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A Turning Point in Copyright: Baker v. Selden and Its Legacy

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Baker v. Selden

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Selden, Baker, and Their Competing Books: Eighteen sixty-five was a year of great hope and high expectations for Charles Selden, then chief accountant to the treasurer of Hamilton County, Ohio, in Cincinnati and author of six books on a condensed ledger system of bookkeeping.¹ In May of that year, Selden had signed a lucrative contract with Hamilton County for use of his bookkeeping system.² He also believed he was about to sell a version of his system to the U.S. Department of the Treasury.³ Selden planned to spend several weeks during the spring of 1865 in Washington DC to make appropriate adaptations of his system for Treasury uses and conclude the deal.⁴

With these two reference accounts, Selden was confident that he would be able to sell his system to many other customers. In March of 1865, he contemplated forming a joint stock company to cash in on “the right to introduce the system throughout one or

¹ See Exhibit A (“An Improved Public Accounting System” by Chas. Selden and Robert Dale Owen, dated March 1865) to an Affidavit of Elizabeth Selden Ross submitted in connection with a post-trial motion, Supreme Court Record in *Baker v. Selden* (hereinafter “Record”) at 91-94. The Record contains copyright notices for seven books by Selden. *Id.* at 43-45. Two with the same title (but a different copyright date) are treated here as one book.

² A copy of the contract between Charles Selden and Commissioners of Hamilton County for rights to use Selden’s system in the treasurer and auditor offices of that county appears in the Record at 111.

³ Exhibit B to an Affidavit of Elizabeth Selden Ross indicates Selden’s confidence that he would be able to adapt and sell his system to the U.S. Treasury Department. See Record at 94. The journals of Salmon P. Chase record a meeting with Charles Selden on August 2, 1862. 1 THE SALMON P. CHASE PAPERS at 356 (John Niven, ed. 1993). Selden’s meeting with Chase suggests that he had the requisite contacts in Washington to make his belief of a deal with the U.S. Treasury feasible, even though Chase was no longer Secretary of the Treasury in 1865.

⁴ Record at 94.

more of the States of the Union, into all State, county and township offices, as well as into the municipal offices of cities and towns, and into the counting houses of all corporations whose offices are kept within the States aforesaid.”⁵ Although Selden had initially designed his bookkeeping system for public treasury and auditing offices, he was confident the system would also be useful to private firms.⁶

Selden’s sense of the magnitude of his achievement is evident from the preface to an 1859 edition of his book: “To greatly simplify the accounts of extensive establishments doing credit business, and embracing an almost infinite variety of transactions would be a masterly achievement, worthy to be classed among the greatest benefactions of the age.”⁷ Perhaps because he felt that a large fortune was soon to be his, Selden became a father for the first time.⁸

By June of 1865, however, the bloom was off this rose. Although Selden still believed he could adapt his system for use by the U.S. Treasury Department,⁹ he was not able to do so in the spring of 1865, or apparently thereafter. He went deeply into debt, mainly as a result of his decision to authorize, apparently at his own expense, the printing of a very substantial number of copies of his books in anticipation of sales that failed to materialize.¹⁰ As a result, in June of 1865 Selden conveyed to his publisher, Moore, Wilstach & Baldwin, the sole and exclusive right “to introduce and dispose of the right to use” his system “either for a limited period of years or for the entire term that the

⁵ Record at 94.

⁶ Id. at 20.

⁷ Id. at 21.

⁸ The second post-trial affidavit of Elizabeth Selden Ross, dated April 30, 1875, makes reference to an 11 year old daughter. Id. at 89. It appears that Selden was expecting to sell his system widely in 1864.

⁹ Id. at 103.

¹⁰ Id. at 89-90.

copyright runs.”¹¹ Selden also conveyed rights “not only [in] the forms heretofore copyrighted, but all additional forms, if any, pertaining to said system which may hereafter, by the owner thereof, be copyrighted in all State, county, township, municipal, and corporate offices.”¹² During that summer and fall, Selden’s intimate friend and former colleague at the Hamilton County treasurer’s office, Eleazer Baldwin, tried to sell Selden’s system to treasury and auditor offices in various counties in Ohio and Indiana on behalf of this publisher (of which his brother Francis was a principal).¹³ Although some counties expressed interest in Selden’s system, only a few nearby counties decided to use his system for longer than short trial periods.¹⁴

By 1867, Selden faced competition from W.C.M. Baker, auditor of Greene County, Ohio, whose first book on the Baker bookkeeping system was published in March of that year.¹⁵ Baker had several advantages over Selden. First, Baker obtained an unconditional endorsement from the State Auditor of Ohio.¹⁶ Second, he offered a lower price than Selden.¹⁷ Third, Baker’s forms were, by most accounts, easier to use than Selden’s.¹⁸ Fourth, Baker was a good salesman. By the fall of 1871, Baker had persuaded more than 40 counties in Ohio, as well as to a number of private firms,

¹¹ Id. at 104.

¹² Id. at 104.

¹³ Record at 10-14.

¹⁴ Hamilton, Butler, and Madison Counties were long-time users of Selden’s system. Id. at 14-19, 30-31, 68-69. Franklin and Scioto Counties used it for a while, but then became customers of Baker’s. Id. at 72, 145. Fayette County used Selden’s system for five years but then adopted Miltonberger’s system. Id. at 48-52.

¹⁵ Its title was *BAKER’S REGISTER OF RECEIPTS AND DISBURSEMENTS WITH BALANCE SHEETS AND REPORTS FOR COUNTY AUDITORS AND TREASURER’S* (1867). See Record at 43.

¹⁶ Id. at 13-14.

¹⁷ Id. at 73-74.

¹⁸ See, e.g., id. at 59.

including a building and loan association and an insurance company, to become his customers.¹⁹

On July 30, 1871, after a period of ill health, Charles Selden departed this world.²⁰ His legacy to his widow Elizabeth was many thousands of dollars of debt and apparently only the copyrights in his books as assets with which to pay off the creditors and provide financial support for his widow and their young daughter.²¹

Six weeks after Selden's death, the Cincinnati Daily Gazette published an article extolling the virtues of Baker's bookkeeping system:

Under the old system, it is a great labor to compile the accounts from the multitude of books and even after it is done, in many cases there are omissions and all responsibility is put upon those that are from their high position guardians of the treasury. With [the] Baker system no such defalcations can possibly occur if the books are thoroughly examined by the responsible parties daily, for each day carries its own record faithfully and as ordinary books are wound up at the end of the year's business by Baker's system the business is completely wound up every day.²²

These were the very same virtues that Selden had claimed for his bookkeeping system. By promoting the Baker system in the city where Selden had lived and worked and mentioning the more than forty Ohio counties that were his customers, Baker may have inadvertently planted in Selden's widow, friends, and creditors the seeds of an idea for a last chance to vindicate Selden's reputation and attain the fortune that had seemed so close to fruition in the spring of 1865.

¹⁹ Id. at 12-14.

²⁰ Id. at 41-42.

²¹ Id. at 89-90. The Record does not reveal the basis, if any, on which Elizabeth Selden was entitled to reclaim the copyright her husband had assigned to the publisher in 1865. There does not appear to be any case law support at the time for her to claim that she was entitled to inherit the copyright because Selden had only assigned his rights, not those of his heirs.

²² Id. at 14.

The Lawsuit Against Baker: Elizabeth Selden was reportedly destitute in 1872,²³ so perhaps it was her husband’s creditors who provided the funds to hire a prominent intellectual property attorney to prepare a lawsuit against Baker. The lawyer was Samuel S. Fisher, a former Commissioner of Patents with more than fifty reported federal cases to his credit (mostly patent cases).²⁴ Fisher was ably assisted by William S. Scarborough, who had represented Hamilton County on a number of occasions.²⁵

In July of 1872, after apparently being unable to negotiate a settlement with Baker, Fisher filed a complaint in federal court in the Southern District of Ohio on behalf of Elizabeth Selden against W.C.M. Baker, alleging copyright infringement.²⁶ The complaint characterized Selden as “the inventor, designer, and author of Selden’s condensed system of bookkeeping,” alleging that no such system had been known prior to Selden’s development of it.²⁷ It also alleged that Selden was “the inventor, designer, and author of a book entitled ‘Selden’s condensed ledger or bookkeeping simplified,’” and several other similarly titled books, duly recorded in 1859, 1860 and 1861.²⁸

(The complaint’s reference to Selden as an inventor is not as odd as a modern reader might think. The copyright statute then in force conferred exclusive rights on “[a]ny citizen of the United States, or resident therein, who shall be the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition,

²³ Id. at 89-90.

²⁴ In Memoriam Samuel S. Fisher (1875).

²⁵ See, e.g., *State ex rel. Mills & Co. v. Comm’rs of Hamilton County*, 20 Ohio St. 425 (1870) (Scarborough successfully defended the Commissioners of Hamilton County who had been charged with misleading bidders for a printing contract that Moore Wiltach & Baldwin won). Scarborough also had experience in patent cases, including as defense counsel to Hamilton County in a patent infringement suit brought by the same Fisher who was lead counsel in *Baker*. See *Jacobs v. Hamilton County*, 13 F. Cas. 276 (S.D. Ohio 1862).

²⁶ Record at 1-4.

²⁷ Id. at 1.

²⁸ Id. at 1-3.

engraving, cut, print, or photograph” and several other categories of works, who complied with statutory formalities.²⁹ Congress amended the copyright act in 1874 to limit the application of the term “inventor” to the print-making field where it is a term of art.³⁰ On appeal to the U.S. Supreme Court, Baker’s lawyers argued that Congress had meant the term “inventor” to be limited to print-making, even before the 1874 amendments.³¹ Although the preface to Selden’s book makes clear that he sought a patent for his bookkeeping system,³² the lawsuit against Baker did not claim patent infringement. This probably means Selden was unable to persuade the Patent Office to issue one. A patent would have given Selden the exclusive right to make, use and sell his bookkeeping system for 14 years.³³)

The complaint stated that Elizabeth Selden had inherited Selden’s rights after probate of her husband’s will³⁴ and that Baker had sought to “injure and destroy [Selden’s] copyrights and deprive [him and her] of the gains, profits and advantages that might otherwise have accrued from [the system]” by pirating Selden’s work.³⁵ It requested a provisional and a permanent injunction against further publication and

²⁹ Rev. Stat., sec. 4952.

³⁰ 18 U.S. Stat. 78.

³¹ Record, Argument for Appellant, at 4-5.

³² Record at 20-21. (“The author, though always desirous of promoting the public good, does not in this instance, disclaim a hope of pecuniary reward; to this end he has taken steps to secure his right to some personal compensation, for what he thinks a valuable discovery. In addition to the copyrights of this little book, he has applied for a patent right to cover the forms of the publication, and prevent their indiscriminate use by the public.”)

³³ The patent term was fourteen years until 1861, when Congress increased it to seventeen years. See GEORGE TICKNER CURTIS, A TREATISE ON THE LAW OF PATENTS FOR USEFUL INVENTIONS at 562, 584-85.

³⁴ Record at 3-4. Mrs. Selden’s complaint said that Selden remained in full enjoyment of his rights in his copyrights during his life and at the time of his death. *Id.* at 3. Yet, Exhibit B to Elizabeth Selden Ross’ post-trial affidavit indicates that Selden assigned his copyrights to his publisher in June 1865. *Id.* at 103-04. Under today’s work for hire doctrine, it is possible that the Commissioners of Hamilton County, rather than Selden, would have been the “author” of his books and hence the owner of copyrights in them, if they were created within the scope of his employment. See 17 U.S.C. sec. 101 (definition of “work made for hire”), 201(b) (employer is author of employee work within scope of employment).

³⁵ Record at 4.

distribution of Baker's book.³⁶ Baker answered with a general denial of Selden's allegations,³⁷ although his principal defense at the trial court level was that Baker's forms were materially different from, and an improvement upon, Selden's forms, and hence, they were non-infringing.³⁸

In mid-May of 1873, William Scarborough deposed four witnesses in support of Elizabeth Selden's claims before a special examiner, Aaron B. Champion.³⁹ Also present was Baker's young attorney, Edward Colston, who cross-examined these witnesses.⁴⁰

First deposed was Sheldon Campbell, a former auditor of Butler County, who had used Selden's system while employed by that office. He identified Exhibits A and B as two of Selden's books and agreed with Selden's descriptions of the benefits of the system.⁴¹ Scarborough showed Campbell a copy of Baker's book and asked what material differences there were between Baker's and Selden's books and their systems. Campbell answered that the principle was the same in both.⁴² Substantially the same testimony, although in different words, was given by William Abernathy and Samuel Mayberry who had used Selden's system while working as bookkeepers for Hamilton County.⁴³ Much of Colston's cross-examination of these witnesses was devoted to bringing out fine details of differences between Baker's and Selden's forms (which

³⁶ Id.

³⁷ Id. at 6.

³⁸ See infra notes xx and accompanying text (discussing testimony of witnesses).

³⁹ The parties stipulated certain facts about Selden's authorship of books on his system, his compliance with statutory formalities, and Elizabeth Selden's succession to her husband's rights by inheritance. Record at 41-44.

