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THE LEGAL PROTECTION OF PRINTED SYSTEMS†
Dale P. Olson*

I. Introduction

During most of the nineteenth century, courts were hostile to the idea of allowing copyright protection for material that was commercial rather than literary in nature, finding commercial material either not to be within the statutory classifications of the copyright acts or not to contain sufficient originality to be constitutionally protected.1 Although most printed material, regardless of its literary merit, is now copyrightable,2 one important case, *Baker v. Selden*, decided in that era of judicial hostility remains viable and perplexing even in the wake of the comprehensive review of copyright law that resulted in the Copyright Act of 1976.

*Baker v. Selden*3 dealt with the alleged infringement of a book explaining and demonstrating a bookkeeping system. From that case emerged a rule that has retained its viability for more than a century: a printed system is not subject to copyright protection. As a limitation on the scope or subject matter of copyright, the deci-

† Copyright 1979 by Dale P. Olson.
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1 See notes 18-22 infra and accompanying text.

Although material which is created by an author's independent effort meets the originality requirement, e.g. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 n.5 (9th Cir. 1977), in order to invest protection in a work which is a variation on material in the public domain, the changes made must be more than trivial. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976), *cert. denied*, 429 U.S. 857 (1976); *Vogue Ring Creations, Inc. v. Hardman*, 410 F. Supp. 609 (D.R.I. 1976). See notes 30-72 infra and accompanying text.
3 101 U.S. 99 (1879).
sion has been adopted to varying degrees by subsequent decisions,\footnote{See text \S II(B) of this article.} Regulations of the Copyright Office,\footnote{37 C.F.R. \S 202.1(b) (1977) provides that "[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing," are not material subject to copyright.} and the Copyright Act of 1976.\footnote{Copyright Act of 1976, supra note 2, at \S 102(a). Section 102(b) of the Act provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." The section was drafted to codify the case law on the scope of copyright protection. The House Report accompanying the final version of the Copyright Act of 1976 states that the purpose of \S 102(b) was "to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 57, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5670. Although both \S 102(b) and \S 133(b) of the 1976 Copyright Act refer to aspects of the issues protected by the case, "[t]he full Baker v. Selden doctrine . . . is neither accepted nor rejected by the Act. Its application is rather left to the courts." M. NIMMER, 1 NIMMER ON COPYRIGHT \S 2.18[B] n.15 (1978) [hereinafter cited as NIMMER].} But the holding of the Court in \textit{Baker} is problematical even in the context of the bookkeeping system the Court was reviewing. Using three distinct and inconsistent approaches, the Court held that the complaint alleging infringement of the plaintiff's bookkeeping system must be dismissed. While the reasoning of the \textit{Baker} court is subject to critical attack on several grounds,\footnote{See part II of this article.} its holding seems correct. Because the plaintiff was attempting to obtain copyright on what was clearly an idea—the display on facing pages of accounting results for a given time period—the case falls within the unimpeachable copyright rule that only the expression of an idea, and not the idea itself, is subject to protection.\footnote{See note 75 infra.}

Were the case authority for only that proposition no problem would arise. But \textit{Baker v. Selden} has been applied in a number of contexts remote from the facts of the case and used to support exclusion from copyright protection of a wide variety of materials characterized as printed systems. Printed systems are properties sharing several elements which made courts uncomfortable; that discomfort often causes a judicial response (relying on \textit{Baker v. Selden}) that the material is outside of the scope of copyright.\footnote{See notes 141-57 infra and accompanying text.} Among these disquieting factors is that printed systems rely on the
interrelationship of elements for their value. Simply protecting the textual explanation of a shorthand system, for example, would not protect the shorthand symbols themselves. Neither does protection of the interrelated elements fall within the comfortable limits of protecting expression of an idea as opposed to the idea itself. Since the elements are intended to be used actively, a printed system falls within a class of subject matter where distinguishing expression from idea is difficult.

A high degree of responsibility for this difficulty lies with the Court’s opinion in *Baker v. Selden* and cases adhering to it, because of the breadth of the Court’s holding, the inconsistent rationale on which the Court relied, and the Court’s failure to segregate the protected from the unprotected elements in the bookkeeping system examined in the case. *Baker v. Selden* has also had an impact outside of the copyright area because the federal statutory scheme of copyright and patent protection was a significant factor in defining the proper scope of permissible state unfair competition protection in several important Supreme Court cases.10

This article will critically examine *Baker v. Selden* and the cases which have developed the exclusionary rule for printed systems in order to: (1) analyze the competing considerations involved in evaluating the protection to be given under copyright law for printed systems; (2) explore the impact of the results of that evaluation on the protection of alternative state unfair competition law; and (3) propose an analytical framework for approaching the issue of copyright protection for printed systems.

II. THE COPYRIGHT EXCLUSION RULE

A. Origin of the Rule: *Baker v. Selden*

The subject matter of *Baker v. Selden* was unremarkable. Charles Selden’s copyrighted book, *Selden’s Condensed Ledger*, contained a textual essay explaining his bookkeeping system; appended to the text were ruled forms with headings illustrating the bookkeeping system in operation. The distinguishing feature of Selden’s ledger, which produced results identical with double entry bookkeeping, was the arrangement of the columns and headings which displayed the entire operation of a day, week, or month.

10 These cases, Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) and Compco Corp. v. Day-Brite Lighting Co., 376 U.S. 234 (1964) are discussed at notes 129-43 *infra* and accompanying text.
on a single page or on facing pages. The alleged mimicking of this arrangement by the defendant resulted in Selden's testator bringing a successful infringement action in the circuit court. The Supreme Court reversed the circuit court with instructions to dismiss the complaint, however, stating that the pivotal issue in the case was "whether the exclusive property in a system of bookkeeping can be claimed, under the law of copyright, by means of a book in which that system is explained." This statement of the issue, the Court's discussion of the policies underlying copyright, and their application to printed systems are the bases for the confusion regarding the scope of copyright, a misunderstanding that has continued despite repeated efforts to apply and clarify the Baker v. Selden rule.

Importantly, the defendant was not alleged to have copied the expression of either the text or the forms; rather the claim was that Baker's work embodied the bookkeeping system explained and illustrated in Selden's book. Since the case could have been decided on this narrower ground, the Court was not actually faced with the broader question that formed the core of its opinion and served as a basis for the extended theoretical discussion contained in the opinion. The Court ignored its finding that the defendant, Baker, had used a different arrangement of columns and headings. That Baker may have copied other elements of the book's arrangement is implied, however, by the Court's statement that if Selden "had the exclusive right to the use of the system explained in his book, it would be difficult to contend that the defendant does not infringe it, notwithstanding the difference in his form of arrangement." There is an indication in the opinion (albeit an unclear one) that the Court suspected that the arrangement presenting the entire operation for a day, week, or month on a single page or two pages facing each other had been directly copied in the defendant's publication. Otherwise, the plaintiff could not have claimed infringement on the basis that Baker had "a similar plan so far as results" were concerned since Selden's own system arrived at the same "results" as double entry bookkeeping. The Court's

