

# The Story of *Baker v. Selden*: Sharpening the Distinction Between Authorship and Invention

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**The Selden and Baker Bookkeeping Systems:** 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.<sup>1</sup> In May of that year, Selden signed a lucrative contract with Hamilton County for use of his bookkeeping system.<sup>2</sup> He also believed he was about to sell a version of his system to the U.S. Department of the Treasury.<sup>3</sup> Selden planned to spend several weeks during the spring of 1865 in Washington DC making appropriate adaptations of his system for Treasury uses and conclude the deal.<sup>4</sup>

In March of 1865, he was so optimistic about his business prospects that he contemplated forming a joint stock company to cash in on “the right to introduce the system throughout one or 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.”<sup>5</sup>

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<sup>1</sup> See Supreme Court Record in *Baker v. Selden* (“Record”) at 91-94.

<sup>2</sup> Id. at 111. The contract was for 12 years and a total of \$6600.

<sup>3</sup> Id. at 94. Salmon P. Chase reported meeting 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 conceivable, even though Chase was no longer Secretary of the Treasury in 1865.

<sup>4</sup> Record at 94.

<sup>5</sup> Id.

Selden was confident that his system would attract customers because it was more efficient than the old-fashioned data-entry intensive bookkeeping system then used by Ohio officials. Under the old system, clerks first recorded information pertinent to each transaction (say, a disbursement from a fund for bridge construction) 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 then 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.<sup>6</sup> With double entry bookkeeping, each transaction would be logged as a credit and a debit in the appropriate columns of the ledger. Preparing a trial balance of the accounts could take several days because information was so distributed throughout 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.

Selden figured out a way to condense the journals and ledger into one book. Users of his system could record pertinent information about transactions and accounts on one page or two adjoining pages.<sup>7</sup> Depending on the user's needs, the transactions of a day, a week, or a month could be recorded on the Selden form. The condensation of the journal and ledger made it easier to create a trial balance and discern the amount to be carried forward to the next period. This allowed for quicker detection of errors or fraud. His books illustrated the system by showing forms with hypothetical entries for a sample

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<sup>6</sup> Id. at 92, 106.

<sup>7</sup> See sample Selden form, Appendix A.

jurisdiction. Selden thought that \$800 a year was a reasonable price for use of his system because it would save an estimated \$2850 a year in clerk salaries.<sup>8</sup>

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."<sup>9</sup> The preface also indicates that "[i]n 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."<sup>10</sup>

By June of 1865, however, the bloom was off this optimistic rose. Although Selden still believed he could adapt his system for use by the U.S. Treasury Department,<sup>11</sup> 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.<sup>12</sup>

Selden's commercial prospects dimmed further in 1867 when W.C.M. Baker, auditor of Greene County, Ohio, published his first book on the Baker bookkeeping system.<sup>13</sup> The Baker forms were similar to Selden's in some respects, for example, in enabling journal and ledger entries to be made on one page, in having columns for entering the date of a disbursement, its number, the recipient, the disburser, and by whose

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<sup>8</sup> Record at 92.

<sup>9</sup> Id. at 21.

<sup>10</sup> Id.

<sup>11</sup> Id. at 103.

<sup>12</sup> Id. at 89-90. Only a few counties used Selden's system for longer than short trial periods. Id. at 14-19, 30-31, 48-52, 68-69, 72, 145.

<sup>13</sup> Its title was BAKER'S REGISTER OF RECEIPTS AND DISBURSEMENTS WITH BALANCE SHEETS AND REPORTS FOR COUNTY AUDIOTRS AND TREASURER'S (1867). See Record at 43.

authorization, and in having space for balances to be carried forward.<sup>14</sup> The principal difference between the Baker and Selden forms was in how they treated accounts. Baker's form featured several blank columns so that bookkeepers could label and then keep track of receipts and disbursements for each type of account; it also had space at the foot of each account column so that bookkeepers could calculate a total period-to-date sum for each account at the foot of the form.<sup>15</sup> With Baker's forms, "you can enter your orders daily and tell just how your accounts stand."<sup>16</sup> With Selden's forms, there was no space for entering orders sequentially or for calculating interim totals. Selden's system contemplated entering totals for each account at the end of the relevant period, so it was "hard to tell how your accounts [stood] during the month."<sup>17</sup>

Baker had several advantages over Selden. Baker's forms were not only more useful for keeping track of specific accounts, but they were also, by most accounts, easier to use.<sup>18</sup> The State Auditor of Ohio had unconditionally endorsed the Baker system.<sup>19</sup> Baker offered a lower price than Selden.<sup>20</sup> And he was a good salesman; by the fall of 1871, he had persuaded more than 40 counties in Ohio and a number of private firms, to become his customers.<sup>21</sup>

On July 30, 1871, after a period of ill health, Charles Selden departed this world.<sup>22</sup> His legacy to his widow Elizabeth was many thousands of dollars of debt and apparently

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<sup>14</sup> Compare the Baker and Selden forms in Appendix A.

<sup>15</sup> Record at 59. Selden's form was also more classically double-entry, having debit and credit columns for each fund of the condensed ledger, while Baker's form was more synthetic and less redundant. Also different were numerous captions and the ruling of most of the columns. See Appendix A.

<sup>16</sup> Record at 66.

<sup>17</sup> Id.

<sup>18</sup> See, e.g., id. at 59. Compare the forms in Appendix A.

<sup>19</sup> Record at 13-14.

<sup>20</sup> Id. at 73-74.

<sup>21</sup> Id. at 12-14.

<sup>22</sup> Id. at 41-42.

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.<sup>23</sup>

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.<sup>24</sup>

These were the very same virtues that Selden had claimed for his bookkeeping system.

By promoting the Baker system in Selden's home town and mentioning his many 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.

**The Lawsuit Against Baker:** Elizabeth Selden was reportedly destitute in 1872,<sup>25</sup> 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).<sup>26</sup> Fisher was ably assisted by William S. Scarborough, who had represented Hamilton County on a number of occasions.<sup>27</sup>

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<sup>23</sup> Id. at 89-90.