⁴⁰ Colston, a former Confederate soldier, had been admitted to the Ohio bar in 1870. Colston was affiliated with the Jordan, Jordan & Williams law firm which was the counsel of record for Baker.

⁴¹ In fact, Campbell quoted from the preface to Selden's book in stating his praise of the system. Id. at 15.

⁴² Id. at 16.

⁴³ Id. at 30-33.

makes for dull reading). Scarborough objected when Colston asked Campbell about whether both sets of forms provided a way to comply with Ohio law.⁴⁴

The fourth witness for Selden was John Gundry, proprietor and superintendent of Gundry's Commercial College in Cincinnati. Gundry testified that he had thirty-five years of experience with all kinds of bookkeeping, and after examining Baker's book and comparing it with Selden's, he saw nothing new in Baker's book.⁴⁵ "It is an effort to obtain the same result as the Selden system by combining the same features."⁴⁶

Anticipating Colston's cross-examination, Scarborough asked Gundry about whether "as to its material features and leading principle," it made any difference where on the forms the names of the funds were listed, and Gundry responded by saying that "[i]t does not make a particle of difference except for convenience."⁴⁷ In responding to Colston's cross-examination, Gundry managed to get into the record several criticisms of Baker's book, including a characterization of it as "defective."⁴⁸ Upon re-examination, Scarborough asked whether differences in the names of certain captions were material, to which Gundry responded "[t]he change in the names amounts to nothing."⁴⁹

Faced with testimony of four pro-Selden witnesses who perceived no material differences between the Selden and Baker forms and systems, Colston proceeded to schedule depositions of eight witnesses in mid-September 1873. One was a former salesman of Baker's system, and five were current or former Ohio treasurer or auditor

⁴⁴ Id. at 19.

⁴⁵ Id. at 38-39.

⁴⁶ Id. at 38.

⁴⁷ Id. at 39.

⁴⁸ Id.

⁴⁹ Id. at 40.

officials who used Baker's or Selden's systems or both.⁵⁰ Unsurprisingly, these witnesses testified that there were substantial and material differences between the two systems.⁵¹ Some praised Baker's system as easier to learn than Selden's system, easier to use, and more likely to detect errors.⁵² Scarborough's cross-examination of these witnesses was thorough and pointed. He got one of Baker's witnesses, for example, to agree that the principle of the Baker and Selden systems was the same and that certain differences in naming and arrangements of captions were not significant.⁵³

Colston's inexperience as a lawyer is evident throughout the record.⁵⁴ Not only were his cross-examinations generally ineffective, but he failed to introduce Baker's book and forms into evidence so that the court could compare Baker's forms with Selden's.⁵⁵ He asked no questions about Selden's patent application, nor about whether any of the witnesses might have had a personal or financial interest in the outcome of the litigation. Two of his witnesses were useless to his case: one, a fourteen year old boy who was excused immediately after testifying that he knew Baker, and the other, a printer who had ruled Baker's forms but knew nothing about their substance.⁵⁶ By far Colston's biggest mistake, however, was in not deposing Baker.

⁵⁰ Two were long-time users of Baker's system; one had used Selden's system, but switched to Baker's; one had used Selden's system, but then adopted Miltonberger's system; and one had only used Selden's system.

⁵¹ Id. at 46, 49-51, 55, 65-66.

⁵² Id. at 46, 52, 56, 59-60, 67.

⁵³ Id. at 71.

⁵⁴ It is worth mentioning that Colston went on to become a distinguished and successful lawyer. See Ohio Bench and Bar at xx.

⁵⁵ Selden's lawyer showed several witnesses a book designated Exhibit 2 which appears to have been Baker's book, but it was not included in the Record. See Record at 16 (Exhibit 2 shown to Sheldon Campbell). Although Baker appended some pages from his book to one of his post-trial affidavits, id. at 119-43, the forms are so dissimilar to Selden's that they cannot have been the basis of the infringement suit. Appendix A contains facsimiles of similar Baker and Selden forms.

⁵⁶ Record at 54 (Longshore deposition); 63-65 (Williams deposition).

Colston's decision not to depose Baker provided an opportunity for Selden's lawyers to strengthen their case. Four months after the other pro-Selden deposition and just a few days before the depositions of Baker's witnesses, John E. Hatch, who had not previously appeared on behalf of Selden, deposed Eleazer Baldwin.⁵⁷ Baldwin testified that during the summer of 1865, he traveled around Ohio and Indiana on behalf of Moore, Wilstach & Baldwin to sell the Selden system and books.⁵⁸ On August 21, 1865, he visited the auditor's office of Greene County. He met Baker and gave him a detailed explanation of the Selden system, which, Baldwin said, was new to Baker ("he required a great deal of explanation in order to understand it").⁵⁹ At first, Baker recommended adopting the Selden system, and Baldwin left a copy of Selden's book with Baker while the decision was pending. On September 25, Baldwin learned that the Commissioners of Greene County had decided against this contract, saying that the price was too high.⁶⁰ (Baker's lawyer did not appear at this deposition. Post-trial affidavits in the Record suggest that he objected to Baldwin's testimony on the grounds he had not had an opportunity to cross-examine this witness.⁶¹)

Baldwin's testimony substantially aided Selden's case. Thanks to it, Selden's lawyers could argue that Baker had access to and had copied Selden's system and forms. Baker may have changed some captions and rearranged some columns in an attempt to disguise his copying, but he pirated a material part of the Selden book, thereby destroying the market for Selden's work. Since Baker didn't offer an explanation about the origins

⁵⁷ Id. at 10-14. Baldwin's testimony, although taken long after those of Selden's other witnesses, is the first deposition in the Record.

⁵⁸ Baldwin had previously worked with the Hamilton County treasurer's office and had used the Selden system while so employed, so he was well qualified to explain it to prospective customers.

⁵⁹ Id. at 11.

⁶⁰ Id. at 11. Baldwin's notebook shows that he gave up on Greene County as a sales prospect in March of 1866. Id.

⁶¹ Id. at 112.

of his system, Baldwin's testimony tipped the scales in favor of the lower court's finding of infringement.

The Trial Court Ruling and Post-Trial Proceedings: In January of 1875, District Judge Philip Swing, after hearing oral argument and assessing the deposition testimony and exhibits, issued findings of fact and conclusions of law.⁶² Baker's books, the court found,

are, in large and material part identical with and infringements of the books of Selden system..., and especially in this, to wit, that the device, method and form of the defendant's books for entering all the items of all monies received and disbursed, item by item, each item to its proper fund, are, as to the five left-hand columns employed by him, identical with and an infringement of the said Selden system; and that the device, method, and form of defendant's said book for aggregating these items with previous balances to their respective funds, and so as to show the condition and balance to the debt and credit of each of these funds, are as to the column of funds, the two columns of brought forwards, the two columns of "totals," and the two columns of "balances," so far as these respect the funds, identical with and an infringement of the books of the said Selden system.⁶³

The court ordered that Baker "forever refrain and be perpetually restrained and prohibited" from publication, sale, or otherwise disposing of his book.⁶⁴ Colston promptly filed an appeal to the U.S. Supreme Court, together with a \$1000 bond.⁶⁵

Three months later, Selden's lawyers challenged the sufficiency of the Baker bond.⁶⁶ Far and away the most interesting materials in the Supreme Court Record are the

⁶² Fisher did not represent Mrs. Selden at this hearing, for on August 14, 1874, Fisher and his ten-year-old son tragically drowned in a canoeing accident when they were carried over the Conewago Falls. IN MEMORIAN S.S. FISHER (1875).

⁶³ Record at 9.

⁶⁴ Id. No objection was taken in Baker's appeal to the perpetual injunction, rather than one limited to the remainder of Selden's copyright terms.

⁶⁵ Id. at 9-10.

⁶⁶ For this motion, Scarborough had two new co-counsel, John Kebler and Henry C. Whitman, who were experienced litigators on bond matters. The first issue was whether the bond was a supersedeas bond or a bond for costs of the appeal. Id. at 73-84. The other was whether the amount of the bond would suffice to cover the amount of damages Baker would have to pay in the event he lost his appeal. The Record does not

affidavits and exhibits submitted in support and opposition to this motion. No longer was the legal dispute between Baker and Selden merely about similarities and differences in their bookkeeping forms. Rather, the dispute widened to consider whether Selden's copyrights gave him an exclusive right to control all uses of his system and all forms that might be designed to implement it. Alternatively stated, the question became, at the Supreme Court level, whether Selden's system and the forms designed to implement it were copyrightable subject matter.

In March of 1875 Baker published a circular to Ohio county commissioners, auditors and treasurers, announcing the publication of his new and improved book.⁶⁷ He expressed confidence that he would be vindicated on appeal, but if the appeal failed, Baker was willing to replace previously purchased books with copies of his new book. He quoted several sections of the copyright statute to support his conclusion that "nothing in the laws [] would prevent any one from using a book purchased; the publisher is the party with whom the parties aggrieved have to deal, and the whole meaning of the law seems to be to prevent publishers interfering with each other's rights."⁶⁸

Four weeks later, Elizabeth Selden (now Mrs. Ross) and her husband Howard (now a co-plaintiff in the case) issued a counter-circular,⁶⁹ pointing out that Selden's copyrights had been upheld as valid and infringed and that Baker had been enjoined from further infringements. From this ruling, "[i]t clearly follows that all county auditors and treasurers who are using or have at any time used the books of said Baker, or procured

contain any ruling on the bond motion, nor any ruling as to whether Baker's 1875 book was within the scope of the injunction. However, the last paragraph of Baker's brief to the Supreme Court indicates that he had been enjoined from publishing his books for five years. Record, Argument for Appellant, at 27.

⁶⁷ Id. at 77-78. The circular became an exhibit to one of the post-trial affidavits.

⁶⁸ Id. at 78. The circular also assured the officials that the two year statute of limitations would have run as to them in any event.

⁶⁹ Id. at 79-80. Howard L. Ross had been added as a co-plaintiff on December 4, 1874. Id. at 7.

their use, are infringers of the Selden copyrights and personally liable to the undersigned.”⁷⁰ The Ross circular insisted that further use of Baker’s books “must be abandoned forthwith.”⁷¹ The Rosses were willing to offer favorable terms to those counties willing to settle “her just claims of past infringement and [pay] for the right to use the books of the Selden system.”⁷² Counties not so disposed “will be held to pay.”⁷³ Although the circular did not explicitly mention Baker’s new book, it condemned “several other books manifestly taken from the Selden system and differing from it...in their colorable and evasive makeshifts,”⁷⁴ and said that they too must not be used.

Several affidavits and exhibits submitted in support of the motion to increase the bond sought to prove two things: first, that Baker’s 1875 book was as much a plagiarism of Selden’s work as the one already enjoined, and second, that the bond should be increased because two years’ worth of damages would be at least \$25,000 to \$30,000.⁷⁵ Several affidavits cast aspersions on Baker’s character by charging him with running a “pharoh house” (that is, a gambling house)⁷⁶ and challenging his net worth (another reason to increase the bond).⁷⁷

Among the documents appended to Elizabeth Selden Ross’ affidavit was a set of endorsements of the Selden system, including one signed by six Commissioners of Hamilton County (dated November 1864) who recommended its adoption “throughout

⁷⁰ Id. at 80.

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Eleazer Baldwin, Samuel Mayberry, and John Gundry, who had been witnesses for Selden submitted post-trial affidavits making these two points. Id. at 74-75, 84-87. Also attesting to these points were affidavits from Francis Baldwin, a principal of Selden’s publisher, and Charles O. Fields, a self-described expert in bookkeeping (although no basis for his expertise was provided). Id. at 73-74, 87-89.

⁷⁶ Id. at 88-89, 112-13. “Pharoh” (aka “faro”) is a card game that was widely played in the US in the 19th century. A history of the game and its rules can be found on the web at <http://www.bevc.net/faro/history.htm> and <http://www.bevc.net/faro/rules.htm>.

⁷⁷ Record at 114-15.

this and other States of the Union,” offering assurances that “when [other officials] discover its simplicity and accuracy, the saving in money effected by it and the many and constantly operating checks it affords against fraud or defalcation, they will never again return to the old system now prevalent in county offices throughout the Union.”⁷⁸

The “old” system to which the Commissioners referred was a data-entry intensive process. For each transaction (say, a disbursement from a fund for bridge construction), clerks would first record information pertinent to it in a journal for that type of account. (If a county had twenty types of accounts, it would need twenty journals.) The same information would be entered in a ledger where all transactions were logged in sequential order, and a cross-reference prepared so that one could trace the information back to the appropriate journal.⁷⁹ With double entry bookkeeping, each transaction would be logged as both a credit and a debit in the appropriate columns of the ledger. Preparing a trial balance of all accounts under this system could require a week’s worth of work because the information was so distributed in these books and much work was required to synthesize the information and assess its correctness. Consequently it was done infrequently, making detection of errors or fraud slow and difficult.