11 101 U.S. at 100.
12 Id. For simplicity, Selden will be referred to as the plaintiff.
13 101 U.S. at 101.
14 Id.
15 This point is underscored by Professor Nimmer in his discussion of the case. NIMMER, supra note 6 at § 2.16[B] (1978).
16 101 U.S. at 100.
17 Id.
failure to decide *Baker v. Selden* on the most narrow available ground is, in itself, troublesome, as is the difficulty in conceptualizing the plaintiff's contentions and the differing nature of the parties' publications from the Court's description. Nevertheless, the most troublesome aspect of *Baker v. Selden* was the Court's reliance on three separate, inconsistent, but contiguous rationales. Dismissal of the infringement complaint required only a finding that the defendant's publication did not infringe the protected elements of Selden's book; the three rationales in the Court's discussion of the policies underlying copyright protection have a much broader sweep. In denying Selden protection against Baker's copying, the Court made three fundamental findings: (1) the bookkeeping system failed to meet the requirement of originality which the Court held excluded from copyright protection works resulting from "mere labor"; (2) the mere use of the system as opposed to explanation of it was permitted by an extention of the privilege of fair use which considerably broadened its scope; and (3) the differences in the scope of protection between copyright and patent properly relegated protection against use of a printed system exclusively to patent. The Court's discussion of these rationales will be expanded in the following section.

1. *The Finding of Lack of Originality*

In denying Selden protection against the alleged infringement, the Court cited with approval *Clayton v. Stone & Hall*, a case denying copyright to a daily market price list. In that case the court had determined the requirements of the copyright act by focusing on the language of the constitutional clause empowering Congress to enact copyright legislation, and on the title of the copyright statute. The *Clayton* opinion focused on the word "science" in the copyright clause and held that the term required limiting protection to properties of a "fixed, permanent, and durable character." Focusing on the title of the statute, the court said that the act was passed "for the encouragement of learning and

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*5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2,872).*

*U.S. Const. art. I, § 8, cl. 8 empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The clause does not confer any substantive rights on any individual but only empowers the enactment of copyright and patent legislation. E.g., American Tobacco Co. v. Werckmeister, 207 U.S. 284, 290 (1907); Tape Indus. Ass'n of America v. Younger, 316 F. Supp. 340, 346 (C.D. Cal.) appeal dismissed, 401 U.S. 902 (1970).*
was not intended for the encouragement of mere industry, unconnected with learning and the sciences.”

This line of reasoning as adopted in *Baker v. Selden* is important because it formed the basis for many subsequent decisions denying copyright to printed systems. Because of the limited textual expression in many printed systems, a closer analogy emerges between printed systems and ideas than between printed systems and expressions. Due to the prejudice in early decisions against works which were the result of “mere industry,” such as tables of figures or the price list in *Clayton v. Stone & Hall* (as opposed to works with literary qualities), printed systems were often equated with this category of properties because of their utilitarian quality. This practice is evident in the early decisions following *Baker v. Selden* which used the Court’s expansive theoretical discussion to extend the exclusion beyond the actual holding. Even the *Baker* Court qualified its broad statements with two particulars: “ornamental designs, or pictorial illustrations addressed to the taste;” and the actual statements of expression, whether textual or pictorial in a book explaining a system were protected by copyright since “their form is their essence, and their object, the production of pleasure in their contemplation. This is their final end.” In contrast the Court said a printed system has its “final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them.”

2. *Fair Use: The Printed System As Distinct From Its Explanation*

In *Baker* the Court also appeared to premise its decision on the theory that a privilege of fair use existed for actual use of the printed system but not to copy it for explanatory purposes. The Court remarked:

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20 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2,872). Writing before the decision in *Baker v. Selden*, Eaton Drone predicted that the appeal of the rationale in *Clayton v. Stone* had waned and that a “more liberal doctrine” was prevalent which would accord price lists and market reports the same copyright protection granted directories. Drone cited *Drury v. Ewing*, 7 F. Cas. 1113 (C.C.S.D. Ohio 1862) (No. 4,095), which held a garment-cutting chart copyrightable, as the principal basis for his optimism. E. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* at 209-11 (1879). In *Baker* the Court distinguished *Drury* as inapplicable. 101 U.S. at 107.

21 101 U.S. at 103-04.

22 id. at 104.
[W]here the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given there-with to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.24

The thesis that the Court considered fair use as a factor in support of its holding is further bolstered by the following discussion contained in the opinion:

The plausability of the claim put forward by the complainant in this case arises from a confusion of ideas produced by the peculiar nature of the art [bookkeeping] . . . . In describing the art, the illustration and diagrams employed happen to correspond more closely than usual with the actual work performed by the operator who uses the art.24

This reasoning is also flatly inconsistent with the Court's consideration of originality in the bookkeeping system and the third ground of the demarcation between copyright and patent protection, since fair use is a doctrine which defines allowable limits of copying for a work which contains sufficient originality and is the proper subject of copyright. If Selden's book contained insufficient originality to be entitled to copyright, the action should have been dismissed for that reason alone, because originality is a constitutional prerequisite for copyright protection. Similarly, if Selden's work were subject only to patent protection, and not to copyright, the action should have been dismissed since the work had not been patented and the complaint was for copyright infringement alone. Nonetheless, the Court considered fair use a defense to the copyright infringement action, and the decision added a gloss that broadened traditional notions of fair use: "[T]he very object of publishing a book on science or the useful arts [is] to communicate to the world the useful knowledge it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book."25

By dividing copying into "use" and "explanation" the Court freed the property for "use" although not for "explanation," a distinction which appears to take into account the competitive effect of the copying work on the copyrighted property and is also

24 Id. at 103.
25 Id. at 104.
26 Id. at 103.
a factor in determining whether the use made of a copyrighted work has been a fair one. Subsequent cases further blurred the distinction between use and explanation by authorizing more extensive copying of printed systems for competing purposes than the doctrine of fair use did, or does, for a work other than a printed system.23

3. The Demarcation Between Copyright and Patent

Selden's infringement claim contained an allegation that forms using similarly ruled lines and headings arranged comparably would have violated his copyright, a claim coextensive with the scope of protection obtained by patent. The Court concluded that to grant Selden the asserted protection would be a "surprise and fraud" on the public since copyright did not require any demonstration of novelty or invention. The Court based this assertion on the following grounds: "The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright."27 Having stated the requirements Selden would have to meet for the protection he claimed, the Court explained the scope of the protection applicable to a book embodying a printed system:

The use by another of the same methods of statement, whether in words or illustrations, in a book published for teaching the art would undoubtedly be an infringement of the copyright. The use of the art is a totally different thing from a publication of the book explaining it . . . . The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent . . . .25

Publication of the book without obtaining a patent on the system thus resulted in a forfeiture of the use of the system to the public domain. Selden's monopoly was narrowed to his explanation of the printed system; this was the extent of the protection afforded by the copyright.29

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23 See notes 73-110 infra and accompanying text.
27 101 U.S. at 102.
25 Id. at 104-05.
29 Id. at 103.
Even without the subsequent development which arguably broadened the rule in *Baker v. Selden* excluding printed systems from copyright protection, the case would remain troublesome since the expansive view of fair use taken by the Court is inconsistent with a viable monopoly on copyrighted works. The most troublesome aspect of the opinion, however, has been the effect of denying copyright protection to a work characterized as a printed system, often without any further consideration of the distinction accorded other works between protected and unprotected elements—stated differently, between the protected expression in a work and the unprotected ideas.

