cases show no inclination to learn from the tort cases, or vice versa. In the 1980s, the Illinois Attorney General sued Maclean Hunter, alleging that the Red Book's values were "inaccurate, unrealistically low, and misleading."[210] Following the suit, the Red Book gained a disclaimer: "You, the subscriber, must be the final judge of the actual value of a particular vehicle."[211] A decade later, the Second Circuit pointed to this disclaimer in holding that the Red Book's values could be copyrighted.[212] But it did not

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logic of sweat-of-the brow "cost recovery" in providing copyright for price lists. McGowan, *supra* note 184.

208. I include substantial bodies of securities law under the heading of "tort law" here because of their strong roots in the common law of fraud and misrepresentation.

209. For more on how these legal judgments cannot avoid engaging with ethical ones, see generally James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 FORDHAM L. REV. 2005 (2009).

210. People *ex rel.* Hartigan v. Maclean Hunter Publ'g Corp., 457 N.E.2d 480, 482 (Ill. App. Ct. 1983).

211. Appellee CCC Info. Servs. Inc.'s Petition for Rehearing and Suggestion for Rehearing En Banc, CCC Info. Servs. Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F. 3d 61 (2d Cir. 1994) (No. 93-7687), 1994 WL 16040469 at *8 n.6.

212. *Maclean Hunter*, 44 F.3d at 72-73.

mention the earlier Red Book case—or any of the many other tort cases that consider when ratings are protected statements of opinion and when they are not.

Having turned to copyright law to understand what ratings are, we now have a better grasp on the different theories underlying them. So if we need to understand the regulation of ratings in order to formulate sensible copyright policy, we at least have better tools with which to start in on that task. Just as the classification of ratings as facts, opinions, and self-fulfilling prophecies helps make sense of the tensions in how copyright law treats them, so too it can help make sense of the tensions in how tort law treats them.

If ratings are statements of fact, then a knowingly incorrect rating is a lie, and the rater can be held liable for it. If ratings are statements of opinion, then there is no way to prove a rating false, and hence no basis for liability. And if ratings are self-fulfilling prophecies, then "true or false?" is entirely the wrong question to ask. Which of these three theories best seems to fit could determine the outcome when a court asks whether Moody's should be held liable for giving a piece-of-junk mortgage-backed security a Aaa rating[213] or for giving a financially stable school district's bonds a "negative outlook,"[214] whether Google has committed tortious interference with contract by giving a website a poor search ranking,[215] or whether a lawyer-rating website can legally give its CEO a higher rating than Justice Ginsburg.[216] A full exploration will need to await another time, but it should be apparent that the interplay among the three theories may yield important insights about ratings regulation.

The law's trouble with ratings illustrates James Boyle's observation that information economics has a dual character:

> The internal tension in the analysis always leaves open the question whether a particular issue is to be classed as a public goods problem, for which the remedy is commodification, or a monopoly of information problem, for which the remedy is unfettered competition.[217]

If this looks like the tension between fact and opinion in courts' discussions of ratings, the resemblance is not a coincidence. Ratings as opinions are commodities: it makes sense to incentivize their

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213. *See* Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 651 F. Supp. 2d 155, 175-76 (S.D.N.Y. 2009).

214. *See* Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 852-56 (10th Cir. 1999).

215. *See* Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *1-2 (W.D. Okla. May 27, 2003).

216. *See* Browne v. Avvo, Inc., 525 F. Supp. 2d 1249, 1251-53 (W.D. Wash. 2007).

217. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS 40 (1996) (footnotes omitted).

production through private ownership. Ratings as facts are market makers: we want broad public access to them.[218]

According to Boyle, courts resolve the tension between commodification and competition in particular cases by "relying unconsciously on the notion of the romantic author."[219] That is exactly how the creative-process theory functions—it lets courts isolate an "author" whose process-design choices stamp the resulting ratings with her personality. But this Article's discussion of ratings as self-fulfilling prophecies adds a third option to the choice between drudge and genius: the author as evil genius. This dark twin of the romantic author has a creative vision and is determined to impose it on the world, regardless of (or perhaps because of) its horrific consequences for others. This counternarrative helps explain some of the ambiguity we feel about ratings, in copyright and beyond.

VI. CONCLUSION

If the line between fact and opinion can be hazy under the best of circumstances, in ratings cases it is downright vexing. Courts and scholars have struggled to describe ratings as one or the other, with results that run the gamut from frustration to confusion. Cases like *Maclean Hunter* reach plausible results for implausible reasons; scholars are at loggerheads over whether and why these facts are different from all other facts.

But the problem of ratings is a three-body problem, not a two-body problem. The hidden gravitational pull, the one that gives "fact" and "opinion" chaotic orbits about each other, comes from ratings' tendency to become self-fulfilling prophecies. It is a weaker contribution than either of the others; ratings can come much closer to being pure facts or pure opinions than they can to being pure prophecies. Still, it is a tendency present in every rating, and it is better to recognize its influence than to pile up the epicycles by trying to patch up the concepts of "fact" and "opinion" until they fit.

Ratings are not facts, opinions, or self-fulfilling prophecies. They are all three. At different times and in different contexts, ratings can act like one or the other, but it is a mistake to see them only in terms of one of these theories. All three are always at work in a rating, and truly understanding the rating requires being alert to all three. This is a complicated, messy, not always pleasant story. But so are ratings.

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218. *See* Muhlerin, *supra* note 53, for an illuminating engagement with this duality.

219. BOYLE, *supra* note 217, at 42.