So what was Selden’s system? Selden designed a form so that journal and ledger entries could be made in one book, instead of multiple books. Users could now record all pertinent information on one page or two adjoining pages. Depending on the user’s needs, the transactions of a day, a week, or a month could be recorded on the one- or two-page form. The condensation of the journal and ledger also made it easier to create a trial balance and discern the amount to be carried forward to the next period. This made it

⁷⁸ Id. at 100-01.

⁷⁹ See Record at 92, 106.

much easier to inspect the books and allowed for quicker detection of errors or fraud. Selden thought that \$800 a year was a reasonable price for use of his system in Hamilton County because he estimated that it would save \$2850 a year in clerk salaries.⁸⁰ (His laid-off colleagues could perhaps find new employment as salesmen for his system, as at least one of them, Eleazer Baldwin, did for a time.)

The *Baker* decision tells us that Selden was the author of six books, and one gets the impression from the opinion that these books explained his system and how to use it.⁸¹ The only extant copy of any of Selden's books available in the Library of Congress appears to be the sixth edition of the book,⁸² and is about twenty-five pages in length. If one doesn't count the words on the title page, the forms, and the intellectual property rights notice, Selden's book is only 650 words long—and most of these puff the merits of his system, rather than explaining how to use it. Comparing the book in the Library of Congress with evidence about other editions in the Supreme Court Record, one gets the impression that Selden published several different editions of the same book. One had a slightly longer introduction, one was tailored for Indiana, and some illustrated how the system might be used by different entities (e.g., a township or the U.S. Treasury). Selden's failure to explain his system may be one reason his books didn't sell better.⁸³

Baker wrote at least four books on bookkeeping, all of which were distinct texts. Three of the four are available in the Library of Congress, and each of them explains in a

⁸⁰ Id. at 92.

⁸¹ See, e.g., *Baker*, 101 US at 99 (“As an author, Selden explained the system in a particular way.”)

⁸² It is entitled SELDEN'S CONDENSED LEDGER AND CONDENSED MEMORANDUM BOOK, AND FORMS OF RECORD, CONDENSED LEDGER, REPORTS, AND CONDENSED MEMORANDUM BOOK (cited as Selden LOC). The title page for this book lists the titles of 5 other books by Selden; its text is virtually identical (except for a longer introduction in the 1859 edition) to the Selden book in the Record at 20-29. The *Baker* opinion indicates that Selden's several books were “additions to and improvements upon the said system.” *Baker*, 101 U.S. at 100.

⁸³ Readers can judge for themselves how self-explanatory it was or was not by looking at Appendix A.

lively and intelligent way the principles of bookkeeping and how to use the Baker system. The most substantial of his books is *Baker's Labor Saving System of Accounts* (1876).⁸⁴ More than 200 pages long, it explains bookkeeping at great length and illustrates various textual points with sample forms and sample entries. A 1986 bibliography of accounting books includes a reference to this book among its 122 listings of 18th and 19th century books on this subject.⁸⁵ (Selden's books are not so cited.) This book remains available in the Harvard and Columbia University Libraries as well as the Library of Congress and the Boston Public Library. The 1867 book which attracted the widow Selden's lawsuit is not in the Supreme Court Record, nor in the Library of Congress. However, the Baker brief to the Supreme Court reproduced a Baker form to enable the Supreme Court to compare it with a Selden form.⁸⁶

Baker told his story about how he developed his bookkeeping system in an affidavit submitted in opposition to the motion to increase the appeal bond.⁸⁷ It recounted his twelve years of experience as deputy auditor and then auditor of Greene County, Ohio. (He was, in other words, an expert at bookkeeping himself.) Baker explained the identity in the five left-hand columns of the Selden and Baker forms (captioned "date," "no.," "to," "for," and "by") as due to the requirements of Ohio law; they were not original to Selden, as the trial judge had concluded. Baker claimed he had been using the categories of his system since 1859, and denied copying them from Selden. He pointed out dissimilarities between his forms and Selden's, explained why the differences were significant, and challenged the originality of other parts of Selden's

⁸⁴ The other two books in the Library of Congress are: W.C.M. BAKER, BOOK-KEEPING POCKET CHART (1881); W.C.M. BAKER, BAKER'S SELF-INSTRUCTIVE BOOK-KEEPING (1874).

⁸⁵ WALTER HAUSDORFER, ACCOUNTING BIBLIOGRAPHY, HISTORICAL APPROACH (1986).

⁸⁶ Record, Arguments for Appellant at 6-7. See Appendix A.

⁸⁷ Record at 116-19.

forms. (Naturally, Selden's lawyers objected to references to this and other post-trial affidavits in the Baker appeal brief.⁸⁸) In essence, Baker was belatedly making an independent creation defense.⁸⁹

Was Baker a slavish imitator, an improver, or an independent creator? If one credits Baldwin's testimony and infers from Baker's silence that the Baldwin testimony was truthful, it is reasonable to conclude that Baker copied something significant (the condensation principle) from Selden's book and system. But several factors suggest that he was not a slavish imitator of Selden's system or forms, let alone of Selden's books. Baker had a dozen years of experience as a bookkeeper by the time he published his first book, and judging from the texts of his later books, Baker was an intellectually curious professional who enjoyed communicating what he knew to those who might benefit from his knowledge.

There are, moreover, many differences between the Baker and Selden forms. One witness for Baker pointed out several differences:

In the first place, the county orders, as issued by the auditor, are entered and numbered progressively in Baker's system. In Selden's the orders are entered unto each separate fund, as they have been issued and not consecutively. There is a difference in the arrangement of the funds. In Baker's system the funds are arranged horizontally, and in Selden's system they are arranged perpendicularly. There is a difference in the mode of entering the receipts. There is a difference in the captions. The columns known as debit and credit in Selden's system are headed 'received' and 'disbursed' in Baker's system; each separate fund is charged with receipts and each separate fund is credited with disbursements.⁹⁰

⁸⁸ Record, Argument for the Appellee at 2-3.

⁸⁹ Baker did not respond to the allegations about gambling, but denied having significant debt. He said nothing about whether he had ever met Selden or Eleazer Baldwin.

⁹⁰ Record at 49.

Baker's form enabled users to calculate a total period-to-date sum for each fund at the footing of the form, which provided useful information about the present state of each fund that could not be readily be obtained if one used Selden's form.⁹¹ With Selden's form, bookkeepers had to wait until the end of the month or until they had filled a page before they could record the orders in the ledger,⁹² so it was "hard to tell how your accounts [stood] during the month, when you have not your orders entered; by Baker's system, you can enter your orders daily and tell just how your accounts stand without so much inconvenience."⁹³ Selden's form was more classically double-entry, having debit and credit columns for each fund of the condensed ledger, but Baker's form was more synthetic and less redundant, so Baker seems to have been an improver.

Independent creation is also not out of the question. A smart bookkeeper like Baker might well have realized that the old data-intensive system was unsuitable for the more complex commerce of the late 19th century and figured out a similar way to condense the recording of transactions data to facilitate more rapid analysis of it. Such a defense becomes more plausible if one discredits Baldwin's testimony. Recall the hint of irregularity in the scheduling of Baldwin's deposition: it was noticed by a lawyer who had never appeared in the case before, on a Saturday, four months after the other Selden depositions, and only days before Colston's eight scheduled depositions, when he was probably busy preparing for them. Colston was either incompetent for not showing up at the Baldwin deposition, or he was not given adequate notice of it. In any event, it

⁹¹ Id. at 59.

⁹² Id. at 65.

⁹³ Id. at 66.

appears that Colston complained about not having had a chance to cross-examine Baldwin.⁹⁴ Cross-examination might have made a difference.

A stronger reason to question Baldwin's testimony is a key contradiction between his deposition testimony and his post-trial affidavit. The post-trial affidavit states that Baldwin first met Baker in 1860 when Baker came to Hamilton County to learn about how it kept books and that Baldwin and Selden spent a lot of time explaining the Selden system to Baker to whom it was then new.⁹⁵ However, when deposed a year and a half earlier, Baldwin said that the Selden system was new to Baker in August of 1865.⁹⁶ Both statements cannot be true. If Baldwin lied about introducing the Selden system to Baker, Baker's independent creation defense would seem more plausible.⁹⁷

Consider also that if Selden thought Baker was a slavish imitator, he could have, but didn't, sue Baker for infringement during his lifetime. It is implausible that Selden and his publisher were unaware of Baker's book in 1867 or soon thereafter, given the active efforts to sell the competing systems to the same county officials in Ohio. Franklin County, for example, decided to drop its use of Selden's system in favor of Baker's in 1867.⁹⁸ Baker reportedly showed his forms to officials in the Hamilton County auditor's office in or about 1867,⁹⁹ and it seems likely one of Selden's colleagues would have mentioned Baker's visit to Selden.¹⁰⁰ Selden may have lacked the financial resources to

⁹⁴ Id. at 112-13.

⁹⁵ Id. at 74-75.

⁹⁶ Id. at 11.

⁹⁷ Maybe the idea Baker learned from Baldwin was the idea of writing a book by which to sell his system to other counties in Ohio.

⁹⁸ Id. at 145.

⁹⁹ Id. at 34.

¹⁰⁰ Sheldon Campbell testified that in the summer of 1870 or 1871, Selden showed Baker's forms to him and asked him what he thought of them. Id. at 17. As Campbell relayed the conversation, Selden was more concerned about whether Campbell liked Baker's or his form better.

initiate a lawsuit against Baker, yet his widow managed to do so, even though she too was burdened by his debts.

The widow Selden estimated that Baker owed her at least \$25,000-\$30,000 for two years of infringement damages.¹⁰¹ (This is roughly half a million dollars in today's dollars.) She did not explain the basis on which she calculated this estimate, nor did the five other post-trial affidavits offered in support of this estimate. However, several endorsements of Selden's system by Hamilton County officials appended to her post-trial affidavit opined that \$400-\$800 a year was a good price for rights to use the Selden system because of the substantial savings in clerk salaries its use would provide.¹⁰² If Baker had 40+ customers, and he or they could be made to pay her \$300-\$400 a year, this would yield approximately what she claimed as her annual damages from infringement.

Officials in many counties using Baker's system decided to fight back against her efforts to extort money from them while the Baker appeal was pending.¹⁰³ Between June and September 1875, more than thirty of them provided affidavits in support of Baker's defense.¹⁰⁴ They typically attested that they had compared Baker's and Selden's forms and books and had concluded that the two systems were materially different; even more different and noninfringing was Baker's new book; and they would never use the Selden system, even if forced to stop using Baker's.

Because a great deal of money was riding on the success of Baker's appeal to the Supreme Court—not only for Baker, but also for Ohio—it was time to call upon more

¹⁰¹ Id. at 90.

¹⁰² Id. at 97, 100. One of Baker's witnesses who had been using the Selden system reported paying \$300 for five years of rights to use the system. This is substantially less than the price Hamilton County had originally contracted to pay (which was \$800 a year for the first two years and \$500 a year thereafter). Perhaps the competition from Baker had an effect on pricing strategies for Selden's system.

¹⁰³ Baker's 1875 circular used the word "extort" to depict the widow's demands for money from the counties.

¹⁰⁴ Record at 144-165.

experienced and eminent counsel to represent him. Baker's appellate team included Edward F. Noyes, Alphonso Taft, and Harlan P. Lloyd. Noyes was a former Governor of Ohio, a hero of the Civil War, and U.S. Ambassador to France during the late 1870's.¹⁰⁵ Taft was a senior and distinguished member of the Cincinnati bar, and a former Superior Court Judge, city council member, and gubernatorial candidate.¹⁰⁶ In 1877, Taft became a law partner of Lloyd, who was also a Civil War hero and a daring young lawyer who had appeared before Taft in 1871 in an important case that recognized the validity of slave marriages.¹⁰⁷ Lloyd handled the oral argument before the Supreme Court on behalf of Baker.¹⁰⁸ Selden's appellate team was Milton I. Southard and Charles W. Moulton, about whom comparatively little information is available.

Arguments to the Supreme Court: A synopsis of the oral arguments made on behalf of Baker and Selden to the Supreme Court precedes the Lawyer's Edition report of the *Baker v. Selden* decision.¹⁰⁹ It indicates that the high powered lawyers now representing Baker had refocused the challenge to Selden's copyright claim. The principal argument to the Court had become that Selden's work was not a proper subject matter for copyright protection because it was a contribution to the useful arts, not to

¹⁰⁵ Noyes is not listed on the Supreme Court briefs, but the Lawyer's Edition of the case mentions him as one of Baker's counsel. *Baker*, 25 L.Ed. at 841. Coincidentally, the Commissioners of Hamilton County sued Noyes in 1874 for defrauding the county of \$13,526 through an allegedly non-competitive contract. Alphonso Taft and Edward Colston represented Noyes in this lawsuit. The Ohio Supreme Court ruled in favor of Noyes in December 1878. See *Board of Commissioners of Hamilton County v. Noyes*, 35 Ohio St. 201 (1878).

¹⁰⁶ During the late 1870's, Taft was briefly Secretary of War and then Attorney General of the United States. After the *Baker* case, he became Ambassador first to Austria and then to Russia. Taft was also father of the future president William Howard Taft and a co-founder of Skull and Bones at Yale.