The following sections of this article evaluate the directions which case law and legislation have taken in response to *Baker* and propose an approach for balancing the *Baker* exclusion with other areas of copyright law.

B. Development of the Rule: Cases Subsequent to *Baker v. Selden*

1. *The Requirement of Originality*

Evaluation of the rule excluding printed systems from copyright protection requires consideration of the policies underlying the grant and the scope of the copyright monopoly. Since copyright legislation is enacted pursuant to the power conferred on Congress by the Constitution, early copyright cases identified originality as a constitutional requirement to qualify a property for copyright. In *Baker v. Selden* the Court endorsed what appears to have been the then prevailing approach to originality and found that there was insufficient originality in works that did not have a literary quality; the inherent assumption was that some connection with the fine arts was required to give a work intrinsic value. Absent such a connection, simple effort invested in a work was insufficient to qualify the material for copyright protection. The judicial hostility toward allowing copyright protection for nonliterary works was tempered by the Supreme Court in several cases subsequent to *Baker* where the Court refused to equate the commercial nature of a property with a lack of originality.

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29 See note 19 supra.
31 Clayton v. Stone & Hall, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2,872); Bartlett v. Crittenden, 2 F. Cas. 967 (C.C.D. Ohio 1849) (No. 1,076); Martinetti v. Maguire, 16 F. Cas. 920 (C.C. Cal. 1867) (No. 9,173).
Quantitatively, only a modicum of originality is currently needed to support a copyright. The requirement of originality is little more than a prohibition of actual copying;\textsuperscript{23} it is enough that the integrated subject matter contains some reflection of the author's personality and acts as a mark of the author's creativity. Originality inhere in the pattern of the work,\textsuperscript{24} and there will ordinarily be sufficient originality if the arrangement is not dictated by purely functional considerations. Sufficient originality to satisfy the constitutional requirement and to support a copyright has been found to be provided by the author's contribution in creating: pen and ink display lettering;\textsuperscript{25} the arrangement of a vacation schedule;\textsuperscript{26} the conceptual organization and presentation of work;\textsuperscript{27} the sequence or phrasing of textual expression;\textsuperscript{28} the


selection of the medium in which the material is expressed; the plan of compilation; the association and combination of ideas or numerical figures; layout; and textual arrangement or the totality of design. Because only some originality in the work's expression is required—expression being the number, variety, and sequence of a certain type of symbol—the ideas which are the subject of the expression need not be original.

The originality present in an arrangement of material is visible in sharpest relief in cases involving compilations of public domain material. These may be properties which may contain no textual or pictorial material original with the author, but which result from a process of gathering, assembling, synthesizing, condensing, editing, or categorizing existing material. In these works the requisite originality is reflected by the stamp the author places on the compilation in exercising judgment in the selection of material, so long as it is more than a trivial variation over the existing work.

In the context of maps and directories, the consideration of originality is approached somewhat differently. The strict requirement of originality adopted in *Baker* from *Clayton v. Stone* which treated nonliterary works as unoriginal has been changed to a re-

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29 *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F.2d 143, 147 (7th Cir. 1963).


requirement that the maps be the product of the author's topographic observation, or some other independent effort to be copyrighted.47 Although the "direct observation" rule for maps is without statutory authority,48 the rule enjoys parallel authority in the case of directories, where the conducting of a survey meets the originality requirement.49 Descriptively, this requires the author to have "started from scratch,"50 and assures that a small measure of the author's scholarship has been injected into the property to meet the constitutional requirement of originality. Like other works, maps or directories are protected only against direct copying, and where a subsequent map or directory is independently created, the existing work may be utilized for purposes of checking the accuracy of the second map or directory.51

One of the grounds relied on by the Court in Baker v. Selden was that no originality was contained in the bookkeeping forms because their functional nature dictated the textual expression.52 Although under the strict notion of originality adopted by the Baker Court the functional and commercial nature of the bookkeeping system was synonymous with a lack of originality in con-


48 Nimmer, supra note 6, § 2.08[1][c][ii]. The requisite originality should be found in any property where the author has invested more than a modicum of labor, skill and judgment whether or not direct topographic observation has taken place in the case of a map or a survey in the case of a directory. In rejecting the direct observation rule in a map case, the Court of Appeals for the Ninth Circuit has correctly stated that the rule appears to rest on the judgment that the only facet of cartography that can result in an original product, the only feature of the art worth protecting, results from direct observation. However, we are unable to find a persuasive reason for adopting this premise, and we therefore decline to rule that maps present considerations that are distinct from all other copyright cases. Expression in cartography is not so different from other artistic forms seeking to touch upon external realities that unique rules are needed to judge whether the authorship is original.


49 See, e.g., Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (2d Cir. 1922), cert. denied, 259 U.S. 581 (1922); See also C.R. Leonard & Co. v. Stack, 386 F.2d 38 (7th Cir. 1967).

50 Adventures in Good Eating v. Best Places to Eat, 131 F.2d 809, 812 (7th Cir. 1942).


52 See notes 18-22 supra, and accompanying text.
sidering whether printed systems could be copyrighted, the courts are increasingly amenable to the liberalized notions of originality articulated in the map and directory cases. The reason for this growing judicial acceptance is that it is the form, arrangement or combination of material which represents the product of labor and skilled effort by the author, separate and apart from that involved in the development of the intellectual conception. Thus, in Long v. Jordan⁵³ a pamphlet expounding a system of old age pensions was held entitled to copyright.

The originality required for copyrighting a plan for conducting a business is closely analogous, since the copyrighted publication which explains the particular plan often includes prepared forms or other printed materials for conducting the business. In Briggs v. New Hampshire Trotting & Breeding Association Inc.,⁵⁴ the plaintiff was the author of a copyrighted brochure which detailed a plan for pooling bets. Under the plan, participants would bet on seven consecutive horse races, with the winnings pooled for the series and then divided among those selecting the largest number of winning horses. Data processing machines were to be employed to implement the pooling arrangement. In dismissing the plaintiff's infringement action, the court distinguished between printed systems which contained the necessary requirements of originality and those which failed to do so, indicating the protection afforded should be proportionate to the originality and creativity involved. The Briggs court drew the line not between "'[W]ritings' and 'systems," but between original, complex, unique systems, and elementary, ordinary systems. The critical test is whether the plaintiff is entitled to protection for his own original, creative work, or whether he is to be given a monopoly for ideas which are common and ordinary."⁵⁵ Rationalizing by use of analogy that the copyright statute protects dramas, the court found no reason to preclude protection to sports simply because they consist principally of activity rather than words.⁵⁶

Similarly, since the originality necessary for copyright inheres in the makeup of the publication and the word order of the text, it should not be a bar to copyright that the business plan explained is not original with the author.⁵⁷ Thus, a set of educational flash

⁵³ 29 F. Supp. 287 (N.D. Cal. 1939).
⁵⁵ Id. at 236.
⁵⁶ Id.
cards containing basic public domain, arithmetic problems was infringed by reproductions published by the defendant using printing plates made by photocopying the plaintiff's cards. The district court found the requisite originality in the selection, arrangement and combination of elements contained in the set; an argument that the utilitarian function of the cards prevented copyright was dismissed as invalid. In like manner, where the subject matter of a copyright case consisted of a chart used to introduce the Russian alphabet to English-speaking students, the originality required to sustain copyright was in the "arrangement, order of presentation and verbal illustrations" of using cognates to acquaint the reader with Russian.