<sup>24</sup> Id. at 14.

<sup>25</sup> Id. at 89-90.

<sup>26</sup> See IN MEMORIAM SAMUEL S. FISHER (1875).

<sup>27</sup> See, e.g., State ex rel. Mills & Co. v. Comm'rs of Hamilton County, 20 Ohio St. 425 (1870) (absolving Commissioners of a charge of misleading bidders as to a printing contract that Moore Wiltach & Baldwin won). Scarborough had also defended Hamilton County in a patent infringement suit brought by Fisher. See Jacobs v. Hamilton County, 13 F. Cas. 276 (S.D. Ohio 1862).

In July of 1872, 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.<sup>28</sup> 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.<sup>29</sup> It also alleged that Selden was “the inventor, designer, and author of a book entitled ‘Selden’s condensed ledger or bookkeeping simplified,’” and of several other similarly titled books.<sup>30</sup> It claimed that Selden had complied with the requisite copyright formalities and that his widow Elizabeth had inherited Selden’s copyrights.<sup>31</sup> It charged Baker with substantially harming the market for Selden’s work by pirating it and requested provisional and permanent injunctive relief against further publication and distribution of Baker’s book.<sup>32</sup> Baker answered the complaint with a general denial of Selden’s allegations.<sup>33</sup> He was represented at the trial court level by a young and inexperienced lawyer, Edward Colston.

The Selden case was tried not with live witnesses in court, but rather through a set of depositions taken before a neutral examiner, transcripts of which were made available to the trial judge. In mid-May of 1873, Selden’s lawyer deposed four supportive witnesses.<sup>34</sup> Two were Hamilton County officials; one was a Selden customer from a

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<sup>28</sup> Record at 1-4.

<sup>29</sup> Id. at 1.

<sup>30</sup> Id. at 1-3. 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, engraving, cut, print, or photograph” and several other categories of works, who complied with statutory formalities. Rev. Stat., sec. 4952.

<sup>31</sup> Record at 3-4. Under today’s work for hire doctrine, the Commissioners of Hamilton County, rather than Selden, might have been the “author” of his books and hence the owner of copyrights in them, insofar as the books 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).

<sup>32</sup> Record at 4.

<sup>33</sup> Id. at 6.

<sup>34</sup> See id. at 10-40 for testimony of these witnesses.

nearby county; and the fourth operated a business school in Cincinnati. Selden's lawyer showed each witness a copy of Baker's book and asked what material differences there were between Baker's and Selden's books and systems. All four testified that the principle was the same in both.<sup>35</sup> John Gundry, the business school proprietor, for example, testified that he saw nothing new in Baker's book.<sup>36</sup> "It is an effort to obtain the same result as the Selden system by combining the same features."<sup>37</sup> Gundry offered several criticisms of Baker's book, including a characterization of it as "defective."<sup>38</sup> When asked whether differences in certain captions were material, Gundry responded "[t]he change in the names amounts to nothing."<sup>39</sup>

To counter this testimony, Baker's lawyer in mid-September 1873 deposed six witnesses who testified about substantial and material differences between the Baker and Selden systems and forms.<sup>40</sup> One was a salesman for Baker's system, four were Baker's customers, and one was an official for a county that had been Selden's customer before switching to another bookkeeping system.<sup>41</sup> The witnesses explained similarities in the Baker and Selden forms as due in part to requirements of state law and to commonalities among bookkeeping forms (e.g., columns for credits and debits).<sup>42</sup> Some witnesses praised Baker's system as easier to learn than Selden's system, easier to use, and more likely to detect errors.<sup>43</sup> Baker's system was not only different from Selden's, in their view, but was better. Baker himself was not deposed.

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<sup>35</sup> Id. at 16.

<sup>36</sup> Id. at 38-39.

<sup>37</sup> Id. at 38.

<sup>38</sup> Id.

<sup>39</sup> Id. at 40.

<sup>40</sup> Id. at 45-73 for testimony of these witnesses. See especially id. at 46, 49-51, 55, 65-66.

<sup>41</sup> Fayette County switched to Miltonberger's System of Accounts. Id. at 52.

<sup>42</sup> See, e.g., id. at 59.

<sup>43</sup> Id. at 46, 52, 56, 59-60, 67.

What may have tipped the evidentiary balance in Selden's favor was the deposition of Eleazer Baldwin, which was taken by a lawyer new to the case, on a Saturday, six months after the other pro-Selden depositions and only a few days before the pro-Baker depositions.<sup>44</sup> Baker's lawyer did not appear at this deposition, and later objected to inclusion of this deposition in the record because he had not received notice of it.<sup>45</sup> Baldwin testified that during the summer of 1865, he traveled around Ohio and Indiana to sell the Selden system and books.<sup>46</sup> He visited the auditor's office in Greene County on August 21, 1865. 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").<sup>47</sup> At first, Baker recommended adopting the Selden system, and Baldwin left a copy of Selden's book with Baker while the decision was pending. Baldwin later learned that the Commissioners of Greene County had decided against this contract, saying that the price was too high.<sup>48</sup>

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 of his system, Baldwin's testimony offered otherwise missing testimony of "piracy."

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<sup>44</sup> Id. at 10-14. Baldwin's testimony, although taken long after those of Selden's other witnesses, is the first deposition in the Record.

<sup>45</sup> Id. at 112.

<sup>46</sup> 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. Id. at 10.

<sup>47</sup> Id. at 11.

<sup>48</sup> Id. at 11.

**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.<sup>49</sup> 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.<sup>50</sup>

The court ordered Baker to “forever refrain and be perpetually restrained and prohibited” from publication, sale, or otherwise disposing of his book.<sup>51</sup>

No record was kept of the proceedings in the Selden case before Judge Swing, so it is impossible to know what legal arguments were made to him or what (if any) precedents the lawyers relied upon in pleading their cases. Nor did Judge Swing’s decision cite precedents in support of his ruling. However, a copyright infringement ruling from the Southern District of Ohio, *Drury v. Ewing*,<sup>52</sup> may have influenced him. That decision characterized Drury as the “authoress and inventress” of a copyrighted chart that depicted her method for taking measurements and cutting garments for

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<sup>49</sup> 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).