¹⁰⁷ *Price v. Slaughter*, 13 Ohio Dec. Rep. 641.

¹⁰⁸ The *Bench and Bar of Ohio* (1897) has a long and highly laudatory biographical sketch of Lloyd. It mentions Lloyd's role in arguing the *Baker v. Selden* case as one of his significant achievements and reveals that after Philip Swing retired as a District Court Judge, a large number of Cincinnati lawyers recommended Lloyd as Swing's successor, but Lloyd declined to be considered. *Id.* at 142-43.

¹⁰⁹ See *Baker v. Selden*, 25 L.Ed. 841, 841-42 (synopsis of lawyer arguments).

science.¹¹⁰ Selden himself had recognized this, Lloyd argued, in seeking a patent for the bookkeeping system. *Perris v. Hexamer*,¹¹¹ *The Trademark Cases*,¹¹² and *Page v. Wisden*¹¹³ were reportedly the three principal cases he relied upon.

(In *Perris* the Court had one year earlier decided that a system of symbols for representing information on maps of city blocks was unprotectable by copyright, while *Page* was an 1869 English decision ruling against copyright in blank cricket scoring sheets. *The Trademark Cases* were arguably relevant because of the Court’s discussion of Congress’ power to protect “authors” and “inventors” under the Intellectual Property Clause of the U.S. Constitution (although not trademark owners because marks needn’t be original or inventive). But Lloyd may have wanted to emphasize *The Trademark Cases*—decided only three weeks before the Court heard Baker’s appeal—because in them, the Court unanimously rejected a ruling by Judge Swing, the very same judge who ruled against Baker.)

The Lawyer’s Edition synopsis reports that Selden’s lawyer countered Baker’s subject matter challenge by pointing out that the copyright statute offered protection to books, as long as they were original contributions to useful knowledge, and citing five decisions and two treatises for giving a broad construction to the word “book” in copyright law.¹¹⁴

The Supreme Court Record contains the briefs filed on behalf of Baker and Selden. Reading them, one gets a substantially different impression of the parties’

¹¹⁰ Id. at 841. It is worth noting that many cases in the 18th and 19th centuries focused on copyrightability of certain subject matters. See, e.g., *Higgins v. Keufel*, 140 U.S. 731 (product label not copyrightable subject matter); *Hime v. Dale*, 2 Camp. 27 (1803) (sheet music held to be a “book” for copyright purposes); *Wood v. Abbott*, 30 F. Cas. 424 (C.C. S.D.N.Y. 1866) (photograph was not statutory subject matter).

¹¹¹ 99 U.S. 675 (1879).

¹¹² 100 U.S. 82 (1879).

¹¹³ 20 Law Times 435 (1869).

¹¹⁴ *Baker*, 25 L.Ed. at 842.

arguments to the Court. The Baker brief articulated seven errors (most of which pertained to substantive law rather than subject matter issues) in the lower court ruling¹¹⁵ and relied mainly on standard copyright cases, such as *Wheaton v. Peters*,¹¹⁶ *Emerson v. Davies*,¹¹⁷ *Lawrence v. Dana*,¹¹⁸ and Lord Mansfield's famous opinion in *Sayre v. Moore*,¹¹⁹ as well as on the newly published Drone copyright treatise.¹²⁰ *Perris* is given some prominence,¹²¹ but *Page v. Wisden* is not mentioned. Most of the Baker brief argued that Baker's and Selden's forms were different except in ways in which bookkeeping forms can be expected to be similar (e.g., use of "debit" and "credit" and "total" columns) and in ways required by Ohio law.¹²² Only in passing is there a hint of the possible patentability of Selden's system.¹²³

The Selden brief mainly focused on the originality of Selden's selection and arrangement of information in the forms and the substantial identity of Baker's and Selden's forms as a basis for affirming the trial court's ruling in favor of Selden.¹²⁴ Although Justice Bradley's opinion in *Baker*¹²⁵ indicates that Selden relied heavily on *Drury v. Ewing*¹²⁶ (which held that a competitor's sale of charts depicting substantially

¹¹⁵ Record, Argument for Appellant, at 2-3.

¹¹⁶ 33 U.S. 591 (1834) (copyright held to be a federal statutory right, not a common law right; failure to comply with statutory formalities would result in loss of copyright).

¹¹⁷ 8 F. Cas. 615 (C.C. D. Mass. 1845) (Davies' competing book on arithmetic infringed Emerson's copyright).

¹¹⁸ 15 F. Cas. 342 (C.C. D. Mass. 1869) (new edition of legal materials infringed copyright in earlier work).

¹¹⁹ 1 East 361 (1785) (map that consolidated information from other maps and corrected errors was noninfringing).

¹²⁰ EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS (1879). See Record, Argument for Appellant at 13-14 (citing *Wheaton v. Peters*), 18, 22-23 (quoting Drone treatise), 18-19 (quoting from *Lawrence v. Dana*), 19-20 (citing and quoting from *Sayre v. Moore*), 21-22 (citing and quoting from *Emerson v. Davies*).

¹²¹ Id. at 26-27 (long quote from *Perris v. Hexamer*).

¹²² Id. at 11-17.

¹²³ Id. at 9.

¹²⁴ Record, Argument for Appellee, at 5-9.

¹²⁵ *Baker*, 101 U.S. at 107.

¹²⁶ 7 F. Cas. 1113 (C.C. S.D. Ohio 1862).

similar patterns for making clothing was copyright infringement), the Selden brief cited *Drury* only once as the fourth of four authorities for the proposition that the term “book” should be given a liberal construction in copyright cases.¹²⁷ The Drone treatise and *Emerson v. Davies* were far more prominent sources of authority for Selden’s position.¹²⁸

After the oral argument, Baker’s lawyers filed a three page supplemental brief.¹²⁹ Five of its six points discuss the distinction between patent and copyright subject matters. It argued, for example, that Selden’s application for a patent, mentioned in the introduction to his book, should be conclusive against his copyright claim.¹³⁰ When Selden’s lawyer in oral argument described the state of the art at the time Selden invented his system and when he characterized the Selden system as “an artificial system for the art of bookkeeping,” this “[id] not refer to authorship, but solely to invention.”¹³¹ Selden’s innovation may fall in a gap between patent and copyright subject matters, but until Congress filled this gap by legislation, courts must apply the law as it was, and so deny Selden’s claim.¹³² The supplemental brief singled out *Perris v. Hexamer* and *Page v. Wisden* as key precedents in support of Baker’s claim.¹³³

From the written materials available, it is fair to infer that during the oral argument, at least one of the Justices—perhaps Joseph P. Bradley who wrote the Court’s opinion—showed interest in Selden’s patent application and perceived the case before the Court as an effort to misuse the copyrights in his books to get patent-like protection for the bookkeeping system. Faced with questions about Selden’s patent application, a good

¹²⁷ Record, Argument for Appellee at 4.

¹²⁸ Id. at 3-5.

¹²⁹ Record, Supplemental Brief for the Appellant.

¹³⁰ Id. at 2.

¹³¹ Id.

¹³² Id. at 2-3.

¹³³ Id. at 1.

lawyer for Baker would have adjusted his argument, agreeing with his Honor that if Selden applied for a patent, he must have thought of his system as an invention, while a good lawyer for Selden might well have scrapped his prepared remarks and made much of *Drury v. Ewing*, the most apt precedent involving copyright protection in an original functional design that had been infringed by a substantially similar competing product.

The Supreme Court's Decision: To comprehend the Supreme Court's decision in *Baker*, it helps to know several things:

- Selden applied for a patent for his bookkeeping system, but apparently hadn't gotten one,
- the complaint characterized Selden as the author and inventor of the Selden system as well as the author and inventor of several books,
- the trial court decision accepted the characterization of Selden as the author and inventor of a bookkeeping system as well as of certain books,
- the evidence offered in support of Selden's claim focused on similarities between the Selden and Baker systems, and none on similarities in explanatory materials in the books,
- the complaint raised the issue of the novelty of Selden's system and lawyers for Selden argued its novelty to the Supreme Court, and
- perhaps most importantly, that the widow Selden had announced her intent to sue all of Baker's customers for their infringing uses of the system if the Supreme Court affirmed the lower court ruling in her favor.

The claim of an exclusive right to control uses of the Selden system was seemingly plausible because the copyright statute at the time granted some rights to “inventors,”¹³⁴ the *Drury v. Ewing* opinion supported Selden’s claim that author/inventors could get exclusive rights to control uses of novel systems through copyright law,¹³⁵ and the Drone treatise endorsed the ruling in *Drury*.¹³⁶

Given this confluence of factors, the Court may have felt the need to articulate at some length the distinction between copyrights and patents and the respective roles of these laws in the protection of the fruits of intellectual labor. The Court could not readily explain why an author could not get copyright protection for a bookkeeping system by applying the then conventional framework for analyzing copyright claims. Such an inquiry typically proceeded by asking: Was the plaintiff’s work a “book” or otherwise statutory subject matter qualifying for copyright protection? Was the work original? Had the defendant copied a substantial or material part of the plaintiff’s work?¹³⁷ If the two works were not identical, had the defendant tried to disguise his piracy by making immaterial variations, or was the second work materially different and/or an improvement?¹³⁸ Was he, in modern parlance, a free-rider or a fair follower?

¹³⁴ See supra note xx.

¹³⁵ The court construed *Drury*’s copyright as giving her exclusive rights to use, as well as to publish, her chart. *Id.* at 1113. It characterized *Drury* as an “authoress and inventress” of the chart depicting her method for taking measurements and cutting garments for women, *id.* at 1114, found infringement in *Ewing*’s use of the same principle as *Drury*’s work, *id.* at 1117, saying *Ewing* had adopted “the essential parts of Mrs. *Drury*’s system,” *id.*, and rejected *Ewing*’s improvement defense because of testimony from dressmakers that use of *Ewing*’s chart produced the same result as *Drury*’s. *Id.* Because *Drury* had been decided in the Southern District of Ohio, Judge *Swing* may have felt obliged to follow it.

¹³⁶ *Drone* at 406.

¹³⁷ See *Drone*, supra note xx. Chapter 2 discusses what may be copyrighted, Chapter 3 the originality requirement, and Chapter 8 piracy standards. For *Drone*, the taking of a material part of a work was piracy. *Id.* at 385, 407-08, 413-14.

¹³⁸ *Id.* at 407-08. *Drone* criticized improvement as a defense. *Id.* at 406. But the famous *Sayre v. Moore* decision recognized improvement defenses. See *Sayre v. Moore*, 1 East 361 (1785).

Selden had certainly published several books, and books were a canonical subject matter for copyright protection. The books were original to him. There was evidence in the record that Baker had copied a substantial part of Selden's work, and the trial judge had resolved the conflicting evidence about whether Baker was a slavish imitator or the author of a different and improved work by ruling in Selden's favor. Selden's lawyers could plausibly argue that similarities between Selden's and Baker's works were not due to their being about the same subject (i.e., bookkeeping), nor due to drawing ideas and information from the same common sources, which the Drone treatise and cases such as *Emerson v. Davies* had recognized as reasons why works might be very similar to one another without infringing.¹³⁹

The *Baker* opinion introduced a new kind of inquiry to the framework for analyzing copyright claims. In essence, it directed courts to consider whether the defendant had copied the author's description, explanation, illustration, or depiction of a useful art (such as a bookkeeping system) and other ideas, or only the useful art or ideas themselves.¹⁴⁰ In the absence of a patent, the useful art and ideas in a work were free to be used and copied at will, even in directly competing works. Any necessary incidents to implementing the art (e.g., blank forms illustrating how to use the system) could likewise be used and copied by second comers without fear of copyright liability.

Modern readers come to the *Baker* decision expecting to find in it a classic statement of the idea/expression distinction and/or of the idea/expression merger doctrine. (The former holds that copyright protection is available for the expression of an

¹³⁹ Drone at 416-17; *Emerson v. Davies*, 3 Story 768, 778 (1845).

¹⁴⁰ The Supreme Court did not use the word "expression" in the *Baker* opinion.

idea, but not for the idea itself.¹⁴¹ Everyone is free to write about others' ideas, as long as each expresses the ideas in his/her own way. The latter holds that if there is only one or a very small number of ways to express an idea, courts should find the idea and its expression to be “merged,” and refuse to protect such expression in order not to grant a monopoly on an idea.¹⁴²) But this is a narrow interpretation of the *Baker* decision influenced by a later treatise,¹⁴³ and not the full message the Court intended to convey.

To come to the *Baker* decision afresh, it is helpful to deconstruct the opinion. The first five (of twenty) paragraphs in the opinion provide background about the case and set up the questions presented by the appeal. Next are seven paragraphs which constitute the core of the analysis, five of which explicitly mention patents.¹⁴⁴ This is followed by six paragraphs on precedents and two paragraphs of conclusion.