In Pantone, Inc. v. A. I. Friedman, Inc., the court considered the question of a color-matching system employed by artists and printers as a medium for denoting tones. Pantone published a copyrighted booklet which contained a color chart arranged in gradations of shades: each color or shade was centered on a page and the tonal spectrum flowing from it by the addition of transparent white or black was arrayed on either side. Manufacturers under license from Pantone produced inks conforming to the shades displayed on the color chart. Although the court said that taken alone a mere gradation of colors would fail to qualify for copyright protection, the grouping which facilitated selection and matching provided the necessary originality.

Similar reasoning was used in the decision of Lee v. Runge, which involved a book explaining a program of facial exercises which were demonstrated by photographic illustrations. The court considered the originality requirement as having been met, since the plaintiff created something by her own labor and judgment; collectively these amounted to the author's contributing something recognizably her own. Where the subject matter of the action was a table prepared for bankers to use in computing interest and discounts, originality was found in the combination of the words, the selection of the figures and symbols, and the order and arrangement which permitted computations to be made. Even though the

58 Gelles-Widmer Co. v. Milton Bradley Co. 313 F.2d 143, 147 (7th Cir. 1963); accord, Deutsch v. Arnold, 98 F.2d 686, 688 (2d Cir. 1939); Guthrie v. Curlett, 36 F.2d 694 (2d Cir. 1929).
61 Id. at 548.
62 441 F.2d 579 (9th Cir. 1971).
property was a compilation of public domain materials, there was sufficient originality to support copyright since the author exercised skill and discretion in selecting and in arranging the material.\textsuperscript{63}

\textit{Harcourt, Brace \& World, Inc. v. Graphic Controls Corp.}\textsuperscript{64} involved a copyrighted printed answer sheet used to record students' responses on intelligence and achievement tests for correction by optical scanning machines. In denying the defendant's motion for summary judgment, the court held that the answer sheets were the proper subject of copyright, reserving the question of the infringement for determination after trial. The court held that although the extent of originality and variation possible was inherently limited by the mechanical requirements of the correcting scanners, the efforts required for the author to structure the sheet entailed skill, expertise and personal judgment in determining the information to be requested from or conveyed to the student, and in the positioning of these materials within the confines of the page. Since the answer sheet was the product of the author's independent creation, the material was entitled to copyright despite being substantially identical to existing answer sheets. Further, the court said the answer sheets conveyed information in the textual directions, and by the reference to the examination with which it was being used; even considered independently from the instructions, the symbols designating question or response spaces were held to be protected expression.\textsuperscript{65} The court in \textit{Harcourt, Brace} narrowed the ambit of the \textit{Baker v. Selden} distinction between the terms "use" and "explanation" on the grounds that they make no clear division; in almost all cases a mixture of use and explanation existed in forms, except those which were used in recording machine-generated data. In regard to the answer sheets before it, the court could find no clear division between the explanation of a system (directions on use in answering examination) and its use (the answer sheet as recording form).\textsuperscript{66}

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\textsuperscript{64} 329 F. Supp. 517 (S.D.N.Y. 1971). The Copyright Office had accepted the answer sheets for copyright registration, thereby characterizing them as not within the regulation that precluded registration for forms used only for recording information. \textit{Id.} at 524, 525.

\textsuperscript{65} \textit{Id.} at 524.

\textsuperscript{66} \textit{Id.} at 524, n. 4. The court followed what it considered to be the "clear
In many respects the holding in Harcourt, Brace & World paralleled the reasoning in Norton Printing Co. v. Augustana Hospital which involved forms for recording laboratory test data. Norton Printing held that the determination of whether the form could be copyrighted could be made on the basis of whether the forms conveyed, or simply recorded, information. A finding that the forms conveyed information regarding the tests to be conducted, and that the format and arrangement were used to indicate where the data was to be recorded, qualified the forms for copyright. Although the court found it unnecessary to decide the issue, cogency was found in the argument that the distinction drawn between forms which conveyed information and forms which only recorded data was without constitutional foundation, so that any property with the necessary originality should receive copyright protection.

These cases are indicative of the approach taken in deciding the issue of whether sufficient originality is contained in a work that could be correctly characterized as a printed system based on the interrelationship of its elements and its functional nature. What remains of the originality requirement for systems applied by the Court in Baker v. Selden is unclear. The Baker Court elected to follow a strict requirement of originality, and one that discriminated against nonliterary works by characterizing them as unoriginal. Since later Supreme Court cases significantly re-

mandate" of the 1909 Copyright Act to allow protection for all the "writings" of an author and held that the use/explanation distinction should be limited to forms which merely serve as recordation devices for mechanically recording data.

* Id. at 134-35.
* Mazer v. Stein, 347 U.S. 201 (1954); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884). But see Justice Douglas' dissent from the refusal to grant certiorari in Lee v. Runge, 404 U.S. 887 (1971). Justice Douglas urged the Court to consider whether the proper test under the U.S. Constitution art. I, § 8, cl. 8 supra, note 19 was originality or novelty. The Court of Appeals for the Ninth Circuit had applied the test of originality, Runge v. Lee, 441 F.2d 579, 581 (9th Cir. 1971), which has been applied generally in determining the works given copyright protection, e.g., Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951); Hoague-Sprague Corp. v. Frank C. Meyer Co., 31 F.2d 583, (E.D.N.Y. 1929), although only the Copyright Act of 1976, supra note 2, at § 102, has expressly limited protection to "original works of authorship fixed in any tangible medium of expression." In the TradeMark Cases, 100 U.S. 82 (1879) (U.S. v. Steffens; U.S. v. Wittermenn; U.S. v. Johnson), the Court held that a trademark could not be considered an original writing of an author since a trademark "may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it." Id.
PROTECTING PRINTED SYSTEMS

Olson: The Legal Protection of Printed Systems

stricited the ambit of judicial inquiry into the originality present in a work by focusing solely on the quantity rather than the quality of the originality, that portion of Baker has been implicitly overruled. This approach has been generally followed by courts considering the question of originality required for printed systems, and the originality to qualify printed systems for copyright protection now largely parallels that required of other properties. This has resulted from decisions which have narrowed the scope of Baker; by focusing on the quantity rather than on the quality of originality present in a system, the courts have correctly aligned printed systems with other materials.

The peculiar nature of printed systems is not best recognized and dealt with by requiring a different standard of originality but rather by adjusting the scope of protection. A printed system is composed of elements of expression, and is the result of intellectual labor on the part of the author, no less than in the case of literary property. Indeed, because a printed system is composed of interrelated elements, each of which may have enough originality to qualify as a separately copyrighted element, a printed system often contains multiple increments of originality.

The argument that the functional nature of the system prescribes the expression and thereby precludes viable originality is not universal enough to deserve elevation to preclude protection as a matter of law. A printed system requires the same judicial examination as any other property to determine whether the requisite originality is present, a test which has been translated largely into a showing of individual effort on the part of the author. By the creation of a printed system, the underlying idea has been reduced from an abstraction to an expression. Thus, a printed system, as a group of diverse units integrated to function in unison, is one step removed from an idea, or one shorthand character, or one color. In forming the different characters into a shorthand system, or the colors into a coordinated wheel, the interdependence by which the

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at 94. The Court held a statute which provided for federal registration of trademarks invalid on this basis.