<sup>50</sup> Record at 9.

<sup>51</sup> Id. Baker’s appeal did not object to the perpetual injunction.

<sup>52</sup> 7 F. Cas. 1113 (C.C. S.D. Ohio 1862).

women.<sup>53</sup> Ewing had infringed this copyright, the court held, because notwithstanding numerous differences in details, Ewing's chart used "the same principle" as Drury's and contained "the essential parts of Mrs. Drury's system."<sup>54</sup> The court rejected Ewing's improvement defense because dressmakers testified that Ewing's chart produced the same result as Drury's.<sup>55</sup> Mrs. Drury had, in the court's view, the exclusive right to control uses of her copyrighted chart, as well as publication of it.<sup>56</sup>

The ruling in *Drury* is consistent with Judge Swing's decision in *Selden*'s favor. In both cases, the trial courts did more than protect authors against verbatim copying of their works. The courts treated alternative implementations of the plaintiffs' systems and reuse of system principles as copyright infringement. At a time when neither Congress nor the courts had articulated a general approach for determining how much control creators should have over adaptations of their works,<sup>57</sup> the trial court rulings in *Drury* and *Baker* offered expansive protection. The courts even seemed willing to protect the plaintiffs' systems against unauthorized uses.

In March of 1875, shortly after Baker's lawyer filed an appeal to the U.S. Supreme Court and posted a \$1000 bond,<sup>58</sup> Baker published a circular to Ohio county commissioners, auditors and treasurers, expressing confidence that he would be vindicated on appeal. Even if the appeal failed, Baker made clear that he would replace previously purchased books with copies of his new and improved book.<sup>59</sup> He quoted several sections of the copyright statute to support his conclusion that users of his books

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<sup>53</sup> Id. at 1114.

<sup>54</sup> Id. at 1114, 1117.

<sup>55</sup> Id. at 1117.

<sup>56</sup> Id. at 1113.

<sup>57</sup> See *Story of Folsom v. Marsh*, *infra*.

<sup>58</sup> Record at 9-10.

<sup>59</sup> Id. at 77-78.

needn't worry about being sued by Mrs. Selden because copyright aimed only to "prevent publishers interfering with each other's rights."<sup>60</sup>

A month later, Elizabeth Selden (now Mrs. Ross) and her husband Howard (now a co-plaintiff in the case) fought back with gusto. They moved to increase the bond to \$25,000-30,000,<sup>61</sup> and charged that Baker's new book also infringed the Selden copyrights and was within the court's injunction.<sup>62</sup> They submitted several affidavits and exhibits in support of these allegations,<sup>63</sup> as well as several affidavits casting aspersions on Baker's character<sup>64</sup> and challenging his net worth.<sup>65</sup>

The Rosses also issued a counter-circular to Ohio public officials,<sup>66</sup> pointing out that a federal court had ruled that Selden's copyrights were valid and infringed. From this, "[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 their use, are infringers of the Selden copyrights and personally liable to the undersigned."<sup>67</sup> Further use of Baker's books "must be abandoned forthwith."<sup>68</sup> The Rosses were willing to offer favorable terms to those counties willing to settle "her just claims of past infringement and [pay] for the

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<sup>60</sup> 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.

<sup>61</sup> This was the amount of damages they claimed for two years of infringement.

<sup>62</sup> The Record does not reveal any court ruling on the bond motion; but it appears from Baker's brief to the Supreme Court that the injunction covered both books. Record, Argument for Appellant, at 27.

<sup>63</sup> Record at 73-75, 84-89.

<sup>64</sup> Id. at 88-89, 112-13. They charged him with running a "pharoh house" (that is, a gambling house). "Pharoh" (aka "faro") is a card game that was widely played in the US in the 19<sup>th</sup> century. A history of the game and its rules can be found on the web at <http://www.bcvc.net/faro/history.htm> and <http://www.bcvc.net/faro/rules.htm>.

<sup>65</sup> Record at 114-15.

<sup>66</sup> Id. at 79-80. Howard L. Ross had been added as a co-plaintiff on December 4, 1874. Id. at 7.

<sup>67</sup> Id. at 80.

<sup>68</sup> Id.

right to use the books of the Selden system.”<sup>69</sup> Counties not so disposed “will be held to pay.”<sup>70</sup>

In opposition to the motion to increase the bond, more than thirty of Baker’s customers filed affidavits that typically attested that they had compared Baker’s and Selden’s forms and books and concluded that the two systems were materially different. Even more different and noninfringing was Baker’s new book. Many said they would never use the Selden system, even if forced to stop using Baker’s.<sup>71</sup>

Baker also submitted an affidavit in opposition to the bond motion that explained how he developed his bookkeeping system.<sup>72</sup> It began by recounting 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 said 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 forms.<sup>73</sup> In essence, Baker was belatedly making an independent creation defense.<sup>74</sup>

**Reassessing the Merits:** Was Baker a “pirate,” as Mrs. Selden alleged, an improver, as the pro-Baker deposition witnesses asserted, or an independent creator, as

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<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> The pro-Baker affidavits can be found, id. at 144-165.

<sup>72</sup> Id. at 116-19.

<sup>73</sup> Selden’s lawyers objected to references to this and other post-trial affidavits in their brief to the Supreme Court. Record, Argument for the Appellee at 2-3.

<sup>74</sup> Baker did not respond to the allegations about gambling, but denied having significant debt. His affidavit said nothing about whether he had ever met Selden or Eleazer Baldwin.

Baker himself believed? If one credits Baldwin's testimony and infers from Baker's initial silence that the Baldwin testimony was truthful, it is reasonable to conclude that Baker copied something significant—the principle of condensing journal and ledger entries onto one form—from Selden's book and system.<sup>75</sup>

Several factors, though, suggest that Baker 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. Judging from the texts of his three later books,<sup>76</sup> Baker was an intellectually curious professional who enjoyed communicating what he knew to those who might benefit from his knowledge. Selden's books, by contrast, were minor variations on one another, with almost no explanatory material.<sup>77</sup> The Baker and Selden forms are, moreover, demonstrably different in several respects,<sup>78</sup> especially in their treatment of accounts.