The Court perceived the question presented as “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.”¹⁴⁵ Selden claimed that “the ruled lines and headings, given to illustrate the system, are part of the book and, as such, are secured by the copyright; and that no one can make or use similar ruled lines and headings... without violating the copyright.”¹⁴⁶ The Court did not doubt that a work on the subject of bookkeeping could be copyrighted, nor that such a work might be “a very valuable

¹⁴¹ This concept is discussed at further length *infra* at notes xx and accompanying text. The word “expression” has become a term of art, signifying not just the words of a text or the lines of a drawing, but more abstract manifestations of the author’s work, such as detailed sequences of events within dramatic plays.

¹⁴² This concept is discussed *infra* notes xx and accompanying text.

¹⁴³ See *infra* notes xx and accompanying text.

¹⁴⁴ Paragraphs 6, 7, 8, 11, and 12 of the *Baker* opinion mention the patent/copyright distinction.

¹⁴⁵ *Baker*, 101 U.S. at 101.

¹⁴⁶ *Id.*

acquisition to the practical knowledge of the community.”¹⁴⁷ But the Court perceived “a clear distinction between the book, as such, and the art which it is intended to illustrate.”¹⁴⁸ Someone might copyright a treatise “on the composition and use of medicines, be they old or new; on the construction and use of ploughs or watches or churns; or on the mode of drawing lines to produce the effect of perspective...but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein.”¹⁴⁹ The reason was simple: “To give the author of a book an exclusive property in the art described therein would be a surprise and fraud upon the public. That is the province of letters patent, not of copyright.”¹⁵⁰ An exclusive right to an invention can only be obtained by subjecting one’s claims to Patent Office examination.¹⁵¹

To hammer home this lesson, the Court devoted one paragraph each to three examples: one on medicines, one on drawing perspective, and one on mathematical sciences. A book on medicines does not give the author an exclusive right to make and sell medicines described therein; to get such an exclusive right, one needs a patent. No matter how many drawings a book on perspective might contain to illustrate this concept, the copyright in the book would not give the author an exclusive right to control the use of perspective.¹⁵² Nor would a copyright in a work on mathematical sciences give an author an exclusive right “to the methods of operation which he propounds, or to the

¹⁴⁷ Id. at 102.

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ Id.

¹⁵² Id. The Court indicated that it didn’t matter if the author described the useful art or used drawings or diagrams to illustrate the art; the underlying principle was the same. Id.

diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires.”¹⁵³

Yet, the Court also made clear that these observations did not apply to “ornamental designs or pictorial illustrations addressed to the taste.”¹⁵⁴ Of such works, “it may be said that their form is their essence and their object the production of pleasure in their contemplation.”¹⁵⁵ Scientific and technical works were different because “their final end [is] in application and use.”¹⁵⁶ The explanatory texts of such works could be protected by copyright, but not the scientific and technical content such works embody.

Returning to Selden’s claim, the Court stated that while “no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein.”¹⁵⁷ (In other words, Baker’s customers were off the hook.) It went on to say that “[t]he copyright of a book on bookkeeping cannot secure the exclusive right to make, sell and use account books prepared upon the plan set forth in such a book.”¹⁵⁸ (In other words, Baker was off the hook.) Because Selden’s system was not patented, it was “open and free to the use of the public,”¹⁵⁹ as were the ruled lines and headings that were constituent elements of implementation of the system.

Perhaps the most interesting paragraph in the *Baker* opinion is the one that attributes the plausibility of Selden’s claim as due to the “peculiar nature of the art described in [his] books” because “the illustrations and diagrams happen to correspond

¹⁵³ Id. at 103.

¹⁵⁴ Id.

¹⁵⁵ Id. at 103-04.

¹⁵⁶ Id. at 104.

¹⁵⁷ Id.

¹⁵⁸ Id.

¹⁵⁹ Id.

more closely than usual with the actual work performed by the operator who uses the art.”¹⁶⁰ One who kept books by Selden’s system would necessarily rule his account books with the same or very similar headings as the forms in Selden’s book. Usually, the Court observed, useful arts “can only be represented in concrete forms of wood, metal, stone, or some other physical embodiment.”¹⁶¹ But the principle was the same regardless of whether the useful art was embodied in writing or in metal. The object of the copyrighted work was explanation; the object of the useful art was use. Exclusive rights in the latter were only available from a patent.¹⁶²

Most intellectual property casebooks edit out one or more, and sometimes all but a few, of the references in *Baker* to the patent/copyright distinction.¹⁶³ Such omissions obscure how important this distinction was to the Court’s—or at least Bradley’s—analysis of the case. Bradley’s patent decisions¹⁶⁴ had often emphasized the harm to the public interest in free competition if courts allowed patent applicants or patentees to game the patent system, for example, by seeking to broaden patent claims through reissue proceedings.¹⁶⁵ Bradley may have realized that upholding Selden’s claim would significantly undermine incentives to use the patent system, for who would bother to go

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 105.

¹⁶² *Id.*

¹⁶³ The Joyce et al. copyright casebook edits *Baker* most heavily (reproducing only 50%), while the Lange et al. casebook edits it the least (reproducing 87%), with other casebook edits in between. More than half of the casebooks edit out the following statement: “By publishing the book, without getting a patent for the art, the latter is given to the public.” *Baker*, 101 U.S. at 103. This is, however, one of the key points of the decision.

¹⁶⁴ By the time *Baker v. Selden* came before the Court, Bradley had a decade of experience as a Justice. Perhaps in part because he had litigated some patent cases as a trial lawyer See, e.g., *Goodyear v. Dunbar*, 10 F. Cas. 684 (C.C.N.J.1860), Bradley wrote a substantial number of patent opinions for the Court (55, plus 10 dissents). Bradley was not alone in writing many patent decisions. During his tenure on the Court, it did not have discretion about whether to hear patent or copyright appeals. U.S. Statutes at Large Vol. 18, Part 1, Title XIII § 699 (1873). This mandatory jurisdiction contributed to a substantial backlog, which explains why there were five years between Colston’s notice of appeal and the Court’s ruling in *Baker*.

¹⁶⁵ See, e.g., *Carlton v. Bokee*, 84 U.S. 463, 471-72 (1872); *Smith v. Goodyear Dental Vulcanite*, 93 U.S. 486, 502 (1877)(Bradley dissent).

to the Patent Office and subject a claimed invention to examiner scrutiny if he could simply write a book or article about it and thereby get exclusive rights to its use? In patent law, quite the reverse was true: publishing a description of an invention without seeking a patent dedicated it to the public domain.¹⁶⁶ The parts of *Baker* that distinguish copyright and patent protection and caution against the use of copyright law to get patent-like protection for innovations embodied in copyrighted works resonate with Bradley's concerns about gaming the patent system.

Perhaps because Bradley was unfamiliar with the copyright canon, the *Baker* opinion does not mention any of the standard copyright cases relied upon in the briefs—not even the previous year's *Perris v. Hexamer* decision which rejected a claim of copyright in a symbol system—nor any copyright treatises.¹⁶⁷ Near the end of the opinion, as though tacked on as an afterthought, is a set of six paragraphs on prior caselaw. Bradley drew *Clayton v. Stone*¹⁶⁸ from Selden's brief, but cited it for a very different proposition, namely, that current stock prices and newspapers were of too fleeting value to be protectable by copyright law. Neither *Baker* nor *Selden* had cited *Cobbett v. Woodward*,¹⁶⁹ but Bradley quoted at length from this decision which allowed competitors to copy drawings of furniture from another firm's catalog as long as they were selling the same items. *Cobbett* suggested that advertisements could not be copyrighted.¹⁷⁰ Bradley apparently agreed with *Page v. Wisden* that cricket scoring sheets were uncopyrightable, for he quoted that decision for this pithy proposition: “To

¹⁶⁶ *Baker*, 101 U.S. at 104.

¹⁶⁷ Justice Bradley, as a patent expert, may not have been as familiar as other Justices with the standard copyright literature, or he may simply have not found it very helpful in analyzing the *Baker* case.

¹⁶⁸ 2 Paine 392, discussed in *Baker*, 101 U.S. at 105-06

¹⁶⁹ L.R. 14 Eq. 407, discussed in *Baker*, 101 U.S. at 106.

¹⁷⁰ *Id.* The Supreme Court later repudiated this analysis in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (upholding copyright in circus poster advertisement). See Chapter xx for a discussion of this case.

say that a particular mode of ruling a book constituted an object for a copyright is absurd.”¹⁷¹ These cases, wrote Bradley, “if not precisely in point, come near the matter in hand, and in our view, corroborate the general proposition which we have laid down.”¹⁷²

Although Bradley did not articulate a common principle in the cases he cited, it was the right of competitors to copy that which copyright did not and should not protect. *Clayton* involved the right of newspapers to publish stock prices from other newspapers, *Cobbett* the right of furniture vendors to advertise their wares with the same or similar drawings, and *Page* the right of printers to sell cricket scoring sheets to the public. This principle was also why Bradley questioned the ruling in *Drury v. Ewing*: “Surely the exclusive right to this practical use [of patterns to make clothing] was not reserved to the publisher by his copyright of the chart.”¹⁷³

(Perhaps because casebook authors have not discerned any principle in Bradley’s choice of these cases, virtually all of intellectual property casebooks edit out *Baker*’s discussion of the precedents. They tend to cut straight from the explanation/useful art discussion to the Court’s conclusion that “blank account-books are not the subject of copyright.”¹⁷⁴ The transition to this conclusion is less abrupt if one realizes that it follows the ruling in *Page* and the Court’s doubts about *Drury*.)

The modern tone and clarity of the *Baker* opinion may be among the factors that explains its presence in so many intellectual property casebooks. (Compare the *Baker*

¹⁷¹ 20 L. T. 435, discussed in *Baker* at 106-07.

¹⁷² *Baker*, 101 U.S. at 107.

¹⁷³ *Id.* Although *Drury* was cited in a few subsequent cases, no American court followed its ruling after *Baker*. One English judge who followed *Drury* was overruled in decisions that relied on *Baker*. See *infra* note xx.

¹⁷⁴ *Baker*, 101 U.S. at 107.

opinion, for example, to *Wheaton v. Peters*, *Emerson v. Davies*, *Lawrence v. Dana*, and the *Trademark Cases*, all of which read like thick porridge.) Bradley stated the facts and legal issues concisely, developed the analysis in a logical manner, and provided useful examples to illustrate his points. Several of the most potent and widely quoted statements of limiting principles of copyright law can be found in the *Baker* decision.

The Legacy of Baker: *Baker v. Selden* is one of the few 19th century copyright decisions to have had lasting significance. *Baker* has been cited in more than 270 subsequent cases and more than 1000 secondary sources (including more than 500 law review articles).¹⁷⁵ Virtually every intellectual property and copyright casebook contains an edited version of the case. Its principal holding is now codified in Section 102(b) of the Copyright Act.¹⁷⁶ The legacy of *Baker* is worthy of study in part because of its longevity and influence, but also because the propositions for which it has been cited have shifted over time.

In the first twenty years after the decision, *Baker* was mainly cited for what it had to say about whether certain kinds of works (e.g., advertisements, newspapers, and news of the day) could be copyrighted. During the next thirty years, *Baker* was mainly cited for its limiting principles, including in some unfair competition cases. During the 1930's, 1940's, and early 1950's, most of the cases citing *Baker* did so to justify their denial of copyright protection to methods, systems, or other functional designs depicted in copyrighted works. A fourth post-*Baker* period commenced with the Supreme Court's

¹⁷⁵ As of August 13, 2004, a LexisNexis shepard search for citations to *Baker v. Selden* yielded 272 cases, 549 law reviews, 1 secondary source, 1 statute, 47 treatises, and 6 American Law Reports/Lawyers' Edition Annotations, while a Westlaw search produced 1,432 documents, consisting of 258 case cites, 1 administrative decision, 3 registers, 1047 secondary sources, 24 appellate filings, 82 appellate briefs, 5 trial motions and memoranda, 3 Australian cases, 3 Canadian cases, and 6 Canadian secondary sources.

¹⁷⁶ "In 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." 17 U.S.C. sec. 102(b).

decision in *Mazer v. Stein*. During the thirty years between 1954 and 1983, owing in part to what the Court said about *Baker* in *Mazer*, and even more to Professor Melville Nimmer's interpretation of the two decisions, the meaning of *Baker* was seemingly narrowed, so that it mainly was cited as an idea/expression case. New to this period was an interpretation of *Baker* as a case about the inseparability of certain ideas and their expressions. From 1984 to 2004, *Baker* continued to be much cited for the idea/expression distinction, and increasingly for the idea/expression merger doctrine.¹⁷⁷ The most important development of this period was, however, a revival of *Baker* as the source of limiting principles in copyright cases involving functional works such as computer programs. Each of these five periods is briefly discussed below.

Subject Matter Challenges (1880-1900): In the first twenty years, ten decisions cited *Baker*. Three litigants relied upon *Baker* because of its endorsement of the *Clayton* and *Cobbett* decisions which had rejected claims of copyrights in newspapers, news of the day, and advertisements. One of these was *Courier Lithographing Co. v. Donaldson Lithographing Co.* in which the challenge to a claim of copyright in advertisements was successful at the trial court level, although the Supreme Court soon reversed it in *Bleistein*.¹⁷⁸ The other two defendants successfully fended off infringement claims, but the courts distanced themselves from *Clayton* and *Cobbett* as to copyrightable subject matter.¹⁷⁹

¹⁷⁷ Although a few cases in the late 1950's to mid-1960's considered the seeming inseparability of certain ideas and their expression, see infra notes xx and accompanying text, *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983) is the first decision to characterize this concept as a "merger" of idea and expression. See infra note xx and accompanying text.