71 See notes 33-54 supra and accompanying text.
units relate to each other is an element of organization and arrangement that is justly entitled to be protected. The fear that a minimal requirement of originality will unduly restrict innovation is unwarranted. To permit copyright for printed systems leaves open the question of the proper scope of protection; indeed, the distinction drawn in Baker v. Selden between use and explanation implicitly recognizes this idea.  

2. The Scope of Protection: Fair Use

As discussed in a preceding section of this article, the rule announced in Baker v. Selden excluding printed systems from copyright has been greatly limited by subsequent decisions which generally permit copyright for qualifying elements composing a system. The arrangement of the elements of expression, including the textual or pictorial explanation of how a printed system is implemented, is subject to copyright, provided the arrangement is the result of original scholarship on the author's part. As with all copyrighted works, the protection a printed system receives is subject to the limitation that the unprotected underlying idea is freely usable by all so long as the means of use does not track the copyrighted expression. Even copying of the expression is not an infringement so long as the copying does not exceed the bounds of fair use, a doctrine which "eludes precise definition; broadly speaking, it means that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner's market for the work." As a result of the indefinite nature of fair use, it is necessarily decided on a case by case basis using guidelines which can be distilled from decisions which have developed

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72 101 U.S. 99, 103-04 (1879). The Baker Court concluded simply: "the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books ruled and arranged as designated by him and described and illustrated in said book." Id. at 107.

73 See section II(A)(1) of this article.

74 See notes 33-46 supra and accompanying text.


the privilege: (1) the purpose and character of the copying; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion copied in relation to the copyrighted work as a whole; and (4) whether any diminishment in the value of the copyrighted work is likely to result from the copying. These factors have also been adopted by the General Revision’s provision on fair use, the first statutory recognition of the judicially-created defense.

Notwithstanding that the monopoly a copyright owner receives is restricted by the privilege of fair use which permits reasonable and limited copying, even of the exact wording or other concrete expression, reproduction of all or substantially all of a copyrighted work cannot be defended as fair use. Further, because the scope of a copyright is limited to protection of the expression from copying, an independently created property, even if it is identical, is not an infringement.

Infringement also occurs only when the original elements of a property are copied, since only those elements of a work are protected. Baker v. Selden failed to consider adequately this aspect of the scope of copyright protection. In sharp contrast to patent, copyright does not grant an exclusive right to the art disclosed; copyright protects no more than the expression and does not inquire into the novelty or originality of the idea underlying the expression. Because expression includes such elements as arrange-

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77 Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 86th Congress, 2nd Session Pursuant to S. Res. 240, Study 14.
81 White v. Bender, 185 F. 921, 925 (C.C.N.D.N.Y. 1911).
83 E.g., Guthrie v. Curlett, 10 F.2d 725 (1926). 35 U.S.C.A. § 154 (Cum. Supp. 1978) gives the patentee “the right to exclude others from making, using, or selling the invention.”
ment and style, however, extensive paraphrasing will constitute infringement.85

In the areas of maps and directories, the materials closest to printed systems, the question of fair use has been dealt with by requiring a subsequent author to do an original topographic observation or a survey; his having done so, an existing copyrighted map or directory may be used as a reference to ensure the accuracy of the new map or directory.86 This approach would have been the best to apply to printed systems. The gloss added to fair use by the Court's division in Baker v. Selden of copying into use and explanation unnecessarily compounded the confusion surrounding fair use. The question of whether copying rises to the level of an infringement is better determined by focusing on what is the central concern in determining if the copying is privileged as fair use: whether the copying seriously diminishes the value of the copied property.87 This may have been what the Baker Court intended to accomplish. Since Baker's works were explanatory, his revenues were presumably derived principally from the sale of the texts, rather than from the sale of forms. A copying work which competed directly with Selden's book could have seriously diminished his revenues. But copying for purposes of use involved a different market, leaving the value of a book explaining the printed system little diminished. Since the Court approached the question of fair use by dividing copying works into use and explanation, as well as relying on the separate but overlapping rationales in disposing of the case,88 the holding has been misconceived by some courts as precluding protection even for properties which have been copied verbatim and for directly competing purposes.89


88 See section II of this article.

At best, it is unclear whether the rule in Baker v. Selden was intended to give its imprimatur to such extensive copying. Yet early cases applying the exclusionary rationale simply determined whether the property had the qualities of a system, including practical application; this label alone was enough to preclude protection even though the property may have contained considerable originality. Brief English Systems v. Owen involved a system of speedwriting consisting of lists of the English alphabet and punctuation marks which utilized condensed phonetic spellings. The court held that there was “no literary merit in a mere system” and that the copyrightable elements were in “the manner of treatment” which was limited to the “manner, method, style, or literary thought” of the publication. Although citing Baker, the court failed to make any distinction between explanation and use. Owen’s publications were explanatory. The facts are ambiguous as to the extent that Owen’s system tracked the Dearborn system. Since Dearborn had used public domain word lists, as had Owen, apparently no copyright was claimed in the word selection, although such a list could be protected if the requirement of originality were met. A similar result was reached in Griggs v. Perrin, where a system of phonetic shorthand which had been explained in the plaintiff’s copyrighted book was simply expanded in the defendant’s publication. Again, no infringement was found.

The better approach is to recognize that a printed system can be copyrighted and to apply the same infringement standard as is used for maps and directories. While infringement is irrevocably intertwined with the question of originality, to require a competitor to “start from scratch” does no violence to the statutory scheme. The balancing of the scope of protection with the originality present in any property gives adequate assurance that a copyright proprietor will not be awarded a monopoly on an area of subject matter while at the same time providing the protection that will promote the policy interests underlying copyright.

This approach was taken in Lee v. Runge, which involved a series of facial exercises illustrated by photographs. The defendant

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48 F.2d 555 (2d Cir. 1931), cert. denied, 283 U.S. 858 (1931).

Id. at 556.

See notes 33-72 supra and accompanying text.

49 F. 15 (C.C.N.D.N.Y. 1892).

441 F.2d 579 (9th Cir. 1971), cert. denied, 404 U.S. 887 (1971).
was found to have infringed the "treatment of the subject matter" in the plaintiff's book by including the plaintiff's exercises in her book; although the defendant's illustrating pictures were rephotographed, only one of the exercises in the defendant's publication was original. The court, however, failed adequately to limit the scope of the plaintiff's copyright. If the defendant had been simply a copyist who appropriated the arrangement of the plaintiff's book, then the finding of infringement was accurate. Since the defendant had been formerly employed by the plaintiff and was therefore familiar with the exercises, however, a more detailed examination was necessary to determine whether her photographs resulted from her own determination of how best to pose the models or whether the defendant had posed her models along the lines of illustrations in the plaintiff's book. If the defendant's pictures were independent creations, there was no copying of the "treatment of the subject." In such a situation to find copyright infringement gives the plaintiff a monopoly on the exercises themselves as opposed to the expression in her publication.