Independent creation is plausible because a smart auditor like Baker might well have realized that the old data-intensive system was unsuitable for the increasingly

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<sup>75</sup> See, e.g., Record at 19.

<sup>76</sup> Baker wrote at least four books on bookkeeping, all of which were distinct texts. Three are available in the Library of Congress, and each explains the principles of bookkeeping in a lively and intelligent way. The most substantial is *Baker's Labor Saving System of Accounts* (1876). More than 200 pages long, it explains bookkeeping in detail and illustrates various textual points with sample forms and entries. A 1986 bibliography of accounting books lists this book as among the noteworthy 18<sup>th</sup> and 19<sup>th</sup> century books on this subject. See WALTER HAUSDORFER, *ACCOUNTING BIBLIOGRAPHY, HISTORICAL APPROACH* (1986). (Selden's books are not so cited.) Baker's 1876 book remains available in the Harvard and Columbia University Libraries as well as the Library of Congress and the Boston Public Library. See also W.C.M. BAKER, *BOOK-KEEPING POCKET CHART* (1881); W.C.M. BAKER, *BAKER'S SELF-INSTRUCTIVE BOOK-KEEPING* (1874). The 1867 book which attracted the widow Selden's lawsuit is not in the Supreme Court Record, nor in the Library of Congress, although Baker's appellate counsel inserted a copy of the Baker and Selden forms in the initial appellate brief. Record, Arguments for Appellant at 6-7. See Appendix A.

<sup>77</sup> Selden's sixth book, which is available in the rare book section of the Library of Congress, is only about 25 pages long, all but three of which are forms. If one omits the words on the title page, the forms, and the intellectual property rights notice, Selden's text is only 650 words long. Most of these words puff the merits of his system, rather than explaining how to use it. Selden's six books appear to have been minor variants on one another, not six wholly different books. One was tailored to the requirements of Ohio law, another to Indiana law, and one to U.S. government accounts. Selden apparently made some improvements in the forms from one edition to the next. One book had a slightly longer introduction.

<sup>78</sup> See supra notes 15-17 and accompanying text.

complex commerce of the late 19<sup>th</sup> century. Condensing the ledger and journals into one form would have been an obvious way to do more efficient data entry and rapid analysis.

Baker's independent creation defense is also plausible if one discredits Baldwin's testimony either because of the procedural irregularity of the deposition being taken without adequate notice to Baker's lawyer or because his post-trial affidavit contradicts his deposition. The 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.<sup>79</sup> Yet, when deposed a year and a half earlier, Baldwin said that the Selden system was new to Baker in August 1865.<sup>80</sup> Both statements cannot be true.

Consider also that if Selden thought Baker was an infringer, he could have, but didn't, sue Baker for infringement during his lifetime. Selden and his publisher must have been aware of Baker's book in 1867 or soon thereafter, given their efforts to sell the competing systems to the same county officials in Ohio.<sup>81</sup> One of Selden's witnesses testified that Baker showed his forms to officials in the Hamilton County auditor's office in about 1867.<sup>82</sup> Another testified that Selden himself had showed the witness Baker's forms and asked the witness which he liked better.<sup>83</sup> Selden may have lacked the financial resources to initiate a lawsuit against Baker, yet his widow managed to do so, even though she too was burdened by his debts.

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<sup>79</sup> Id. at 74-75.

<sup>80</sup> Id. at 11.

<sup>81</sup> Franklin County decided to drop its use of Selden's system in favor of Baker's in 1867. Id. at 145.

<sup>82</sup> Id. at 34.

<sup>83</sup> Id. at 17.

**Baker's Appeal:** 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<sup>84</sup>—it was time to call upon more 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.<sup>85</sup> Taft was a senior and distinguished member of the Cincinnati bar, and a former Superior Court Judge, city council member, and gubernatorial candidate.<sup>86</sup> 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.<sup>87</sup> Lloyd handled the oral argument before the Supreme Court on behalf of Baker.<sup>88</sup> Selden's appellate team was Milton I. Southard and Charles W. Moulton, about whom comparatively little information is available.

Baker's initial brief to the Supreme Court focused heavily on the explainable differences defense<sup>89</sup> and relied on conventional copyright cases<sup>90</sup> and the newly

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<sup>84</sup> The Rosses claimed annual damages amounting to about \$250,000 in today's dollars.

<sup>85</sup> 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).

<sup>86</sup> 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 the U.S. 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.

<sup>87</sup> *Price v. Slaughter*, 13 Ohio Dec. Rep. 641.

<sup>88</sup> The *Bench and Bar of Ohio* (1897) has a highly laudatory biographical sketch of Lloyd, which mentions Lloyd's role in arguing the *Baker v. Selden* case as one of his significant achievements. *Id.* at 142-43.

<sup>89</sup> Record, Argument for Appellant, at 11-17.

<sup>90</sup> Among the conventional cases relied upon were *Wheaton v. Peters*, 33 U.S. 591 (1834)(see *Wheaton Story* supra); *Emerson v. Davies*, 8 F. Cas. 615 (C.C. D. Mass. 1845) (competing book on arithmetic infringed); and *Sayre v. Moore*, 1 East 361 (1785) (map that consolidated information from other maps and corrected errors was noninfringing). See Record, Argument for Appellant at 13-14 (citing *Wheaton*), 19-20 (citing and quoting from *Sayre*), 21-22 (citing and quoting from *Emerson*).

published Drone copyright treatise.<sup>91</sup> Obliquely it raised a copyrightable subject matter challenge to Selden’s claim in contending that Selden’s system was not a “book” and that “ruled lines for blank books do not constitute authorship.”<sup>92</sup>

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.<sup>93</sup> It pointed to many authorities that supported giving the term “book” a liberal construction in copyright cases, *Drury* among them.<sup>94</sup>

The main points made during oral argument before the Supreme Court can be discerned from a synopsis that appears in the Lawyer’s Edition report of the case.<sup>95</sup> It indicates that Baker’s lawyers had reframed his defense. The main argument now was that Selden’s work was not a proper subject matter for copyright protection because it was a contribution to the useful arts, not to science.<sup>96</sup> Selden himself had recognized this in seeking, although apparently not obtaining, a patent for the bookkeeping system.<sup>97</sup> (A patent would have given Selden the exclusive right to make, use and sell his bookkeeping system for 14 years.<sup>98</sup> A patent examiner would have had to be convinced Selden’s system was novel and inventive before issuing the patent.) Baker’s lawyer now

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<sup>91</sup> EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS (1879). Record, Argument for Appellant, at 18, 22-23 (quoting Drone treatise).