¹⁷⁸ 104 F. 993, 995-96 (6th Cir. 1900), rev'd sub nom., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Two Justices dissented for reasons given by the Sixth Circuit which had relied on *Baker*.

¹⁷⁹ *J.L. Mott Iron Works v. Clow*, 82 F. 316 (7th Cir. 1897)(no infringement of plumbing fixture catalog); *Tribune v. Associated Press*, 116 F. 216 (C.C. D. Ill. 1900)(AP did not infringe Chicago Tribune copyrights in republishing news items the Tribune had licensed from the London Times).

Baker was also invoked on subject matter grounds in two cases involving claims of infringement of patents on information innovations. The Mayor of New York, a defendant in one of these cases, relied on *Baker* in arguing that the patentee should have copyrighted his bond and coupon register rather than patenting it.¹⁸⁰ This argument did not succeed at the trial court level and was not mentioned in the Supreme Court decision (which raised, but did not address, the question as to whether the register was patentable subject matter).¹⁸¹

Baker defenses were successful in two cases in which claims of infringement were based on copying of systems embodied in copyrighted works. In *Griggs v. Perrin*, for example, the defendant had copied the plaintiff's shorthand system, but explained it in his own words.¹⁸² *Baker* was also influential in an English case very similar to *Drury v. Ewing*, in which the plaintiff sued a competitor for selling similar cardboard patterns for making dress sleeves. The lower court followed *Drury v. Ewing* and enjoined the defendant's manufacture of a similar pattern, but the appellate court reversed, citing *Baker* not only for the doubt it cast on the ruling in *Drury*, but also for the unprotectability of mechanical contrivances, such as the plaintiff's pattern, and the method of measuring that it enabled.¹⁸³

The first case to cite *Baker* for the proposition that “[a] copyright gives no exclusive property in the ideas of an author” was *Simms v. Stanton* in which the court

¹⁸⁰ *Munson v. Mayor of New York*, 3 F. Cas. 338 (C.C.S.D.N.Y. 1880), rev'd, 124 U.S. 601 (1888). The Court struck down the Munson patent on obviousness grounds. See also *U.S. Credit Sys. Co. v. American Credit Indemnity Co.*, 53 F. 818 (C.C.S.D.N.Y. 1893) (striking down patent for method of insuring against bad debts).

¹⁸¹ *Munson*, 3 F. Cas. at 338; 124 U.S. at 604.

¹⁸² 49 F. 15 (C.C.N.D.N.Y. 1892). See also *Amberg File & Index Co. v. Shea Smith & Co.*, 82 F. 314 (7th Cir. 1897).

¹⁸³ *Hollinrake v. Truswell*, 3 Chan. D. 420, 426-29 (1894).

decided that Stanton had not unfairly appropriated protectable material from Simms' book on human physiognomy in her own books on this same subject.¹⁸⁴

Limits on Unfair Competition and Scope of Protection (1901-1930): During the early 20th century, *Baker* was cited an additional fifteen times. Four were unfair competition cases in which *Baker* was cited for its limiting principles. Justice Brandeis' dissent in *International News Service v. Associated Press* was one of them.¹⁸⁵ In another, *Buob v. Brown Carriage*, an Ohio judge ruled against the plaintiff's *INS*-inspired unfair competition claim by pointing out that Buob did not have a patent on his method of measuring auto top covers, and *Baker* precluded a claim of infringement in copyrighted written materials depicting this method.¹⁸⁶

Three claims for copyright infringement involved similar sales materials. One court enforced a copyright in advertisement drawings of dresses, but made clear that this copyright did not extend to the dress design depicted therein, citing *Baker*.¹⁸⁷ A second involved copying of ads from a statutory catalog, in which *Baker* was distinguished as a

¹⁸⁴ 75 F. 6, 10 (C.C.N.D. Cal. 1896). *Emerson v. Davies*, *Sayre v. Moore*, and the Drone treatise were the principal authorities the court relied upon in *Simms*. Id. at 9-10. The ninth American case to have cited *Baker* during this period involved an unauthorized sale of books intended to be distributed by licensed subscription. The trial judge in *Henry Bill Pub. Co. v. Smythe*, 27 F. 914 (C.C.S.D. Ohio 1886) "discarded [the] decisions [relied on by the defendant, including *Baker*] for fear of being misled by them." *Burnell v. Chown*, 69 F. 993 (N.D. Ohio 1895) is an example of a case in which *Baker* was not cited, but arguably should have been. It ruled against a claim of copyright infringement based on copying of a method of checking credit worthiness.

¹⁸⁵ 248 U.S. 215, 255 n. 7 (1918)(citing *Baker* for the proposition that "[a]n author's theories, suggestions, and speculations, or the systems, plans, methods, and arrangements of an originator, derive no such protection from the statutory copyright of the book in which they are set forth.") See Chapter [on *INS*].

¹⁸⁶ 11 Ohio App. 266, 268-70 (1st Dist. 1919). See also *Crump Co. v. Lindsay, Inc.*, 130 Va. 144, 107 S.E. 679 (1921)(ruling against unfair competition claim as to automobile accessory catalogs); *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 216 F. 401 (W.D. Mich. 1908)(ruling against unfair competition claim based on similarities in product catalogs)..

¹⁸⁷ *Nat'l Cloak & Suit Co. v. Kaufman*, 189 F. 215 (C.C.M.D.Pa. 1911)(infringement to copy drawings of dresses, although not the dresses). When National Cloak later tried to enforce its copyrights in drawings against the maker of competing dresses, it lost. *National Cloak & Suit Co. v. Standard Mail Order*, 191 F. 528 ("a manufacturer of unpatented articles cannot practically monopolize their sale by copyrighting a catalog containing illustrations of them"). This rule is now codified in 17 U.S.C. sec. 113(b).

bookkeeping system case.¹⁸⁸ A third involved copying of sales techniques in a manual of instruction for selling pianos.¹⁸⁹

Two system/description cases involved an entrepreneur named Burk who claimed copyright in burial association system described in a booklet written by him. In the first, Johnson, who had purchased the right to sell Burk's plan in certain territories, sued Burk for fraud, hoping thereby to get back a deed put in escrow as consideration for obtaining these rights. Johnson alleged that Burk must have known he did not have the exclusive right he claimed in this system. The court cited *Baker* as a reason why poor Johnson should not have believed Burk and dismissed the case.¹⁹⁰ The second rejected Burk's claim of copyright infringement against a rival firm in Hawaii that wrote its own materials on the same plan.¹⁹¹

A third case that would seem to fit the system/description mold, but was not so characterized, was *Guthrie v. Curlett*.¹⁹² *Guthrie* is interesting in part because it is factually quite similar to *Baker*, yet the Second Circuit gave that precedent little attention. Guthrie's innovation lay in consolidating freight tariff information into a more concise form, with the aid of ruled columns and symbols. Curlett published a competing work featuring the same consolidation. Guthrie had not only sought, but also obtained, a patent on his method of compressing freight tariff information, and his first lawsuit against Curlett had been for patent infringement. The Second Circuit's decision in the copyright case makes no mention of the patent, nor of the same court's decision three years earlier

¹⁸⁸ *Da Prato Statuary Co. v. Giuliani Statuary Co.*, 189 F. 90, 93 (D. Minn. 1911). See also *King Features Syndicate v. Fleisher*, 299 F. 533, 537 (2d Cir. 1924) (cartoonist had the exclusive right to make 3-dimensional toys depicting his 2-dimensional Barney Google character, citing *Baker*, because the toys were "addressed to the taste.")

¹⁸⁹ *Stone & McCarrick, Inc. v. Dugan Piano Co.*, 210 F. 399 (E.D. La. 1914).

¹⁹⁰ *Burk v. Johnson*, 146 F. 209 (8th Cir. 1906).

¹⁹¹ *Burk v. Relief & Burial Ass'n*, 2 Haw. 388 (D. Haw. 1909).

¹⁹² 36 F.2d 694 (2d Cir. 1929).

that struck down Guthrie's patent on subject matter grounds.¹⁹³ *Guthrie* cited *Baker* only once for the proposition that an author "must be protected in his choice of expression, and his copyright held to that."¹⁹⁴ The Second Circuit also made little use of *Baker* in ruling on an infringement claim as to lectures concerning a method of teaching students how to improve memory, citing it for the proposition that copyright does not protect the subject of a work, but its treatment.¹⁹⁵

Coolest to *Baker*, though, was Learned Hand, then a district court judge, in *Reiss v. National Quotations*, which upheld the validity of copyright in a code book of made-up words.¹⁹⁶ *National Quotations* may have argued that under *Baker*, the contents of the book embodied an unprotectable coding system and/or that the book's object was use, not explanation. Hand characterized *Baker* as "too foreign to the case at bar to deserve comment."¹⁹⁷ This was the only time in his long and influential career that Hand ever cited *Baker*. More than any other judge, Hand was responsible for refocusing copyright infringement analysis in the next post-*Baker* period on the idea/expression distinction, and the patterns of abstraction that might be laid upon any work.¹⁹⁸ Under the patterns test, higher level abstractions became unprotectable ideas, but lower level abstractions tended to be considered "expression."¹⁹⁹ Although Hand developed and applied the patterns test in cases involving literary and dramatic works, courts subsequently applied

¹⁹³ *Guthrie v. Curlett*, 10 F.2d 725 (2d Cir. 1926). The patentable subject matter analysis in *Guthrie* is incoherent.

¹⁹⁴ *Id.* at 696. Two decisions cited *Baker* for the unprotectability of systems, ideas and theories in the course of ruling against infringement claims as to dramatic plays. *Barnes v. Miner*, 122 F. 480 (S.D.N.Y. 1903); *Eichel v. Marcin*, 241 F. 404 (S.D.N.Y. 1913).

¹⁹⁵ *Nutt v. National Institute for the Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929).

¹⁹⁶ 276 F. 717 (S.D.N.Y. 1921).

¹⁹⁷ *Id.* at 719.

¹⁹⁸ Among Hand's most influential decisions were: *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936); *Nichols v. Universal Pictures*, 45 F.2d 119 (2d Cir. 1930). *Nichols* articulates the "patterns" test. *Id.* at 121.

¹⁹⁹ See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936)(detailed sequences of events within scenes of a movie held to be protectable expression).

the patterns test in cases involving functional writings, which resulted in different outcomes than a *Baker*-inspired system/description test would have produced.²⁰⁰

Heyday of The System/Description Distinction (1931-1953): More than a third of the thirty-seven cases that cited *Baker* in the 1930's through early 1950's were system/description cases. Perhaps it was the Depression and World War II, when so little capital was available to start new ventures that caused so many to use brainpower to figure out new ways of making money. One developed a shorthand system,²⁰¹ another a system for teaching cornet playing,²⁰² a third devised a bridge game problem and solution,²⁰³ a fourth invented a system for giving away prizes in theatres,²⁰⁴ a fifth devised new roller skating races,²⁰⁵ a sixth made up a system for aiding tax preparations,²⁰⁶ while a seventh developed a system for reorganizing insolvent life insurance companies.²⁰⁷ These creators (and some others²⁰⁸) sought to use copyright law to protect their creations against competitive copying. Courts relied principally on *Baker* in ruling against these infringement claims.

Baker defenses were also successful in five cases claiming infringement based on copying of the useful art depicted in copyrighted drawings (e.g., a parachute design and a bridge road approach).²⁰⁹ Seven other cases relied upon *Baker* in rejecting copyright claims as to forms, including two involving competitive copying of temperature

²⁰⁰ See, e.g., *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F.Supp. 37 (D. Mass. 1990).

²⁰¹ *Brief English Systems v. Owen*, 48 F.2d 555 (2d Cir. 1931).

²⁰² *Jackson v. C. G. Conn Ltd.*, 9 U.S.P.Q. (BNA) 225 (W.D. Okla. 1931).

²⁰³ *Russell v. Northeastern Pub. Co.*, 7 F. Supp. 571 (D. Mass. 1934).

²⁰⁴ *Affiliated Ent., Inc. v. Gantz*, 86 F.2d 597 (10th Cir. 1936).

²⁰⁵ *Selzer v. Sunbrock*, 22 F. Supp. 621 (S.D. Cal. 1938).

²⁰⁶ *Aldrich v. Remington Rand, Inc.*, 52 F. Supp. 732 (D. Tex. 1942).

²⁰⁷ *Crume v. Pacific Mutual Life Ins. Co.*, 140 F.2d 182 (7th Cir. 1944).

²⁰⁸ See, e.g., *Dunham v. General Mills*, 116 F.Supp. 152 (D. Mass. 1953)

²⁰⁹ See *Muller v. Triborough Bridge Authority*, 43 F. Supp. 298 (S.D.N.Y. 1952) (bridge approach); *Fulmer v. U.S.*, 103 F.Supp. 1021 (Ct. Cl. 1952)(parachute design).

recording charts.²¹⁰ The two latter cases expressed concern that copyright not be construed to provide patent-like protection.²¹¹

A few cases cited *Baker* for the idea/expression distinction. New to this period was the use of *Baker* to distinguish between novelty required for patent protection and the lower originality standard of copyright.²¹²

Four defendants invoked *Baker* to challenge copyrights in lampbase statuettes.²¹³ Stein created certain statuettes and registered them as works of art, but then poked holes in the top and bottom of the statuettes, ran wires through the middle, and mass-produced them as lamp bases. His competitors argued that Stein had committed fraud on the Copyright Office when he registered the statuettes as works of art when he fully intended to mass-produce them for utilitarian purposes. They drew upon dicta from *Baker*, wherein the Court stated that copyright was available for works whose object was explanation, but not for those whose object was use.²¹⁴ The lamps, they claimed, were utilitarian articles, not works of art. Some lower court decisions pointed to the availability of design patent protection for lamp bases, with a nod to *Baker*, as another reason to deny copyright protection.²¹⁵

Narrowing *Baker* To The Idea/Expression Distinction And Nascent Merger Doctrine (1954-1983): The Supreme Court's 1954 decision in *Mazer v. Stein* marks the

²¹⁰ Taylor Instrument Co. v. Fawley Brost Co., 139 F.2d 98 (7th Cir. 1943); Brown Instrument Co. v. Warner, 161 F.2d 910 (D.C. Cir. 1947).

²¹¹ See, e.g., *Taylor*, 139 F.2d at 99.

²¹² Alfred Bell & Co. v. Catalada Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951).

²¹³ Stein v. Expert Lamp Co., 188 F.2d 611 (7th Cir. 1951); Stein v. Benaderet, 109 F.Supp. 364, 366 (E.D. Mich. 1952); Stein v. Mazer, 204 F.2d 472 (4th Cir. 1953); Rosenthal v. Stein, 205 F.2d 633 (9th Cir. 1953). The Fourth and Ninth Circuits upheld Stein's copyrights; the Seventh Circuit and the Michigan case ruled they were invalid.

²¹⁴ *Expert Lamp*, 188 F.2d at 613.

²¹⁵ *Id.*; *Benaderet*, 109 F.Supp. at 366.

start of a new phase in *Baker*'s history.²¹⁶ *Mazer* cited *Baker* only once as an idea/expression case, characterizing it as a case in which “the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings.”²¹⁷ Although the Court in *Mazer* did not expressly reject the explanation/use distinction drawn from *Baker*, it did not find compelling the argument *Mazer* derived from it.²¹⁸ In a classic overbroad dictum, the Court in *Mazer* stated that “[n]either the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted.”²¹⁹ (Copyright and design patent protection may both be available to protect some ornamental designs for articles of manufacture, such as Stein’s statuette-lampbase. It is a different question whether copyright and utility patent protection are available for the same creation, which was the issue discussed in *Baker*.) *Mazer*’s conclusion that the statuette was not the less a work of art for having been mass-produced resonated with the reasoning in *Bleistein* (in which the Court had also rejected a *Baker*-based subject matter challenge to the plaintiff’s copyright).²²⁰

Treatise author Melville Nimmer never liked the *Baker* decision, and saw in *Mazer* a repudiation of everything about *Baker* except the idea/expression distinction.²²¹ “It is noteworthy,” said Nimmer, “that in *Mazer v. Stein*, the Supreme Court interpreted

²¹⁶ 347 U.S. 201 (1954).

²¹⁷ *Id.* at 217.

²¹⁸ *Id.* at 218. Since the statuette was not an operational part of the lamp, but an ornamental feature, *Mazer*’s explanation/use argument was off-base. *Baker*, after all, recognized that copyright was appropriate for ornamental designs that appealed to taste. *Baker*, 101 U.S. at 103.

²¹⁹ *Mazer*, 347 U.S. at 217.

²²⁰ See chapter [on *Bleistein*].

²²¹ Melville Nimmer & David Nimmer, *Nimmer on Copyright* sec.2.18 [D](1). Copyright treatise author Paul Goldstein has also been critical of *Baker* and its progeny. See, e.g., Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Soc’y 209 (1982)

Baker v. Selden as merely holding that the copying of an idea, without the copying of expression of the idea (as the defendant had made a different arrangement of columns and used different headings), does not constitute infringement.”²²² The Nimmer treatise relied upon dicta from *Mazer* in opining that utility patent and copyright protection could overlap.²²³ It largely ignored the system/description caselaw and questioned the so-called blank form rule derived from *Baker*.²²⁴ Even after the Copyright Act of 1976 codified the central holding of *Baker* by articulating in Sec. 102(b) that “[i]n no case does copyright protection for an original work of authorship extend to any idea, *process, procedure, system, method of operation, principle, concept or discovery*” embodied in a work, Nimmer saw no need to give content to the highlighted words. Instead, he refocused the interpretation of *Baker* as an idea/expression case, and the courts largely followed his lead.

Approximately half of the seventy-two cases decided between 1954 and 1983 cited *Baker* for the idea/expression distinction, often saying no more about the case than that copyright only protected expression and never ideas, followed by a citation first to *Mazer* and then to *Baker*.²²⁵ (The influence of Nimmer’s treatise may explain why *Mazer* is so frequently cited for the idea/expression distinction; this would otherwise be odd, for the holding in *Mazer* had nothing whatever to do with this distinction.)

Half a dozen or so cases in the first decade after *Mazer* relied upon *Baker* in rejecting claims of copyright in systems or utilitarian designs depicted in copyrighted

²²² Nimmer, *supra*, at sec. 2.18 [D](1).

²²³ *Id.* at sec. 2.19.

²²⁴ *Id.* at sec. 2.08[1].

²²⁵ See, e.g., *Gero v. Seven-up Co.*, 535 F.Supp. 212, 216 (EDNY 1982); *Gibson v. CBS, Inc.*, 491 F. Supp. 583, 584 (SDNY 1980); *Miller Brewing Co. v. Carling O’Keefe Breweries of Canada, Ltd.*, 452 F.Supp. 429, 439 (WDNY 1978)

works.²²⁶ However, by the late 1960's, when the Nimmer treatise began to influence court decisions, there was a steep decline in such cases, even when plaintiffs were plainly seeking to protect methods or systems.²²⁷ Yet, a few courts still invoked *Baker* for the unprotectability of methods explained in copyrighted works and the unprotectability of useful designs depicted in a copyrighted drawing.²²⁸

Nine of the seventy-two cases involved challenges to the copyrightability of forms or form books (about half were successful). The caselaw on blank forms may have been relatively rare until the 1960's²²⁹ because no one had seriously challenged *Baker*'s conclusion that blank forms were uncopyrightable until then. Nimmer argued that forms could be original, and when they were, they should be protectable by copyright law.²³⁰ Three plaintiffs who succeeded in protecting their forms relied upon Nimmer's criticism of the blank form rule derived from *Baker*.²³¹ Yet, most blank form cases from this period follow *Baker* on this point,²³² as did the U.S. Copyright Office.²³³

²²⁶ See, e.g., *Gaye v. v. Cillis*, 167 F.Supp. 416, 418 (D. Mass. 1958)(method of doing business); *Briggs v. New Hampshire Trotting and Breeding Ass'n*, 191 F.Supp. 234 (D.N.H. 1960)(horse race betting system).

²²⁷ See, e.g., *Trebonik v. Grossman*, 305 F.Supp. 339 (N.D. Ohio 1969)(finding infringement based on copying of the method of organization of guitar chord information); *Pantone, Inc. v. A.I. Friedman, Inc.*, 249 F.Supp. 545 (SDNY 1968)(color matching system).

²²⁸ See, e.g., *Kepner-Tregoe, Inc. v. Carabio*, 203 USPQ (BNA) 124 (ED Mich 1979)(management training methods); *Russell v. Trimfit*, 428 F.Supp. 91 (ED Pa 1977) (copyright in drawing did not confer exclusive right to make toe mittens).

²²⁹ See supra note xx and accompanying text for citations to some earlier forms cases.

²³⁰ Nimmer, supra note xx, secs. 2.08, 2.18 (criticizing *Baker*'s conclusion and arguing that original forms should be copyrighted). The treatise acknowledges that the Copyright Office regulation follows *Baker*. *Id.* at n. 22.

²³¹ *Norton Printing Co. v. Augustana Hospital*, 155 USPQ (BNA) 133 (N.D. Ill. 1967); *Edwin K. Williams, Inc. v. Edwin K. Williams & Co.-East*, 377 F.Supp. 418 (C.D. Cal. 1974) (questioning whether *Baker* is still good law in light of criticism levied against it), *aff'd*, 542 F.3d 1053 (9th Cir. 1976)(affirming ruling of infringement because of copying of instructions); *Harcourt Brace & World, Inc. v. Graphics Controls Corp.*, 329 F. Supp. 517, 524 n. 4 (SDNY 1971)(protecting blank answer sheets for multiple choice tests).

²³² See, e.g., *Time-Saver Check, Inc. v. Deluxe Check Printers, Inc.*, 178 USPQ (BNA) 537 (ND Tex. 1978)(rejecting arguments based on Nimmer's criticism of *Baker* as to blank forms); *Januz Mktg Comms v. Doubleday & Co.*, 569 F.Supp. 76 (SDNY 1982)(quoting *Baker* at length); *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 971-72, n.8 (11th Cir. 1983)(rejecting arguments based on Nimmer's criticism of the blank forms ruling in *Baker*).

New to the fourth post-*Baker* period was an assessment of the problems that arise when there is only one or a small number of ways to effectively express certain ideas.²³⁴ *Continental Casualty Co. v. Beardsley* was one such case.²³⁵ Beardsley claimed copyright in the Beardsley plan for providing blanket indemnity for replacement of lost stock certificates. The plan was described in a six page booklet, less than three pages of which explained it and the rest illustrated the plan in forms. Continental did not challenge Beardsley's copyright in the booklet, but did contest the claim of infringement based on the use of substantially similar phrasings in the bond forms. The court observed:

In comparing these paragraphs, one must remember that words of insurance art, and not literary expression, are involved. Therefore, what might be called a paraphrase and plagiarism in another matter, is significantly different for the purposes of the matter at hand. All the words and expressions are commonplace within the insurance field. Any different interpretation would serve to confer a monopoly of an idea.²³⁶

Two other such cases involved jeweled bees and sweepstakes contest rules.²³⁷

Although some courts in the initial post-*Mazer* flattened out the meaning of *Baker* under the influence of the Nimmer treatise, some judges found *Baker* useful for other propositions. Six cases, for example, used it to show that copyright does not require novelty in a patent sense, but only originality.²³⁸ At least seven cases (other than these six) mentioned *Baker* in their discussions of the distinction between patent and copyright

²³³ 37 C.F.R. sec. 202.1(c) provides that "blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms, and the like, which are designed for recording information and do not in themselves convey information" are not copyrightable subject matter.

²³⁴ The term "merger" was not used to express this concept until 1983. See *infra* note xx.

²³⁵ 151 F.Supp. 28 (S.D.N.Y. 1957).

²³⁶ *Id.* at 37.

²³⁷ *Morrissey v. Proctor & Gamble Co.*, 379 F.3d 675, 678-79 (1st Cir. 1967)(sweepstakes contest rule); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971)(jeweled bees). None of these cases used the term "merger" to describe this phenomenon.

²³⁸ See e.g., *Wihtol v. Wells*, 231 F.2d 550 (7th Cir. 1956).

protection.²³⁹ Some unfair competition cases cited *Baker* for the right to copy to compete,²⁴⁰ and other cases for the freedom to use others' ideas from published works.²⁴¹ Five cases involved claims of infringement arising from construction of architectural works from copyrighted drawings.²⁴² Six computer program cases made various uses of *Baker*, but these will be discussed in the next section.

Limited Scope for Functional Writings (1984-2004): More than 130 decisions cited *Baker* in the most recent period.²⁴³ As in the fourth period, *Baker* was mainly cited as an idea/expression distinction case,²⁴⁴ and sometimes as an idea/expression merger case.²⁴⁵ Defense efforts to rely on *Baker* and section 102(b)'s exclusion of methods and systems generally fell on deaf ears,²⁴⁶ although some videogame cases recognized that under *Baker* and its progeny, only original audiovisual depictions of characters and scenes could be protected by copyright, not the constituent elements of the games themselves.²⁴⁷

The most significant development of the fifth post-*Baker* period came about in a series of cases applying copyright law to computer programs. A few cases in the late

²³⁹ See, e.g., *McAlpine v. AAMCO Automotive Transmissions, Inc.*, 461 F.Supp. 1232 (ED Mich 1978); *Freedman v. Grolier Ent., Inc.*, 179 USPQ (BNA) 476 (SDNY 1973).

²⁴⁰ See e.g., *The 88 Cents Store, Inc. v. Martinez*, 227 Ore. 147 (1961).

²⁴¹ See, e.g., *Sterner v. U.S.*, 434 F.2d 517 (Ct.Cl. 1970).

²⁴² See, e.g., *Schuchart & Assoc. v. Solo Serve Corp.*, 540 F.Supp. 928 (WD Tex 1982)(copyright in architectural plans did not create right to control construction of building); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895 (5th Cir. 1972)(copying floorplan from brochure may infringe copyright).

²⁴³ *Baker* was thus cited about as many times in the past 21 years as in the first 104 years of its history. For the first 50 years, it was cited roughly once every other year, and in the next 24 years, a little over once a year. After *Mazer*, it was cited about 3.5 times a year; while in the latest period, *Baker* was cited more than 6.5 times a year. Most of the law review commentary citing *Baker* was published in and after the mid-1980's. Much of it addresses copyright protection for computer programs.

²⁴⁴ See, e.g., *Toro Co. v. R&R Prods. Co.*, 787 F.2d 1208, 1211 (8th Cir. 1986).

²⁴⁵ See, e.g., *id.* at 212.

²⁴⁶ See, e.g., *Toro Co. v. R&R Products Co.*, 787 F.2d 1208 (8th Cir. 1208)(system for identifying products and parts); *ADA v. Delta Dental Plans Ass'n*, 126 F.3d 977 (7th Cir. 1997)(system of abbreviations of dental treatments); *Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991)(method for predicting outcomes of baseball games).

²⁴⁷ See, e.g., *Williams Electronics, Inc. v. Bally Mfg. Corp.*, 568 F.Supp. 1274 (ND Ill 1983).

fourth period had relied upon *Baker*, its progeny and/or section 102(b) in questioning the copyrightability of machine-executable forms of computer programs because they are mechanical processes.²⁴⁸ These judges perceived no difficulty in copyright protection for flow charts and source code instructions that were original and fixed in a tangible medium, but they thought that if machines depicted in drawings were beyond the scope of copyright, so should be machine-executable forms of programs.²⁴⁹

After the Third and Ninth Circuits rejected challenges to the copyrightability of Apple Computer operating system programs,²⁵⁰ the debate over the copyrightability of programs ended in the courts.²⁵¹ Both decisions construed *Baker* as limiting the scope of copyright in expression only when there was only one or a small number of ways to express certain program ideas such that ideas and their expressions had merged.²⁵² Soon thereafter, the Third Circuit in its 1986 decision in *Whelan Associates v. Jaslow Dental Labs.* ruled that the structure, sequence and organization (“SSO”) of programs was also protectable by copyright and endorsed a merger-based test for software copyright infringement.²⁵³ Under this test, programmers would be liable for copyright infringement if they copied “SSO” from another program unless there was only one or a very small number of ways to structure a program of that sort.

²⁴⁸ See *Apple Computer, Inc. v. Franklin Computer, Inc.*, 545 F.Supp. 812 (ED Pa. 1982) (relying on *Baker*), rev'd, 714 F.2d 1240 (3d Cir. 1983); *Data Cash Systems v. JS&A Group*, 480 F. Supp. 1063, 1068 (N.D. Ill. 1979)(relying on *Baker*'s progeny), aff'd on other grounds, 628 F.2d 1038 (7th Cir. 1980).

²⁴⁹ See, e.g., *Franklin*, 545 F. Supp. at 823-24; *Data Cash*, 480 F. Supp. at 1067-69.

²⁵⁰ *Apple Computer Inc., v. Franklin Computer Co.*, 714 F.2d 1240 (3d Cir. 1983); *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521 (9th Cir. 1984).

²⁵¹ This debate lived somewhat longer in the law review literature. See Pamela Samuelson, et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 Colum. L. Rev. 2308, 2311-13 n. 5-6 (1994) (citing this literature).

²⁵² See, e.g., *Franklin*, 714 F.2d at 1253; *Formula*, 725 F.2d at 524.

²⁵³ 797 F.2d 1222, 1234-45 (3d Cir. 1986).

The *Whelan* decision was initially very influential in computer program cases.²⁵⁴ However, six years later, the Second Circuit questioned *Whelan* in *Computer Associates Int'l v. Altai, Inc.*, as based on an outmoded understanding of computer programs and an overbroad interpretation of the proper scope of protection for functional works, such as programs.²⁵⁵ The Second Circuit cited *Baker* in holding that functional design elements of programs, such as program-to-program interfaces, were not protectable by copyright law.²⁵⁶ It directed courts to assess whether elements copied by defendants were constrained by external factors, dictated by efficiency, or standard programming ideas, and if so, these similarities were to be filtered out before courts made a determination as to whether the defendant's program infringed.²⁵⁷ Thereafter, *Altai* displaced *Whelan* as the principal case providing guidance about the scope of copyright protection for computer programs.²⁵⁸

Although *Altai* relied on *Baker* for key principles, it, like *Whelan*, did not attempt to give content to the *Baker*-inspired "process, procedure, system, method of operation" limitations in Section 102(b). The most notable post-*Altai* case to apply these limitations to computer programs was the First Circuit's decision in *Lotus Dev. Corp. v. Borland Int'l*.²⁵⁹ The trial court had held Borland liable for copyright infringement because it copied the command hierarchy of the Lotus 1-2-3 program in the emulation mode of its

²⁵⁴ See, e.g., *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989); *Lotus Dev. Corp.*, 740 F. Supp. 37, 67 (D. Mass. 1988).

²⁵⁵ 982 F.2d 693, 705-06 (2d Cir. 1992).

²⁵⁶ *Id.* at 703-04.

²⁵⁷ *Id.* at 707-11.

²⁵⁸ See, e.g., Pamela Samuelson, *Brief Amicus Curiae of Copyright Law Professors in Lotus Development Corp. v. Borland Int'l, Inc.* (brief to U.S. Supreme Court), 3 J. Intell. Prop. L. 103, 121-24 (1995)(discussing influence of *Altai*).

²⁵⁹ 49 F.3d 807 (1st Cir. 1995).

competing spreadsheet program.²⁶⁰ Borland argued that this hierarchy constituted a functional system or method that could not be protected under *Baker* and Section 102(b) because of its role in facilitating users' ability to construct "macros" for commonly used sequences of operations. The First Circuit, invoking Section 102(b) and the *Baker* decision, Court of Appeals decided that Lotus' command hierarchy was a method of operating a computer to perform spreadsheet functions, and reversed the lower court ruling in Lotus' favor.²⁶¹

Baker and *Altai* were also influential in *Sega Enterprises Ltd. v. Accolade, Inc.*, in which the Ninth Circuit ruled that making copies of computer programs for the purposes of getting access to functional design elements of programs, such as interfaces, was fair use.²⁶² The court observed that "[i]f disassembly of copyrighted object code is per se an unfair use, the owner of the copyright gains a de facto monopoly over the functional aspects of his work—aspects that were expressly denied copyright protection by Congress,"²⁶³ citing Section 102(b). The court went on to say that "to enjoy a lawful monopoly over the idea or functional principle underlying a work, the creator of the work must satisfy the more stringent standards imposed by the patent laws."²⁶⁴ Although the Ninth Circuit did not cite *Baker* for this proposition, the statement resonates with the Court's decision in *Baker*. The Ninth Circuit also agreed with *Altai* that functional works

²⁶⁰ Lotus Dev. Corp. v. Borland Int'l, 799 F.Supp. 203 (D. Mass. 1992).

²⁶¹ *Borland*, 49 F.3d at 815-17. The Supreme Court accepted Lotus' petition for certiorari, but shortly after the oral argument, the Court affirmed the First Circuit's ruling by an equally divided vote. Lotus Dev. Corp. v. Borland Int'l, Inc., 516 U.S. 233 (1996). Thirty-four copyright professors argued to the Court that the Lotus command hierarchy was unprotectable under section 102(b) because it was a fundamental part of the functionality of the Lotus macro system. See Borland Brief, supra note xx, at 131 (relying on *Baker*).

²⁶² 977 F.2d 1510, 1527-28 (9th Cir. 1992).

²⁶³ Id. at 1526.

²⁶⁴ Id.

such as computer programs and those describing bookkeeping systems were entitled, as *Baker* had long ago held, to only “thin” protection from copyright law.²⁶⁵

Conclusion: This recounting of the tale of Baker and Selden and the litigation that led to the Supreme Court’s influential decision should dispel a few myths about the case. Selden was not, as one judge thought, the inventor of the now universally used T-account system of bookkeeping,²⁶⁶ nor was he the author of an influential accounting treatise, as another learned judge believed (rather, Baker was).²⁶⁷ The *Baker* decision did not originate the idea/expression distinction,²⁶⁸ nor the idea/expression merger doctrine, although *Baker* continues to be widely cited as the origin of these two doctrines. It is quite appropriate to cite *Baker* in support of these propositions, for the decision contains some potent statements that courts in subsequent cases have found helpful in articulating this distinction and that doctrine.

It is more accurate to view *Baker* as the source of the system/description distinction, but *Baker* wasn’t even the first decision to rule that systems depicted in copyrighted works (and their constituent parts) are unprotectable by copyright. That honor belongs to *Perris v. Hexamer*.²⁶⁹ *Baker* was also not the first case to rule against a copyright claim based on copying of a functional design for which the plaintiff had sought a patent, for *Collendar v. Griffith* had done this eight years earlier.²⁷⁰ Even *Baker*’s ruling that “blank account books are not the subject of copyright and the mere

²⁶⁵ Id. at 1524..

²⁶⁶ Lotus Dev. Corp. v. Paperback Software Int’l, 740 F. Supp. 37, 41 (D. Mass. 1990).

²⁶⁷ ADA v. Delta Dental Plans Ass’n, 126 F.3d 977, 981 (7th Cir. 1997). This judge also erred in stating that upholding Selden’s claim would have given him the exclusive right to double-entry bookkeeping. Id. Double-entry bookkeeping has been in common use since the Middle Ages.

²⁶⁸ Emerson v. Davies, 8 F. Cas. 615 (C.C. D. Mass. 1845), for example, speaks of the unprotectability of ideas and the protectability of expression. Id. at 618-19.

²⁶⁹ 99 U.S. 675 (1879).

²⁷⁰ 6 F. Cas. 104 (1873)(striking down patent for bevel-sided billiard table for lack of novelty, and ruling against copyright claim arising from defendant’s engraving of competing table).

copyright of Selden’s book [could] not confer copyright upon him the exclusive right to make and use account-books ruled and arranged as designated by him and described and illustrated in the book”²⁷¹ was not original, for the Court acknowledged it had drawn the rule from *Page v. Wisden*.²⁷²

Baker has, however, had some effective critics. Some courts have renounced or questioned dicta from *Baker*. In *Bleistein*, for example, the Court repudiated the dicta from *Baker* on the uncopyrightability of advertisements, and in *Mazer*, the Court did not find the explanation/use distinction useful. Congress legislatively narrowed the legacy of *Baker* when it extended copyright protection to architectural works and to machine-executable computer programs.²⁷³ Nimmer’s narrow interpretation of *Baker* has enjoyed considerable influence. Moreover, *Baker*’s vision of separate domains for patent and copyright remains controversial among intellectual property professionals.²⁷⁴

Yet, the principal holding of *Baker* was codified in Section 102(b), which provides that copyright protection for original works of authorship does not extend to any “procedure, process, system, method of operation” embodied in such works, any more than to any “idea, . . . principle, concept or discovery” in them.²⁷⁵ *Baker* also lives on in the statutory rule that denies copyright to pictorial, graphic, or sculptural works having functions beyond conveying information or displaying an appearance (e.g., clothing and chairs),²⁷⁶ as well as in the rule that copyright in a drawing does not create rights in useful

²⁷¹ *Baker*, 101 U.S. at 107.

²⁷² *Id.* at 106-07 (quoting *Page v. Wisden*).

²⁷³ Pub. L. No.101-650, sec. 706 , 104 Stat. 5133 (1990); Pub. L.No. 96-517, sec. 10(a), 94 Stat. 3028 (1980).

²⁷⁴ See, e.g., Pamela Samuelson, *Survey on the Patent/Copyright Interface for Computer Programs*, 17 *AIPLA Q.J.* 256 (1989).

²⁷⁵ 17 U.S.C. sec. 102(b).

²⁷⁶ 17 U.S.C. sec. 101 (definitions of “pictorial, sculptural and graphic works” and “useful article”).

articles depicted therein.²⁷⁷ The computer program cases have contributed to a revival of *Baker* as a source of limitations on the scope of copyright protection in functional writings. These cases have also revived *Baker*'s caution about potential misuses of copyright to get patent-like protection in the functional design elements of copyrighted works. Courts and commentators have also come to see in *Baker* policy reasons for treating ideas and information as free for unlimited reuses.²⁷⁸ This is a remarkably rich legacy for a copyright opinion written by a patent expert in the relatively early days of the Industrial Age, well before the Information Age in which *Baker* has arguably played its most significant role.

²⁷⁷ 17 U.S.C. sec. 113(b).

²⁷⁸ See, e.g., *Feist Pub. Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 350 (1991).