The basic difficulty in these cases results from the need to accommodate the protection accorded a property with the competing interest of stimulating creativity. Since copyright never provides a monopoly on the underlying ideas, the subject matter remains available for later authors. The question of functional use, an ingredient in a work characterized as a printed system, requires that the privilege of fair use be expanded to permit noncompeting use of the system, something that the Court in Baker recognized, but failed to implement in fashioning the decree in that case.

A case which dealt well with this aspect of Baker is Stone & McCarrick, Inc. v. Dugan Piano Co.\(^6\) There the plaintiff had pub-

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\(^6\) 210 F. 399 (E.D. La. 1914). The trial court conceded for the purpose of argument that the advertisements contained in the plaintiff's book were copyrightable, noting that the cases went both ways on the question. But by characterizing the plaintiff's book as a manual of instruction the court was able to find that no infringement occurred even though one of the advertisements from the plaintiff's book had been reproduced. The court's statement that the case is on "all fours" with Baker v. Selden, 101 U.S. 99 (1879), is only partially correct; in Baker the Court found no copying of the copyrighted work. The Dugan court's assessment of the application of the principles of Baker is certainly correct. In affirming, the Court of Appeals was not willing to assume advertisements were copyrightable, and particularly those which contained misstatements having a tendency to mislead and deceive the public. 220 F. 837 (5th Cir. 1915). A right to private use has also been implied from the marketing of a book of forms. American Institute of Architects v. Fenichel, 41 F. Supp. 146 (S.D.N.Y. 1941). See also S. Cohen, Fair Use in the Law of Copyright, 6 ASCAP COPYRIGHT LAW SYMP. 43, 48 (1955).
lished a copyrighted book which contained a series of instructions for producing advertisements. The defendant used a part of the book as an advertisement for his products. The court declined to find infringement on the rationale that the defendant was simply using the publication for the purpose for which it was designed; this was "use" as opposed to "explanation." By this approach to fair use, even a larger amount of material may be taken as long as its publication remains noncompetitive with the plaintiff's. This should be the case with any personal use by an individual; only where the property is included in a competing publication should the privilege not apply.

The functional nature of a printed system necessarily limits the scope of the monopoly, particularly where the expression is set by extrinsic factors. For example, the requirements of the optical scanning machines limited the variation possible in the answer sheets in Harcourt, Brace & World, Inc. v. Graphic Controls Corporation. But this fact in itself should be no bar to copyright protection. Such is the case with maps and directories where the expression is preordained by the subject matter; but, as the originality required in those cases is tailored to the subject matter, so is the scope of protection. By focusing on the independent effort involved in creating a system, the protection can be tailored to preclude any lock on the subject matter, while at the same time affording a modicum of protection to the property which is a writing created as the result of intellectual effort. The difficulties posed by attempting to bifurcate a property into use and explanation are compounded by the realization that no strict demarcation is possible.

The bifurcation of a property into protected "expression" and unprotected "ideas" is premised on the underlying purpose of the copyright clause in the Constitution: to promote societal progress by encouraging authors by extending them a limited monopoly on their works. The primary purpose of benefit to society overrides

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87 See note 86 supra, and accompanying text.
89 Copyright Act of 1976, note 2 supra, § 102.
90 In Mazer v. Stein, the Supreme Court stated that "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."" 347 U.S. 201, 219 (1954).
any individual interests and is expressly recognized in the policy underlying copyright protection. These same policies are recognized in the doctrine of fair use which permits copying within prescribed limits, offsetting the benefits which accrue to the public from permitting the use against the loss to the creating author.101

The monopoly accruing to the copyright proprietor is a limited one. Succinctly, it is the right to multiply copies, and as a necessary corollary this includes the right to exclude others from so doing.102 Since the prohibition is against copying of expression, protection accrues to the author's word choice and style.103 This excludes any protection simply for basic themes. At that level of abstraction, to grant copyright protection would be a monopoly on such a substantial amount of material as to inhibit the basic purpose of the constitutional clause in promoting authorship.104 A copyright in no way preempts or monopolizes a subject. A different means of expression avoids the copyright.105 Within the confines of these general limitations, however, protection should be given to the elements of a property which are entitled to copyright and which, together, comprise the author's expression.

In the context of a printed system, this means particularly the elements of organization, as well as any material, such as shorthand characters which, taken collectively, contain sufficient originality to be copyrighted. Where the printed system operates through a series of forms and the copier is marketing competing forms, protection should be extended to the expression just as with any other property. Where the copying is for the purpose of implementing the system, however, the fair use privilege should ordinarily permit the copying. In sum, this approach arrives at much the same result as the bifurcation into use and explanation that Baker v. Selden employed. However, the advantage in this approach is


that it does not require any distinction to be made on the basis of such an indefinite standard. Instead, by focusing on the question of competing use and diminishment in value of the copied property, the reviewing court is able to isolate effectively the relevant issues. Not to permit noncompeting copying may well be tantamount to giving the author a monopoly on an idea.106 When the copying involves a competitor, the approach places a burden on the competitor of originating his own material. A subsequent author is in no way foreclosed from expressing the underlying idea, even in a similar fashion, so long as it is not the result of copying. A standard of infringement paralleling that used in the map and directory cases thus rewards the efforts of the first author while in no way precluding future authors from exploring the same subject area.107

Several courts have approached an application of Baker v. Selden that is generally consistent with that suggested in this article. Crume v. Pacific Mutual Insurance Co.108 involved four copyrighted pamphlets which detailed a plan for reorganizing insolvent insurance companies. The court found the requisite originality in the materials but held that the premise underlying Baker permitted both the use of the reorganization plan disclosed and also, as a corollary, that of the descriptive words or phrases to the extent necessary to accomplish the use of the plan.

Crume took a thrust that would allow a wide latitude of copying. On the premise that the Baker rationale permitted the use for practical application where the means of implementation was language, Crume would permit the use of language in such instances, expressly disapproving decisions that required changing of words as an undue restriction on the right to use the underlying ideas. In Mazer v. Stein, which allowed copyright protection for statuettes intended to be used as lamp bases, however, the Baker rationale was implicitly narrowed. There, the Supreme Court described the case as applying only to forms which did not disclose information.109 While not expressly limiting Baker, it is consistent with the limitations placed on the case by a number of lower courts.110 While not fully recognizing the limitations that the inherent defects in

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107 See note 51 supra and accompanying text.
108 140 F.2d 182 (7th Cir. 1944), cert. denied 322 U.S. 755 (1944).
110 E.g., Scholz Homes, Inc. v. Maddox, 379 F.2d 84 (6th Cir. 1967); Gelles-Widmer Co. v. Milton Bradley Co., 313 F.2d 143 (7th Cir. 1963).
the *Baker* Court's reasoning impose on application of the rule to printed systems, these cases collectively show a laudatory willingness to analyze the differing grounds of approach in *Baker*. Certainly the automatic exclusion from copyright protection that *Baker* might dictate is no longer absolute but is to be determined using an analysis that segregates protected from unprotected elements and cautiously defines the scope of the protection to assure that it does not become a monopoly precluding another author from independently producing a related work.