<sup>92</sup> Id. at 5-8. It hinted at the possible patentability of Selden’s system as a reason to deny the Selden claim. Id. at 9.

<sup>93</sup> Record, Argument for Appellee, at 5-9. The Selden brief relied on many of the same conventional cases as the Baker brief and the Drone treatise.

<sup>94</sup> Record, Argument for Appellee at 4. Baker’s brief challenged *Drury*, saying that it had been criticized by bench and bar. Record, Argument for Appellant at 9.

<sup>95</sup> See *Baker v. Selden*, 25 L.Ed. 841, 841-42 (synopsis of lawyer arguments) (1880).

<sup>96</sup> Id. at 841. “Science” at that time was understood to mean “knowledge,” not just the disciplines deemed to be science nowadays (e.g., chemistry, biology, physics).

<sup>97</sup> Id.

<sup>98</sup> The patent term was fourteen years until 1861, when Congress increased it to seventeen years. See GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF PATENTS FOR USEFUL INVENTIONS at 562, 584-85.

principally relied upon *Perris v. Hexamer*,<sup>99</sup> a year-old Supreme Court decision holding that a system of symbols for representing information on maps of city blocks was unprotectable by copyright, and *Page v. Wisden*<sup>100</sup> an 1869 English decision holding blank cricket scoring sheets to be uncopyrightable.

The Lawyer's Edition reports that Selden's lawyer countered Baker's subject matter challenge, saying that the copyright statute offered protection to books, as long as they were original contributions to useful knowledge,<sup>101</sup> as Selden's was. The *Baker* opinion indicates that Selden's lawyer relied heavily on *Drury v. Ewing*,<sup>102</sup>

In a supplemental brief, filed after the oral argument, Baker's lawyers elaborated on the subject matter defense.<sup>103</sup> Five of the six points in this brief discuss the distinction between patent and copyright subject matters. Selden's application for a patent, it argued, should be conclusive against his copyright claim, for it showed that he conceived of his system as a useful art.<sup>104</sup> When Selden's lawyer described the state of the art when Selden invented his system and when he characterized the Selden system as "'an artificial system for the art of bookkeeping,'" this "d[id] not refer to authorship, but solely to

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<sup>99</sup> 99 U.S. 675 (1879).

<sup>100</sup> 20 Law Times 435 (1869). *Page v. Wisden* had not been cited in Baker's initial brief to the Court. Also newly cited in the oral argument was *The Trademark Cases*, 100 U.S. 82 (1879), which the Court had decided only three weeks before it heard Baker's appeal. These cases were arguably relevant because of the opinion's discussion of Congress' power to protect "authors" and "inventors" under the Intellectual Property Clause of the U.S. Constitution. But Baker's counsel may also have wanted to emphasize *The Trademark Cases* because the decision unanimously overturned the very same judge who had ruled against Baker.

<sup>101</sup> *Baker*, 25 L.Ed. at 842. They relied upon five decisions and two treatises for giving a broad construction to the word "book" in copyright law

<sup>102</sup> *Baker*, 101 U.S. at 107.

<sup>103</sup> Record, Supplemental Brief for the Appellant.

<sup>104</sup> *Id.* at 2.

invention.”<sup>105</sup> Even if Selden’s innovation fell in a gap between patent and copyright subject matters, only Congress could legislatively fill this gap.<sup>106</sup>

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 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 found infringing by a substantially similar competing product.

**The Supreme Court’s Decision:** The *Baker* opinion is unusual in the attention it gives to the distinction between copyrights and patents and the respective roles of these laws in the protection of the fruits of intellectual labor.<sup>107</sup> The Court could not readily explain why an author could not get copyright protection for a bookkeeping system by

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<sup>105</sup> Id.

<sup>106</sup> Id. at 2-3.

<sup>107</sup> In most copyright cases, it is neither necessary nor appropriate to discuss the patent/copyright distinction, but *Baker* was unusual in several respects: 1) Selden had applied for a patent for his bookkeeping system, and apparently hadn’t get one; 2) the complaint characterized Selden as the author and inventor of the Selden system as well as the author and inventor of several books; 3) the trial court decision accepted the characterization of Selden as the author and inventor of a bookkeeping system as well as of certain books; 4) 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; 5) the complaint raised the issue of the novelty of Selden’s system and lawyers for Selden argued its novelty to the Supreme Court; and 6) 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 *Drury* decision supported Selden’s claim that author/inventors could get exclusive rights to control uses of novel systems through copyright law, see *supra* notes 52-57 and accompanying text, and the Drone treatise had endorsed *Drury*. See Drone at 406.

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?<sup>108</sup> 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?<sup>109</sup> Was he, in modern parlance, a free-rider or a fair follower?

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 key similarities between Selden's and Baker's works were not due to their being about the same subject, nor to drawing ideas and information from the same common sources, which the Drone treatise and prior cases had recognized as reasons why works might be very similar to one another without infringing.<sup>110</sup>

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) or ideas, or had only copied the useful art or

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<sup>108</sup> See Drone, Chapters 2, 3 and 8. Drone believed that taking a material part of a copyrighted work was piracy. *Id.* at 385, 407-08, 413-14.

<sup>109</sup> *Id.* at 407-08. Drone criticized improvement as a defense, *id.* at 406. although the famous *Sayre v. Moore* decision had endorsed it. See *Sayre v. Moore*, 1 East 361 (1785).

<sup>110</sup> Drone at 416-17; *Emerson v. Davies*, 3 Story 768, 778 (1845).

ideas themselves.<sup>111</sup> In the absence of a patent,<sup>112</sup> the useful art depicted in a work, along with its ideas, could be used and copied by anyone, even in directly competing works. Any necessary incidents to implementing the art (e.g., blank forms illustrating use of 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 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.<sup>113</sup>) But the Court intended to convey a substantially different message.

To come afresh to the *Baker* decision and to discern how important the patent/copyright distinction was to the *Baker* ruling,<sup>114</sup> it is helpful to review core parts of the opinion. The Court perceived the key question to be “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.”<sup>115</sup> 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

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<sup>111</sup> The Supreme Court did not use the word “expression” in the *Baker* opinion.

<sup>112</sup> The Court did not specifically mention utility patents. It spoke only of patents, but viewed in context, it seems to have meant utility patents. Following the Court in this respect, I use the term “patent” to mean “utility patent.”

<sup>113</sup> This concept is discussed infra notes 196-206 and accompanying text.

<sup>114</sup> Five of the seven paragraphs of the *Baker* opinion which constitute the core of the Court’s analysis mention the patent/copyright distinction. 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.

<sup>115</sup> *Baker*, 101 U.S. at 101.

headings...without violating the copyright.”<sup>116</sup> 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 acquisition to the practical knowledge of the community.”<sup>117</sup> But the Court perceived “a clear distinction between the book, as such, and the art which it is intended to illustrate.”<sup>118</sup> 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.”<sup>119</sup> 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.”<sup>120</sup> Exclusive rights to inventions can only be obtained by subjecting one’s claims to Patent Office examination.<sup>121</sup>

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 about 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, copyright in the book would not give the author an exclusive right to control the

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<sup>116</sup> Id.

<sup>117</sup> Id. at 102.

<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> Id.

use of perspective.<sup>122</sup> 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 diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires.”<sup>123</sup>

Yet, the Court also made clear that these observations did not apply to “ornamental designs or pictorial illustrations addressed to the taste.”<sup>124</sup> Of such works, “it may be said that their form is their essence and their object the production of pleasure in their contemplation.”<sup>125</sup> Scientific and technical works were different because “their final end [is] in application and use.”<sup>126</sup> The explanatory texts of such works can 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.”<sup>127</sup> (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.”<sup>128</sup> (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,”<sup>129</sup> as were the ruled lines and headings that implemented the system.

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<sup>122</sup> 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.

<sup>123</sup> Id. at 103.

<sup>124</sup> Id.

<sup>125</sup> Id. at 103-04.

<sup>126</sup> Id. at 104.

<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Id.

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 more closely than usual with the actual work performed by the operator who uses the art.”<sup>130</sup> 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.”<sup>131</sup> But the principle was the same regardless of whether the useful art was embodied in writing or in metal.<sup>132</sup>

Near the end of the *Baker* opinion, seemingly tacked on as an afterthought, is a set of six paragraphs discussing prior caselaw.<sup>133</sup> The Court agreed with *Page v. Wisden* that cricket scoring sheets were uncopyrightable: “To say that a particular mode of ruling a book constituted an object for a copyright is absurd.”<sup>134</sup> It also questioned *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.”<sup>135</sup>

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<sup>130</sup> Id.

<sup>131</sup> Id. at 105.

<sup>132</sup> Id. The Court characterized the “object” of the copyrighted work as explanation and of a useful art as use, saying that exclusive rights in use were only available with a patent. Id.

<sup>133</sup> The *Baker* opinion does not mention the conventional copyright cases discussed in the briefs, nor any copyright treatises. Justice Bradley, as a patent expert, may not have been as familiar with the copyright literature, or he may simply have not found it very helpful in analyzing the *Baker* case.

<sup>134</sup> 20 L. T. 435, discussed in *Baker* at 106-07.

<sup>135</sup> Id. *Baker*’s concern that inventors should not be able to get patent-like protection from copyrights in their writings resonates with concerns Justice Bradley had expressed in some patent decisions. The public interest in free competition would be harmed if courts allowed patent applicants or patentees to game the patent system, for example, by seeking to broaden patent claims through reissue proceedings. 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). Bradley may have realized that upholding Selden’s claim would significantly undermine incentives to use the patent system, for who would bother to go to the Patent Office and subject a claimed invention to examiner scrutiny if he could simply write an article about it and thereby get exclusive rights to its use? In patent law, publishing a description of an invention without seeking a patent within a reasonable time dedicates it to the public domain.

The *Baker* decision ends with the conclusion that “blank account-books are not the subject of copyright, and that the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book.”<sup>136</sup> The Court thought that these conclusions followed from its agreement with *Page* about the uncopyrightability of blank forms and its doubts about *Drury*'s grant of patent-like protection over practical use of *Drury*'s copyrighted clothing patterns. Viewed in context of the case as a whole, the Court appears to have held Selden's forms to be uncopyrightable not because they were blank (and hence lacking in authorship),<sup>137</sup> but because the Court viewed the forms as embodiments of Selden's system.

**The Legacy of Baker:** *Baker v. Selden* is one of the few 19<sup>th</sup> century copyright decisions to have had continuing significance in the copyright caselaw and literature. *Baker* contains potent statements of limiting principles of copyright law from which many subsequent courts and commentators have drawn guidance.<sup>138</sup> Virtually every intellectual property and copyright casebook contains an edited version of the case. Its principal holding—that copyright does not protect systems described in copyrighted works—is now codified in Section 102(b) of the Copyright Act.<sup>139</sup> Also codified are three other emanations of *Baker*: the useful article limitation on the copyrightability of

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<sup>136</sup> *Baker*, 101 U.S. at 107.

<sup>137</sup> Most of the forms in Selden's books were not, in fact, blank, but contained sample entries to illustrate how to use the system. See Record at 22-29. Baker was not charged with copying these entries.

<sup>138</sup> A LexisNexis shepard search for citations to *Baker v. Selden* as of August 13, 2004, 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 the same day 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.

<sup>139</sup> “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).

pictorial, sculptural, and graphic works<sup>140</sup>; the rule that copyright protection for drawings of useful articles does not extend to the useful articles depicted in the drawings<sup>141</sup>; and the rule that blank forms are uncopyrightable.<sup>142</sup> *Baker* has also been widely cited for other doctrines and principles.<sup>143</sup> 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 evolved over time.

**The Uncopyrightability of Useful Arts:** The *Baker* decision announced that innovative useful arts are not copyrightable subject matter.<sup>144</sup> Relatively few post-*Baker* cases have claimed copyright in original designs for useful articles, and no such case has been successful.<sup>145</sup> Prior to 1976, Copyright Office regulations distinguished between original designs of useful articles, which were unregistrable on subject matter grounds, and original works of artistic craftsmanship, such as jewelry, which could qualify for copyright protection.<sup>146</sup> In the Copyright Act of 1976, Congress sharpened the distinction between protectable works of artistic craftsmanship and unprotectable useful articles by providing that original works of artistic craftsmanship can be protected as pictorial, graphic, or sculptural works “insofar as their form but not their mechanical or utilitarian

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<sup>140</sup> See definitions of pictorial, graphic, and sculptural works and of useful article in 17 U.S.C. sec. 101.

<sup>141</sup> 17 U.S.C. sec. 113(b).

<sup>142</sup> Copyright Office Regulations, 37 C.F.R. sec. 202.1(c).

<sup>143</sup> This chapter will discuss four other copyright doctrines influenced by *Baker*: the patent/copyright distinction, the idea/expression distinction, the idea/expression merger principle, and the narrow scope of protection for functional writings. *Baker* has also been widely cited for other principles. See, e.g., *Feist Pub. Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 350 (1991) (freedom of ideas).

<sup>144</sup> *Baker*, 101 U.S. at 102-03.

<sup>145</sup> See, e.g., *Brandir Int'l v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987) (design of bicycle rack held uncopyrightable). *Baker* was even influential on this point in England. In *Hollinrake v. Truswell*, 3 Chanc. D. 420 (1894), 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. 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. *Id.* at 426-29.

<sup>146</sup> See discussion of history of these regulations in *Mazer v. Stein*, 347 U.S. 201, 211-13 (1954),

aspects are concerned.”<sup>147</sup> Designs of useful articles are protectable “only if, and only to the extent that, [they] incorporate[] pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”<sup>148</sup> The test for whether useful articles are disqualified from copyright is whether they have “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”<sup>149</sup> Harley-Davidson motorcycle designs may be elegant enough to be displayed in the Guggenheim Museum, but art and utility are too intermingled for these designs to qualify for copyright protection.

Congress has created two exceptions to the general *Baker*-inspired rule against copyright for works that might otherwise be deemed unprotectable useful arts: first, when it decided to protect machine-executable computer programs by copyright,<sup>150</sup> and second, when it extended copyright protection to architectural works in 1991, as part of the U.S. accession to the Berne Convention.<sup>151</sup>

**The Drawing/Useful Art Distinction:** More common have been cases in which plaintiffs have sought to assert copyright protection in useful articles indirectly by claiming that defendants copied designs from copyrighted drawings. National Cloak, for example, was unsuccessful in its copyright infringement suit against a competitor insofar

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<sup>147</sup> 17 U.S.C. 101 (definition of “pictorial, graphic, and sculptural works”).

<sup>148</sup> *Id.*

<sup>149</sup> 17 U.S.C. sec. 101 (definition of “useful article”).

<sup>150</sup> Pub. L. No. 96-517, sec. 10(a), 94 Stat. 3028 (1980). See discussion *infra* notes 202-17 and accompanying text.

<sup>151</sup> Pub. L. No. 101-650, sec. 706, 104 Stat. 5133 (1990). Prior to this statutory change, the copyright caselaw generally accepted that copying of architectural plans might infringe copyright, but not construction of a building depicted in copyrighted architectural drawings. See *DeSilva Construction Corp. v. Herrald*, 213 F.Supp. 184, 195-96 (M.D. Fla. 1962).

as it was based on copying of dress designs from National Cloak's drawings.<sup>152</sup> Also unsuccessful were claims of infringement based on copying of a parachute design, a bridge approach design, and a natural gas pipeline route from copyrighted drawings.<sup>153</sup> *Baker* is the primary precedent courts have relied upon in denying such claims. Extending copyright protection to useful designs depicted in drawings would be inconsistent with *Baker* because it would indirectly protect the useful arts that *Baker* opined were uncopyrightable subject matter. This aspect of *Baker*'s legacy is codified in the Copyright Act of 1976.<sup>154</sup>

**The System/Description Distinction.** The Supreme Court distinguished in *Baker* between Selden's bookkeeping system, which copyright did not protect, and Selden's description or explanation of the system, which copyright law protected against improper appropriation.<sup>155</sup> Given the clarity of the Court's statement about the unprotectability of methods and systems, it is surprising how many plaintiffs have sought copyright protection for systems described or otherwise embodied in copyrighted works. This was especially common in the 1930's through early 1950's. 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,<sup>156</sup> another a system for teaching cornet playing,<sup>157</sup> a third devised a

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<sup>152</sup> Nat'l Cloak & Suit Co. v. Standard Mail Order, 191 F. 528 (S.D.N.Y. 1911).

<sup>153</sup> 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); Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458 (5<sup>th</sup> Cir. 1990)(pipeline design).

<sup>154</sup> 17 U.S.C. sec. 113(b).

<sup>155</sup> *Baker*, 101 U.S. at 104. The Court regarded useful arts to be equally unprotectable whether they were depicted in drawings or texts. *Id.*

<sup>156</sup> Brief English Systems v. Owen, 48 F.2d 555 (2d Cir. 1931).

