

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

MAR - 8 1990

ROBERT L. HOECKER
Clerk

RURAL TELEPHONE SERVICE)
COMPANY, INC.,)
)
Plaintiff-Appellee,)
)
v.)
)
FEIST PUBLICATIONS, INC.,)
)
Defendant-Appellant.)

No. 88-1679
(D.C. No. 83-4086)
(D. Kan.)

ORDER AND JUDGMENT*

Before TACHA and EBEL, Circuit Judges, and KANE, District Judge.**

This appeal is from an order of the district court awarding summary judgment in favor of plaintiff Rural Telephone Service Company, Inc. (Rural), finding that defendant Feist Publications, Inc. (Feist) violated the federal copyright laws by copying the white pages of Rural's 1982-83 telephone directory. After a Rule 54(b) certification by the district court on the copyright infringement issue, defendant appeals alleging that the district court erred in finding that Feist's activities in compiling the independent telephone directory constituted a copyright

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable John L. Kane, Jr., District Judge, United States District Court for the District of Colorado, sitting by designation.

infringement and in awarding attorneys' fees and damages. We affirm.

As a part of its telephone service to its cooperative members in Northwest Kansas, Rural compiles, publishes and distributes an annual telephone directory covering its telephone service area. The 1982-83 Rural telephone directory was marked with an appropriate copyright notice identifying Rural as the copyright proprietor and indicating the year of publication. Feist publishes and distributes a northwest area-wide telephone directory which covers some of the same geographical areas as Rural's directory. The undisputed facts show that Feist was unable to purchase the Rural white page listings so Feist took the Rural telephone directory, edited it, and used only the listings that covered its area of service. Those listings were sorted by towns and alphabetized. The lists were then sent to verifiers in each of the communities to verify the telephone numbers and addresses. Feist's directory contained the information derived in this way. The district court relied on the substantial precedent which holds that a telephone directory is a compilation copyrightable under the United States copyright laws. E.g., United Tel. Co. v. Johnson Publishing Co., 855 F.2d 604, 607-08 (8th Cir. 1988); Hutchinson Tele. Co. v. Fronteer Directory Co., 770 F.2d 128, 132 (8th Cir. 1985); Southern Bell Tele. & Tele. Co. v. Associated Tele. Directory Publishers, 756 F.2d 801, 809-10 (11th Cir. 1985); Southern Bell Tele. Co. v. Nationwide Indep. Directory Serv., Inc., 371 F. Supp. 900, 905 (W.D. Ark. 1974). The district court found that the use of Rural's materials by

Feist was neither de minimis, e.g., Warner Bros. Inc. v. American Broadcasting Cos., Inc., 720 F.2d 231, 242 (2d Cir. 1983) (de minimis rule allows copying of small and usually insignificant portion of copyrighted work), nor "fair use" and therefore constituted an infringement of the copyright laws, e.g., Rockford Map Publishers, Inc. v. Directory Serv. Co., 768 F.2d 145, 149-50 (7th Cir. 1985) (copying map compilation), cert. denied, 476 U.S. 1061 (1986); Central Tele. Co. v. Johnson Publishing Co., 526 F. Supp. 838, 843 (D. Colo. 1981) (copying telephone directory). We find no error in these determinations of the district court. We further agree with the district court that allegations of antitrust violations do not constitute defenses to a claim of copyright infringement. E.g., Harms, Inc. v. Sansom House Enters., 162 F. Supp. 129, 135 (E.D. Pa. 1958), aff'd sub nom. on other grounds, Leo Feist, Inc. v. Lew Tandler Tavern, Inc., 267 F.2d 494 (3d Cir. 1959); Buck v. Cecere, 45 F. Supp. 441, 441-42 (W.D.N.Y. 1942); Buck v. Newsreel, Inc., 25 F. Supp. 787, 789 (D. Mass. 1938). Contra M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 850 (D. Minn. 1948), appeal dismissed, 177 F.2d 515 (8th Cir. 1949). Statutory damages and attorneys' fees are within the discretion of the district court. E.g., Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 122 (8th Cir. 1987) (copyright attorneys' fees award reviewed under abuse of discretion standard); Harris v. Emus Records Corp., 734 F.2d 1329, 1335 (9th Cir. 1984) (copyright statutory damages award reviewed under abuse of discretion standard). Under the circumstances of this case, we find no abuse of discretion in the award of statutory damages of

\$6,000 and attorneys' fees. We **AFFIRM** for substantially the reasons given by the district court.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge