In the
United States Court of Appeals
for the Second Circuit

August Term, 2025
No. 25-1065 (L)
No. 25-1195 (Con)

RAPAPORT USA, INC.,
Plaintiff-Appellant,

v.

NIVODA USA LLC,
Defendant-Appellee.*

On Appeal from the United States District Court
for the Southern District of New York.

ARGUED: JANUARY 9, 2026
DECIDED: SEPTEMBER 4, 2026

Before: LIVINGSTON, NARDINI, and PÉREZ, *Circuit Judges*.

* The Clerk of Court is respectfully directed to amend the case caption as indicated above.

Plaintiff-Appellant Rapaport USA, Inc., an information provider in the diamond industry, sued Defendant-Appellee Nivoda USA LLC, for copyright infringement. Rapaport publishes a weekly price list for diamonds, which it provides to paid subscribers. In its complaint, Rapaport alleges that Nivoda violated copyright law by copying diamond prices from the price list and displaying references to those prices on Nivoda's website, which serves as an online diamond and gemstone marketplace. The United States District Court for the Southern District of New York (Jed S. Rakoff, *District Judge*) dismissed the complaint, concluding that under the "merger doctrine," which withholds protection where an idea and its expression "merge" because the idea can be expressed in only a few ways, Rapaport failed to allege an actionable copyright infringement claim. According to the district court, allowing the suit to proceed would impermissibly accord protection to an idea because the market prices for diamonds based on their size, color, and clarity can be expressed in only one way. Rapaport appeals, arguing that the district court erred by concluding that the merger doctrine barred its suit, or at a minimum erred by applying that doctrine before discovery. We agree that the district court erred by applying the doctrine on this motion to dismiss because crucial questions remain as to how the price list is created and therefore whether its prices can, in fact, be expressed only one way. Accordingly, we VACATE the district court's judgment and REMAND for further proceedings consistent with this opinion.

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WILLIAM J. NARDINI, *Circuit Judge*:

Plaintiff-Appellant Rapaport USA, Inc., ("Rapaport") an information provider in the diamond industry, sued Defendant-Appellee Nivoda USA LLC, ("Nivoda") for copyright infringement. Every week, Rapaport publishes The Rapaport Price List (the "Price List" or "List") for diamonds, which it provides to paid subscribers. In its complaint, Rapaport alleges that Nivoda violated copyright law by copying diamond prices from the Price List and displaying references to those prices on Nivoda's website, which serves as an online diamond and gemstone marketplace. Nivoda moved to dismiss, asserting that Rapaport failed to obtain the required copyright registrations for the Price Lists at issue, did not adequately allege that Nivoda engaged in infringement, and that Nivoda's references to the prices constitute fair use. The United States District Court for the Southern District of New York (Jed S. Rakoff, *District Judge*) granted Nivoda's motion, concluding that under the merger doctrine, which withholds protection where an idea and its expression "merge" because the idea can be expressed in only a few ways, Rapaport failed to allege an actionable copyright infringement claim. According to the district court, allowing the suit to proceed would impermissibly accord protection to an idea because the market prices for diamonds based on their size, color, and clarity can be expressed in only one way. Rapaport appeals, arguing that the district court erred by concluding that the merger doctrine barred its suit, or at a minimum erred by applying that doctrine before discovery. We agree that the district court erred by applying the doctrine on this motion to dismiss because crucial questions remain as to how the List is created and therefore whether its prices can, in fact, be expressed in only one way. Accordingly, we VACATE the district court's judgment and REMAND for further proceedings consistent with this opinion.

I. Background

For purposes of this appeal, we assume (as we must) the truth of the following facts drawn from Rapaport's complaint, together with any documents integral to that complaint. *See Knapp v. Barclays PLC*, 171 F.4th 166, 170 (2d Cir. 2026); *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 112 F.4th 144, 148 n.1 (2d Cir. 2024).

Rapaport publishes various informational products about the diamond industry. One of these is the Price List, which it provides weekly to paid subscribers. The List consists of several tables listing the prices for various categories of diamonds, organized by carat weight, which are subdivided by color and clarity. Diamonds weighing between .01 and 0.3 carats, for example, are grouped together, with values corresponding to various levels of diamond clarity and color. From most to least valuable, diamond clarity ranges from "IF" to "I3," and diamond color ranges from "D" to "N." Printed versions of the Price List are accompanied by text that reads: "Prices in this report reflect our opinion of HIGH CASH ASKING PRICES. These prices are often discounted and may be substantially higher than actual transaction prices."[1] Joint App'x at 25–26.

Rapaport asserts that the Price List reflects its "opinion as to what diamonds of different sizes, color, and clarity should sell for in the market." *Id*. at 8. This opinion, it alleges, is the product of its "extensive hard work and expertise in the diamond industry," and serves as "the international benchmark used by dealers to establish diamond prices in all the major markets." *Id.*

On January 8, 2025, Rapaport sued Nivoda for copyright infringement.[2] Rapaport alleged that Nivoda, which runs an online marketplace for diamonds and gemstones, had been "copying, publishing, distributing, creating derivatives of, and otherwise exploiting the entirety of [the Price List]" since the summer of 2023.

[1] Rapaport also occasionally publishes the Price List in its bimonthly magazine, which includes a "guide" to the List. The guide instructs that the Price List "quotes Rapaport opinion" of asking prices for diamonds meeting certain specifications and notes that diamonds may trade at values higher or lower than those included in the List depending on several factors, including supply, demand, credit terms, and market type and location.

[2] Rapaport's complaint also named Nivoda Limited and David Sutton as defendants. Rapaport voluntarily dismissed its action against these defendants without prejudice a month after filing suit.

Id. at 12. Nivoda engaged in this alleged infringement by "display[ing] diamond prices based upon or otherwise copied from [the Price List]" on its website. *Id.* Screenshots of Nivoda's website depict how Nivoda references prices from the List.[3] Just above the sales price for an advertised diamond, Nivoda lists a percentage that represents the difference between Nivoda's price for the diamond and the price for that category of diamond in the Price List. For example, "if the benchmark price of a 1.00 carat, G color, VS2 clarity diamond is $8,000, and such a diamond is being listed . . . on Nivoda's website for $6,000, the Website will feature an image of the specific diamond for sale, along with the words '$6,000' and '-25%.'" *Id.* at 23**.**

Nivoda moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) on three grounds. First, Nivoda asserted that Rapaport failed to obtain copyright registrations for editions of the Price List it alleges Nivoda copied.[4] Second, it argued that Rapaport failed to state a claim for copyright infringement because individual prices are not copyrightable and Rapaport did not allege actionable copying. And third, it argued that Nivoda's references to the Price List constitute fair use.

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[3] Nivoda submitted these screenshots in support of its motion to dismiss. The district court concluded the screenshots were integral to Rapaport's complaint and considered them in reviewing Nivoda's motion.

[4] In its complaint, Rapaport lists copyright registrations for its bimonthly magazine (in which weekly editions of the Price List are sometimes included) but not for the weekly editions of the Price List. Rapaport argues that its registrations for the magazine confer protection over the weekly editions of the List as they form constituent parts of the magazine.

The district court granted Nivoda's motion. Without resolving whether Rapaport holds a valid copyright for the allegedly infringed Lists, or whether Nivoda copied from those Lists, the court concluded that Rapaport failed to adequately allege infringement because of the merger doctrine. The merger doctrine bars protection for expressions of an idea that may be expressed in only a few ways, which ensures that the underlying idea itself is not afforded copyright protection. *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991). The court reasoned that the market price for diamonds based on their size, color, and clarity can be expressed in only one way, and so copying values from the Price List could not give rise to copyright infringement. For this same reason, the district court denied Rapaport leave to amend the complaint.

Rapaport appeals, arguing that the district court erred by concluding that that the merger doctrine bars a copyright infringement claim based on the copying of prices on the Price List, or at the very least, erred by dispositively applying the doctrine before discovery. Nivoda, for its part, urges us to affirm the district court's dismissal on the basis of the merger doctrine or on any of the alternative grounds for dismissal it raised below.

For the reasons set forth below, we agree with Rapaport that the district court erred by concluding, on the basis of the limited record before it, that the merger doctrine bars a copyright infringement claim based on the copying of prices listed in the Price List. We therefore remand for further proceedings in the district court, including consideration of Nivoda's alternative grounds for dismissal.

II. Standard of Review

"We review *de novo* a district court's dismissal for failure to state a claim, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff." *Knapp*, 171 F.4th at 170 (internal quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

III. Discussion

"To prevail on a claim of copyright infringement, the plaintiff must demonstrate both (1) ownership of a valid copyright and (2) infringement of the copyright by the defendant." *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 108–09 (2d Cir. 2001).

"It has been long accepted that copyright protection does not extend to ideas; it protects only the means of expression employed by the author." *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc.*, 44 F.3d 61, 68 (2d Cir. 1994); 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.") This "fundamental copyright principle . . . has produced a corollary maxim that even expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself." *Kregos*, 937 F.2d at 705. Where that is true, the expression merges with the idea itself, such that it is not protected by the law of copyright.

To determine whether the merger doctrine applies, courts first "identify[] the 'idea' that might be merging with its expression." *N.Y. Mercantile Exch., Inc. v. IntercontinentalExch., Inc.*, 497 F.3d 109, 117 (2d Cir. 2007). They then "look at the range of possible expressions and consider whether all possible expressions are so 'substantially similar' that granting the copyright would bar others from expressing the underlying idea." *Id.* (quoting *Hart v. Dan Chase Taxidermy Supply Co., Inc.*, 86 F.3d 320, 322 (2d Cir. 1996)). Where the expression takes the form of a number, "[t]he question then becomes the possible range of that number." *Id.* at 118. Determining this range allows the court to assess whether the number is an "original creation[]," deserving of copyright protection, or merely a "pre-existing fact[]," free to be copied. *CCC*, 44 F.3d at 67; *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) ("[A]ll facts—scientific, historical, biographical, and news of the day. . . . may not be copyrighted and are part of the public domain available to every person.") (citation modified)).

In *New York Mercantile,* our Court used this framework to determine whether the merger doctrine applied to settlement prices for futures contracts produced by a financial intermediary, NYMEX. 497 F.3d at 116–18. For purposes of appeal, the Court accepted NYMEX's formulation of the "idea" at issue—that is, "a sound and reasonable opinion of fair market value for each NYMEX contract as of the close of open outcry trading on the NYMEX floor each day . . . by assessing trades, bids, and offers and (in various instances) off exchange information, particularly developed late in the trading day." *Id.* at 117. Because this idea may be expressed only as a number, the Court considered the range of potential values for that number. *Id.* at 117–18. It concluded that "any dissension would be exceptionally narrow" because "any settlement price for a particular futures contract would be determined based on the same underlying market facts." *Id.* at 118. Accordingly, the Court held that the merger doctrine barred protection.

In reaching this conclusion, we distinguished *CCC*, which held that the merger doctrine did not bar copyright protection for a compendium of projections of used-car valuations (the "Red Book"). *N.Y. Mercantile*, 497 F.3d at 115 n.5; *CCC*, 44 F.3d 61. We explained that "[t]he used car prices in *CCC* . . . were the editors' predictions . . . of expected values for average vehicles," which were based on "assumptions" instead of "pre-existing facts about the outside world which are discovered from actual market activity." *N.Y. Mercantile*, 497 F.3d at 115 n.5 (internal quotation marks omitted).

Additionally, we emphasized that the doctrine must be applied with "considerable care," keeping in mind the policy considerations that underlie copyright law. *Id.* at 117 (quoting *Kregos*, 937 F.2d at 705). Namely, the law strives to maintain a balance between maintaining the public's access to ideas and "promot[ing] the advancement of knowledge and learning by giving authors economic incentives . . . to labor on creative, knowledge-enriching works." *CCC*, 44 F.3d at 65.

Finally, to ensure the doctrine is applied with care, we have expressed a "strong preference" for determining the applicability of the merger doctrine "only after all the evidence of substantial similarity is before the court." *Hart*, 86 F.3d at 322. Our prior cases have therefore tended to resolve these questions upon motions for summary judgment.[5] To the same end, we consider the doctrine when assessing whether actionable infringement has occurred, as opposed to whether a copyright is valid, because the infringement context generally offers "a more detailed and realistic basis for evaluating the claim that protection of expression would inevitably accord protection to an idea." *Kregos*, 937 F.2d at 705.

In holding that Rapaport failed to sufficiently allege infringement, the district court concluded that the merger doctrine applied to the Price List. To arrive at this conclusion, the court first identified the "idea" merging with Rapaport's expression as "the

[5] *See, e.g.*, *N.Y. Mercantile*, 497 F.3d 109 (reviewing district court's conclusion that merger doctrine applied to plaintiff's work on a motion for summary judgment); *CCC*, 44 F.3d 61 (same); *Kregos*, 937 F.2d 700 (same).

market price of diamonds based on their size, color, and clarity." Special App'x at 7. The court then asked whether "there are multiple ways to express the diamond prices featured on the List." *Id.* at 8. Concluding that "there are not," the court observed that "[t]he only way to express the price of a particular diamond or type of diamond is with the specific number corresponding to that price." *Id.* The court ended its analysis by noting that it did not need to determine whether "the merger doctrine necessarily applies any time the idea that might be merging with the expression involves a number," because Rapaport alleged that the Price List "consisted of numbers that served to set an industry benchmark," and thus sought protection over an expression similar to the settlement prices in *New York Mercantile*. *Id.* at 10 (internal quotation marks and citation omitted); *see also N.Y. Mercantile*, 497 F.3d at 112 (reviewing the district court's conclusion that NYMEX's settlement prices should not enjoy protection in part because they are "widely publicized and used as benchmarks by market participants").

On appeal, Rapaport argues that the district court erroneously applied the merger doctrine because it failed to consider both the possible range of values that might be used to express the valuation of a particular diamond and the policy considerations that weigh in favor of protecting the List. We reach the same conclusion.

As a preliminary matter, we disagree with the court's characterization of the "idea" at risk of merging with Rapaport's expression. The district court described this "idea" as "the market price of diamonds based on their size, color, and clarity." Special

App'x at 7. Without evidence to establish how the Price List is created, however, the court lacked a basis for concluding that this idea is what is reproduced in the Price List. As pled, the Price List reflects Rapaport's "*opinion* as to the market value of any diamond based on size, color, and clarity," based on Rapaport's "analysis and sophisticated expert industry opinion." Joint App'x at 10 (emphasis added). Rapaport does not allege, for example, that the List reflects nothing more than the average transaction prices for particular types of diamonds in a particular time span, based on an aggregation of reported sales. To the contrary, text accompanying printed versions of the Price List emphasizes that the List reflects Rapaport's "opinion" of prices, which may differ "substantially" from "actual transaction prices." *Id.* at 25–26. Thus, for the limited purpose of our analysis, drawing all reasonable inferences in Rapaport's favor based on the facts alleged in the complaint and other facts appropriately considered at this stage of litigation, we identify the "idea" at risk of merging with Rapaport's expression, as "Rapaport's opinion as to the value," as opposed to the actual "market price" (meaning the price set by the market) of particular diamonds based on their size, color, and clarity.

Additionally, the district court went on to apply only one part of the two-step framework set forth in *New York Mercantile.* After characterizing the "idea" behind the Price List as "the market price of diamonds" based on three key characteristics and observing that these prices can be expressed in only one way—as a number—the court ended its analysis. Special App'x at 7. In *New York Mercantile*, however, we instructed courts to inquire about the "possible range of that number." 497 F.3d at 118. This step is crucial: In order to determine whether all possible expressions of a party's opinion regarding diamond price valuation are "substantially similar," *id*. at 117, we must assess the possible range of these estimates. In doing so, we evaluate whether the number is better considered a "mechanical derivation[]" of a pre-existing fact, or an "original creation[]," *CCC*, 44 F.3d at 67, resulting from "some minimal degree of creativity," *id.* at 65 (quoting *Feist*, 499 U.S. at 345).

In *New York Mercantile,* we observed that while NYMEX's process for calculating settlement prices varied between "months with sufficient trading . . . and months without," the Prices always reflected NYMEX's calculation of "the appropriate market valuation of each commodity contract."[6] 497 F.3d at 111, 115. We thus concluded that NYMEX failed to show "numerous possible variations . . . as to what the Settlement Prices should be" because these prices were based on "the same underlying market facts." *Id*. at 118 (omission in original). Put another way, anyone armed with the same basic set of data (about which futures contracts traded at which prices) would calculate the same outputs (namely, the actual market price for those contracts at the close of each day's trading) within a

[6] "For high-volume months, settlement prices are based on a formula: 'a weighted average of all trades done within the closing range'" and "[f]or low-volume months. . . . NYMEX asserts that the membership 'considers, sifts, weighs and extrapolates from a wealth of data at the close of trading to reach an opinion' as to the appropriate settlement price." *N.Y. Mercantile*, 497 F.3d at 111.

minimal range of possible variation. Even assuming that NYMEX's determination of settlement prices constituted an act of creation rather than merely of discovery, we held that there was such "substantial similar[ity]" among all possible expressions of those settlement prices that the merger doctrine barred copyright protection. *Id.* at 117.

In *CCC*, on the other hand, we concluded that the used-car values listed in the Red Book were not "pre-existing facts that had merely been discovered by the Red Book editors," but rather the plaintiff's "original creations," which were entitled to copyright protection. 44 F.3d at 67. This conclusion reflected the Red Book's process of formation: The Red Book represented "editors' predictions, based on a wide variety of informational sources and their professional judgment, of expected values for 'average' vehicles for the upcoming six weeks in a broad region," and "not historical market prices, quotations, or averages." *Id.* at 63; *see also id.* at 67 (describing the term "'average' vehicle" used in the Red Book as an "abstract concept"). We reached similar conclusions in determining that the merger doctrine did not apply to bar the infringement lawsuit: The "valuations copied by [the alleged infringers] from the Red Book" were "infused with opinion," and the "ideas" underlying the Red Book's valuations fell within "the category of approximative statements of opinion by the Red Book editors." *Id.* at 72–73.

Like the used-car valuations included in the Red Book, the values included in Rapaport's Price List, as alleged, reflect Rapaport's "opinion" as to hypothetical products meeting certain specifications, based on Rapaport's "analysis and sophisticated expert industry opinion." Joint App'x at 10. On appeal, Rapaport emphasizes that the values included in the Price List do not express the "actual market price of any-real world diamond," Appellant's Br. at 20, but rather its "opinion as to what should be the sales prices for different classes of hypothetical diamonds," *id.* at 25. Perhaps most relevant, unlike the actual market price of particular futures contracts (which the settlement prices in *New York Mercantile* aimed to capture mostly by reference to a fixed set of trading data), the value of a diamond—like that of a used car—may depend on any number of facts beyond current trading data, such as subjective considerations of personal opinion and aesthetic preference. Rapaport alleges in its complaint that it arrives at the values included in the Price List by reference to factors beyond raw trading data, such as its "extensive market research and proprietary knowledge," and its "decades of knowledge, investment, and industry relationships." Joint App'x at 10. At this stage of the litigation, we are obliged to take them at their word. Only discovery can tell whether the sources and processes used by Rapaport in fact more closely resemble those used by NYMEX to determine settlement prices, and not (as alleged) those used by the Red Book editors for used-car valuations.

Also relevant to this analysis, and absent from the district court's decision, are the principles that guide our application of the merger doctrine. We have previously recognized that the concerns that animate the doctrine—such as the need to keep ideas free from private ownership—are less pronounced where the idea at issue involves “matters of taste and personal opinion,” *Kregos*, 937 F.2d at 707, and more pronounced where the idea “undertake[s] to advance the understanding of phenomena or the solution of problems,” *CCC*, 44 F.3d at 71. In concluding that the merger doctrine did not apply to a “baseball pitching form” that displayed player statistics believed helpful to predicting game results, the Court in *Kregos* reasoned that while the form was designed to “have some utility in predicting outcomes,” it also reflected Kregos’ personal opinion and beliefs, leaving room for “readers to make their own judgments as to the likely outcomes from the sets of data [the author] has selected.” 937 F.2d at 701, 707. Thus, allowing Kregos to maintain ownership of the form did not risk removing a useful idea from the public domain. Similarly, in holding that the merger doctrine did not apply to the Red Book in *CCC*, we observed that the used-car valuations included in the Book “are not ideas of the first, building-block, category described in *Kregos*, but are rather in the category of approximative statements of opinion by the Red Book editors.” *CCC*, 44 F.3d at 72. Thus, the *CCC* Court concluded, allowing the Red Book to enjoy protection would impair the “free circulation” of ideas only with respect to ideas “infused with opinion.” *Id.* at 72–73.

As alleged at this early stage of the case, Rapaport’s Price List appears to be infused with “matters of taste and personal opinion.” *Kregos*, 937 F.2d at 707. Rapaport advertises the List as reflecting its “opinion,” Joint App’x at 25–26, asserts the List is “the unique product of Rapaport[ ]’s analysis and sophisticated expert industry opinion derived from its extensive market research and proprietary knowledge," *id*. at 10, and cautions readers that actual transaction prices may vary "substantially" from those included in the List. *Id.* at 25–26. Moreover, like the Red Book at issue in *CCC*, the List attempts to value hypothetical products whose ultimate value is tied, at least in part, to subjective preferences. We are therefore not persuaded that failing to apply the doctrine will "seriously impair the policy of the copyright law that seeks to preserve free public access to ideas." *CCC*, 44 F.3d at 73.

In weighing these principles, we also consider whether applying the merger doctrine will hinder the goal of copyright law to encourage authors to produce works that advance society by giving them exclusive rights to their work. *Id.* at 68–69. In *New York Mercantile*, for instance, the Court observed that NYMEX did not need economic incentives in the form of exclusive rights to continue recording settlement prices because NYMEX was independently required to do so by law. 497 F.3d at 118. Nivoda does not suggest, nor does the present record indicate, that Rapaport would still have an incentive to produce the Price List if it lost its exclusive rights over that publication. The Price List "is available by paid subscription only" and, Rapaport asserts, is the product of "significant time, resources and expense," resulting from the company's longstanding "industry and customer relationships." Joint App'x at 10–11. Accordingly, applying the doctrine appears unlikely, based on what we must assume to be true at this point in the proceedings, to serve copyright's aim of encouraging the authorship of innovative works.

In sum, the district court erred by concluding that the merger doctrine barred protection of the Price List, on the basis of the limited record before it, because: (1) the court improperly concluded that the Price List's values may be expressed only in one way; and (2) the principles underlying the merger doctrine weigh against applying the doctrine to the List.

Nivoda presents two counterarguments to rebut this conclusion. We reject both in turn.

First, Nivoda urges us to find dispositive Rapaport's characterization of the Price List as a "benchmark." Nivoda argues that because the Price List operates, according to Rapaport's own admission, as the "international benchmark used by dealers to establish diamond prices in all the major markets," Appellee's Br. at 15 (quoting Joint App'x at 8), the expressive variations of the Price List are necessarily "very low, even negligible," *id.* at 19 (internal quotation marks omitted). To serve as an international benchmark, Nivoda argues, the Price List must correlate to "market realities" and thus must reflect values whose numerical expression is limited. *Id.* at 17. Without this correlation, "the prices would instantly lose their credibility, and, consequently, their function as a benchmark." *Id.*