The fair use standard applied by the *Baker* Court is consistent with its hostile approach to meaningful protection for printed systems generally, but a critical analysis of the Court's reasoning and subsequent development in the case law requires a modification of the *Baker* Court's approach. Printed systems should be subject to no more liberal copying for use by a competing publisher than other works. A more difficult question is presented by private use. Generally such a use is noncompeting. A shorthand method, for example, is exploited in the medium of a book both presenting and explaining its operation. Where the printed system is embodied in a form where private use publication would diminish a possible source of author revenue, no general rule can be stated as to whether the use is a fair one. The best approach involves balancing the different criteria that collectively determine whether the use made of copyrighted material by a subsequent author is permissible. In this respect a printed system should be treated no differently from other copyrighted material.

3. *The Demarcation Between Copyright and Patent*

Although the Court in *Baker v. Selden* avoided ruling on the patentability of the bookkeeping system, a major premise of the decision assumes that the scope of protection necessitated that the patent requirement of novelty be met if any protection were to be granted. In sharp contrast to the minimal standard of originality required for copyright, the patent standard of novelty is stringent and subject to administrative examination by the Patent Office before, and judicial review after, the patent is issued. In return for the inventor's meeting the more difficult novelty standard, the scope of patent protection is correspondingly broader than copy-

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111 101 U.S. at 102.
112 E.g., Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).
right protection; it protects against the use, manufacture and sale of the invention even if independently discovered for the statutory period. The fear of monopoly that the Court in Baker assumed would result if Selden's copyright claim was upheld resulted in its concluding that such extensive protection necessarily restricted printed systems to patent protection, if they were to be protected at all.

This aspect of the Baker rationale was applied in a case with similar facts, Aldrich v. Remington Rand, Inc., where the plaintiff claimed infringement of a manual containing text and forms for establishing a tax bookkeeping system for governmental units. The defendants copied and distributed the forms to a city for use in establishing an accounting system similar to the plaintiff's system. The court held that patent and not copyright would be the only protection against a use by the public of the system described by the text and illustrated by the forms, which were held not subject to copyright. As Briggs v. New Hampshire Trotting & Breeding Association, Inc., underscored, however, patent protection is unavailable for systems consisting solely of printed matter. The court's remarks are apposite since some exclusionary cases subsequent to Baker v. Selden premise the denial of copyright at least partially on the allocation of subject matter between patent and copyright. Since patent is unavailable for printed systems unless they are used in conjunction with structural devices for which patent protection is available, to deny copyright is tantamount to denying all protection. A blind spot arises in the scope and breadth of protection unless a judgment is made that printed systems are unentitled to protection. Although Congress is authorized to grant protection within the constitutional confines of the copyright clause, copyright is a matter of congressional grace; it

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114 101 U.S. at 102.
exists solely as a result of statutory grant for works subject to federal protection, and Congress may segregate certain classes of works and deny them protection.\textsuperscript{120}

To the extent that the rationale of \textit{Baker v. Selden} rests on properly defining the respective subject matter of copyright and patent, the result can be criticized because the premise is inaccurate. Since patent is unavailable for printed systems to the extent that to grant a copyright on a printed system would be to give protection parallel in scope to patent, the result is erroneous. To deny protection based on these faulty premises is inequitable. Copyright should be granted on the basis of a determination that sufficient originality is present to fulfill the necessary requirement. Correspondingly, the degree of the protection should extend to the copyrightable components of the systems, subject to the privilege of fair use. The question of patent protection should not be involved.

\section*{III. \textit{Alternative State Protection: Misappropriation}}

Under the federal copyright statute of 1909 until divestitive publication occurs, state common law copyright shelters a property against infringement.\textsuperscript{121} Under the 1976 copyright revision act the federal sphere of protection becomes operative from the moment the work is placed in a tangible medium of expression, rather than from the time of divestitive publication.\textsuperscript{122} After the point in time at which federal copyright protection becomes operative, uncertainty arises as to whether any state protection is available to the author of a printed system if the copyright exclusion rule of \textit{Baker v. Selden} were to be applied with its full breadth. Since publication preempted common law or state copyright protection under the copyright laws prior to the present act\textsuperscript{123} and will be preempted from the moment of tangible expression under the Copyright Act of 1976 whether published or not,\textsuperscript{124} state protection would have to be sought under the general doctrine of

\begin{footnotes}

\textsuperscript{121} DeCosta v. Columbia Broadcasting System, 377 F.2d 315 (1st Cir. 1967), \textit{cert. denied} 389 U.S. 1007 (1967); G. Ricordi & Co. v. Haendler, 194 F.2d 914 (2d Cir. 1952).

\textsuperscript{122} Copyright Act of 1976, \textit{supra} note 2, § 102(a).


\textsuperscript{124} Copyright Act of 1976, \textit{supra} note 2, § 102(a).
\end{footnotes}
“misappropriation.” Misappropriation is a tort so labeled in the landmark case of International News Service v. Associated Press, 125 (hereinafter referred to as I.N.S.) where the Associated Press sought to enjoin International News Service from supplying its clients with news taken from Associated Press releases. The Court posited the issue as the protection of the commercial value of news between competitors. Noting that the news itself, the historical facts of an event, was not protected by copyright, the Court decided the question on the principles of unfair competition. In affirming the trial court decision, the Supreme Court structured the decision not to prohibit International News Service from using the news dispatches entirely, but only to the extent that delay in their use was necessary to prevent depreciating the value of Associated Press distribution. The I.N.S. case, according to the Court, involved:

[T]aking material that has been acquired . . . as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant [A.P.] for money . . . . [The] defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant’s members is appropriating to itself the harvest of those who have sown.126

Although jurisdiction was based on diversity of citizenship in I.N.S., the Court premised its decision on the federal common law, a basis that subsequently disappeared from the ambit of the federal courts as a result of Erie R.R. v. Tompkins.127 Despite this tacit

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125 248 U.S. 215 (1918).
126 Id. at 239-40.
overruling, *I.N.S.* has retained an understandable allure for courts required to decide the equities present in a case of misappropriation. But notwithstanding this basic appeal, the *I.N.S.* approach is fraught with difficulties. Even at the time of the decision, Justice Brandeis argued in dissent in *I.N.S.* that the failure of the copyright statute to grant such protection should preclude recognition of a "quasi-property" right unless the extension had been legislatively generated. The problems of applying misappropriation are multiplied by the uncertain ramifications of the expansion of the federal doctrine of preemption in *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting, Inc.*

In basic terms, to invoke successfully misappropriation, the author of a printed system who was denied copyright protection would have to parallel the appropriation of his property with the competitive appropriation present in *I.N.S.* Even before the federal preemption doctrine was expanded in *Sears-Compco,* a number of courts had refused to adopt the theory on reasoning that is similar to that in Justice Brandeis' dissent in *I.N.S.* Particularly, these courts declined to apply the doctrine to any published work, reasoning that the federal copyright statute preempted the field and that to grant state protection where the author failed to obtain, or the property was ineligible for, copyright was inconsistent with the federal scheme of protection. Judge Learned Hand, in particular, voiced strong opposition to any extension of *I.N.S.* to "writings," as constitutionally defined, on the argument that such protection would conflict with the uniformity of protection that the constitution intended; Hand would have confined *I.N.S.* to its facts. Consistent with this approach is the further argument that the vagueness of differing law that results from state protection as encompassing as misappropriation not only offends the inherent interest in uniformity present in the copyright statute but could also undermine the copying that *Sears-Compco* intended to promote.