The List's status as a reliable tool in the industry, however, does not reveal how the List's values are formulated or dictate their potential numerical range. That dealers use the List to "establish diamond prices" demonstrates the List's utility, but not necessarily its methodology; the List may be useful even if it does not directly reflect transaction prices—in part, for example, because it reflects Rapaport's editorial judgment and industry "expertise." Joint App'x at 8. In both *Kregos* and *CCC*, we emphasized that a work's utility to consumers does not always correlate to its relationship with real world data. *See, e.g.*, *CCC*, 44 F.3d at 67 ("The fact that an arrangement of data responds *logically* to the needs of the market for which the compilation was prepared does not negate originality."); *see also Kregos*, 937 F.2d at 707 (recognizing that even though Kregos "implies that his selections have some utility in predicting outcomes. . . . he has not gone so far as to provide a system for . . . determining a probability as to which [pitcher] is more likely to win."). While discovery may conceivably reveal that the List does, in fact, directly reflect nothing more than "market realities," its status as a benchmark does not alone establish as much.

Nivoda also argues that any reliance on *CCC* is misplaced because that case involved the wholesale copying of a compilation, which Rapaport does not allege to have occurred here.[7] Nivoda is correct that *CCC* assessed the applicability of the merger doctrine to a compilation—a grouping of data whose originality derives from its coordination and arrangement. *See CCC*, 44 F.3d at 68–72; *see also* 17

[7] While Rapaport uses the phrase "wholesale copying" in its brief on appeal, *see, e.g.*, Appellant's Br. at 24, 45, it does not allege that Nivoda has engaged in infringement by copying the entire Price List. Rather, Rapaport alleges in its complaint that Nivoda "displays diamond prices based upon or otherwise copied from [the Price List]." Joint App'x at 12. The screenshots of Nivoda's website support this description, depicting Nivoda's display of percentages representing the difference between Nivoda's price for the diamond and the price for that category of diamond in the Price List, not a display of the entire List itself.

U.S.C. § 101 (defining "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship"). Nivoda is likewise correct that the Court concluded that the merger doctrine did not apply in part because the alleged infringement constituted copying "virtually the entire compendium." *CCC*, 44 F.3d at 72.

But this aspect of *CCC* does not command a different outcome here. To start, *CCC*'s merger analysis relies heavily on the principles that underlie the merger doctrine, which apply beyond the compilation context. *See id.* at 72–73 (citing policy considerations as one of two bases for concluding that the merger doctrine does not apply to the Red Book); *see also N.Y. Mercantile*, 497 F.3d at 118 (discussing *CCC*'s policy analysis to determine the applicability of the merger doctrine to individual settlement prices). Moreover, while the Court's merger analysis relied in part on the Red Book's status as a compilation, the Court also considered—as discussed above—the extent to which the Red Book's individual valuations might constitute original expressions and not just ideas capable of being expressed only in one way. *See CCC*, 44 F.3d at 67 (concluding that the Red Book "valuations themselves are original creations" because they reflect "predictions" derived from "a multitude of data sources" as well as "professional judgment and expertise").

Finally, apart from its arguments in favor of applying the merger doctrine, Nivoda urges us to affirm the district court's dismissal on various grounds that the district court did not consider:

that Rapaport failed to obtain the required copyright registrations for the Price Lists at issue; that Rapaport failed to state a claim for infringement because individual prices are not copyrightable; and that Nivoda's references to the Price List are fair use. Because "we are a court of review, not of first view," we remand to the district court to consider Nivoda's alternative grounds for dismissal in the first instance. *Havens v. James*, 76 F.4th 103, 123 (2d Cir. 2023) (internal quotations marks omitted).

IV. Conclusion

In summary, we hold as follows:

The district court erred by concluding, on the limited record presented on this motion to dismiss, that the values in Rapaport's Price List may be expressed in only one way, and that the merger doctrine therefore bars this lawsuit for copyright infringement.

Accordingly, we VACATE the judgment and REMAND for further proceedings consistent with this opinion.