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131 Both *Sears* and *Compco* considered questions of state protection for invalid patent designs. The Court's remarks are apposite to "writings" as well, however, and some specific references are made to the impact of the doctrine on copyright. 376 U.S. at 231 n.7, 376 U.S. at 231. See also *Quick Point Pencil Co. v. Aronson,* 567 F.2d 757 (8th Cir. 1977), *cert. granted,* 98 S.Ct. 2843 (1978) (No. 1413).
132 248 U.S. at 248-67 (1918).
In *Sears-Compco* competitors had been enjoined by trial courts from copying product features which had been held ineligible for design patent protection; in both cases the Court of Appeals for the Seventh Circuit allowed state law protection on a finding that Illinois law permitted holding one competitor liable for simply copying and marketing another competitor's unpatented article.\(^{131}\) In reversing that decision the Supreme Court enunciated a doctrine that widened the ambit of federal copyright and patent preemption and affirmatively permitted the copying of designs which did not qualify for design patent. Although the Court generally denied states the power to prohibit the copying of a published but unpatented or uncopyrighted article,\(^{135}\) subsequent cases have distinguished misappropriation as developed in *I.N.S.* from simply "copying" design features present in *Sears-Compco*.\(^{132}\) The distinction is premised on the different degree of competitive advantage afforded a competitor by the copying specifically allowed by *Sears-Compco* and the wholesale appropriation involved in situations such as "record piracy" cases. There, a sound recording is used as a master to reproduce copies for sale, permitting the "disklegger" to bypass the recording costs, performer's royalties and the expense of promotion while receiving the benefits from the expenditures made by the original recording company.\(^{137}\)

The courts which have afforded relief against record piracy on a common law basis have relied on the basic rationale of *I.N.S.* which stated a basic concept of business morality which equalizes competitors' economic posture. The most interesting aspect of the record piracy cases is the courts' balancing of preemption with their abhorrence of the record duplicator's business practices. On balance, the esoteric notions of federal supremacy in the protection of published writings have been outweighed by what the courts viewed as commercial theft.\(^{138}\)

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\(^{131}\) *Stiffel Co. v. Sears, Roebuck & Co.*, 313 F.2d 115 (7th Cir. 1963); *Day-Brite Lighting, Inc. v. Compco Corporation*, 311 F.2d 26 (7th Cir. 1962).

\(^{132}\) 376 U.S. 225 (1964); 376 U.S. 324 (1964).


The difficulty with rejecting the post-
Sears-Compco misappropriation cases is that to do so is to place the party who undertakes the expense of originating a property, such as a sound recording, at a significant disadvantage against a competitor who is able to capitalize on original recording company’s expenditures and significantly to minimize his own costs. In Sears, Stiffel, the plaintiff, had borne the costs of popularizing pole lamps and the initial design costs. In order to become a competitor Sears had to absorb the costs of tooling for manufacture. This case is unlike the situation where a record duplicator’s costs are simply the minimal expenses of producing copies from a master sound recording. The difficulty with misappropriation, amplified by Sears-Compco, is that it is an encompassing doctrine which could defeat the free copying federal preemption demands, if not carefully controlled. The question then becomes: can misappropriation protect any published writings? Or, does the failure of Congress to expand copyright protection to a particular class of writings indicate a Congressional policy to deny protection and permit copying?

In the copyright area it is a precarious business to read intent from Congressional silence, requiring even more creative interpretative abilities than does interpreting the statute itself.\(^\text{133}\) If the record piracy cases are used as a focal point, an indication is clear that when Congress wants a class of writings protected it is specifically stated.\(^\text{134}\) But the corollary is not necessarily correct: silence

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In addition to the protection given to sound recordings under the Copyright Act of 1976, § 102(a)(7), recordings are also protected under many state statutes. Record Industry Assoc. of America, State Laws Against the Piracy of Sound Recordings: A Handbook for Enforcement and Prosecution (1976).

\(^{133}\) Judge Henry J. Friendly has written: “Anyone who has had to deal with the Copyright Act of 1909 must stand in awe of the ability of the framers to toss off a sentence that can have any number of meanings.” The Gap in Law Making: Judges Who Can’t and Legislators Who Won’t, 63 Colum. L. Rev. 787, 783 (1963). The January 1, 1978, effective date of the Copyright Act of 1976 precludes anything more than speculation on how the new statute will fare under Judge Friendly’s test. Hopefully, the more than 20 years that went into its consideration will mean less judicial difficulty in applying the terms of the statute. For an evaluation of the new statute, as compared to the Copyright Act of 1909, concluding that on balance the new act is an improvement, see 1 Nimmer, supra note 6, at vii.

\(^{134}\) 17 U.S.C. § 101(e) as amended by Publ. L. 92-140 (October 15, 1971) provided copyright protection for sound recordings on which the sounds constituting
need not mean that Congress intends to prohibit the states from protecting published writings. This was the approach taken by the court in Grove Press, Inc., v. Collector's Publications, Inc.,\textsuperscript{111} where the plaintiff had set type at substantial cost for reprinting a public domain work. The defendant photographically prepared printing plates from the plaintiff's publication to avoid typesetting costs. Although the plaintiff's version of the public domain work contained insufficient originality to support copyright, the court enjoined the defendant on the misappropriation theory to prohibit publication by use of plates produced by photographing the plaintiff's reset version. The Grove Press court placed the two publishers on the same economic plane in producing the public domain work.

Sears-Compco expresses a preference for encouraging copying of properties within the ambit of the federal statutes unless a federal monopoly is awarded. Although an early committee report preceding the passage of the Copyright Revision Act of 1976 specifically equated misappropriation protection with the protection afforded by copyright,\textsuperscript{112} and would have preempted misappropriation, the final draft of the act was not so far reaching. Under the Copyright Revision Act of 1976, misappropriation is preempted only to the extent that the protection is "within the general scope of copyright."\textsuperscript{113} In the case of printed systems which are denied copyright protection, even stronger reasons support a policy which prohibits the states from granting protection on the theory of misappropriation.

Even a preliminary inquiry into the complicated reasoning of Baker v. Selden demonstrates an emphatic insistence that the constitutional and federal statutory policy precludes a monopoly of a printed system. To permit an author to sidestep this federal policy by seeking state protection would defeat the policy encouraging use of the printed system; to permit protection for a printed system on a state-by-state basis is to defeat the free use of the system. State misappropriation protection is clearly inconsistent with that distinctly articulated policy against monopoly of printed systems.

\textsuperscript{111} 264 F. Supp. 603 (C.D. Cal. 1967).
\textsuperscript{113} 17 U.S.C.A. § 301(b)(3) (1976).
IV. Conclusion

*Baker v. Selden* remains an important copyright authority in the demarcation of the appropriate limits of copyright protection. The difficulty with *Baker* is the Court's approach in treating printed systems as a distinct type of property and applying a separate set of rules to them, including an exaggerated standard of originality.

The Court's difficulty understanding the protection that could have been given to printed systems without precluding protection entirely led to the exclusionary rule discussed in this article. That rule was to a significant degree a reflection of the then prevailing idea that copyright protection should not be given to all material created by original effort but only to material which reflected some measure of literary quality.

While state protection for printed systems should be precluded because they are within the subject matter of copyright, copyright protection should be extended. By evaluating a printed system under the same standards as, and extending the same scope of protection to, other works, the excesses of the *Baker* decision are neutralized.