<sup>157</sup> Jackson v. C. G. Conn Ltd., 9 U.S.P.Q. (BNA) 225 (W.D. Okla. 1931).

bridge game problem and solution,<sup>158</sup> a fourth invented a system for giving away prizes in theatres,<sup>159</sup> a fifth devised new roller skating races,<sup>160</sup> a sixth made up a system for aiding tax preparations,<sup>161</sup> while a seventh developed a system for reorganizing insolvent life insurance companies.<sup>162</sup> These creators (and others<sup>163</sup>) sought to use copyright law to protect their creations against competitive copying. Courts relied principally on *Baker* in ruling against these infringement claims.

In the early twentieth century, a few courts began to reframe *Baker* as an idea/expression case, moving away from the system/description distinction. Had the Second Circuit followed *Baker*'s analysis in *Guthrie v. Curlett*,<sup>164</sup> for example, it would have denied Guthrie's claim of copyright infringement because Curlett had copied Guthrie's system for consolidating freight tariff information, not his description or explanation of the system.<sup>165</sup> The Second Circuit instead reasoned that Curlett had not copied Guthrie's means of expression, citing *Baker* only once for the proposition that an author "must be protected in his choice of expression, and his copyright held to that."<sup>166</sup>

*Baker*'s system/description distinction did not impress Learned Hand, then a district court judge, in *Reiss v. National Quotations*, which upheld the validity of a

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<sup>158</sup> Russell v. Northeastern Pub. Co., 7 F. Supp. 571 (D. Mass. 1934).

<sup>159</sup> Affiliated Ent., Inc. v. Gantz, 86 F.2d 597 (10<sup>th</sup> Cir. 1936).

<sup>160</sup> Selzer v. Sunbrock, 22 F. Supp. 621 (S.D. Cal. 1938).

<sup>161</sup> Aldrich v. Remington Rand, Inc., 52 F. Supp. 732 (D. Tex. 1942).

<sup>162</sup> Crume v. Pacific Mutual Life Ins. Co., 140 F.2d 182 (7<sup>th</sup> Cir. 1944).

<sup>163</sup> See, e.g., Dunham v. General Mills, 116 F.Supp. 152 (D. Mass. 1953).

<sup>164</sup> 36 F.2d 694 (2d Cir. 1929).

<sup>165</sup> Guthrie had not only sought, but obtained, a patent on his method of compressing freight tariff information. His first lawsuit against Curlett was for patent infringement. The Second Circuit ruled that Guthrie's patent claimed unpatentable subject matter. See *Guthrie v. Curlett*, 10 F.2d 725 (2d Cir. 1926). The copyright decision makes no mention of Guthrie's patent, nor of the prior decision on the patent claim.

<sup>166</sup> *Id.* at 696. See also *Nutt v. National Institute for the Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929)(finding infringement of instructional materials, citing *Baker* for the idea/expression distinction).

copyright in a code book of made-up words.<sup>167</sup> National Quotations probably argued that under *Baker*, the contents of the book embodied an unprotectable coding system and/or that the book's object was practical use, not explanation. Like Selden's form, the code book conveyed no thought and expressed no idea. Hand dismissed this defense, characterizing *Baker* as "too foreign to the case at bar to deserve comment."<sup>168</sup> 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 on the idea/expression distinction and on the patterns of abstraction that might be laid upon any work.<sup>169</sup> Under the patterns test, higher level abstractions became unprotectable ideas, while lower level abstractions tended to be considered "expression."<sup>170</sup> Hand developed and applied the patterns test in cases involving literary and dramatic works. However, some courts have applied the patterns test and idea/expression distinction in other kinds of cases, occasionally resulting in different outcomes than a *Baker*-inspired system/description test would have produced.<sup>171</sup>

After enactment of the Copyright Act of 1976, which codified the unprotectability of systems and methods of operation embodied in copyrighted works, one might have expected courts to be more attentive to the system/description distinction. However, defense efforts to rely on *Baker* and section 102(b)'s exclusion of methods and systems

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<sup>167</sup> 276 F. 717 (S.D.N.Y. 1921). The book was intended to enable confidential transmissions of messages via telegraph between parties who agreed that certain made-up words would signify English words.

<sup>168</sup> *Id.* at 719. Hand did not explain why he thought *Baker* was "foreign" to the *Reiss* case.

<sup>169</sup> 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.

<sup>170</sup> See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936)(detailed sequences of events within scenes held to be protectable expression).

<sup>171</sup> See, e.g., *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F.Supp. 37 (D. Mass. 1990).

have generally fallen on deaf ears in the past few decades.<sup>172</sup> No consensus exists in the post-1976 Act caselaw or commentary about what systems or methods are excluded under sec. 102(b) or how to test for their exclusion.

**Uncopyrightability of Blank Forms:** The concluding paragraph of the *Baker* decision states that “blank account-books are not the subject of copyright.”<sup>173</sup> Courts have generalized this proposition from *Baker* and ruled that blank forms are uncopyrightable subject matter.<sup>174</sup> The U.S. Copyright Office has accordingly refused to register claims of copyrights in “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.”<sup>175</sup> Several cases in the 1970’s challenged the “blank form” exclusionary rule after *Nimmer on Copyright*, an influential treatise, challenged it as unsound. If forms satisfied copyright’s originality standard, Nimmer thought they should be protectable by copyright law.<sup>176</sup> A few plaintiffs in the 1970’s persuaded courts to follow Nimmer and extend copyright protection to blank forms.<sup>177</sup> However, most decisions follow *Baker* in refusing copyright protection to blank forms, although it is not always clear whether this is due to a perceived lack of authorship in “blank” forms or instead to concerns that forms

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<sup>172</sup> See, e.g., *Toro Co. v. R&R Products Co.*, 787 F.2d 1208 (8<sup>th</sup> Cir. 1988)(numbering system for products and parts); *ADA v. Delta Dental Plans Ass’n*, 126 F.3d 977 (7<sup>th</sup> Cir. 1997)(system of abbreviating types of dental treatments); *Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991)(method for predicting outcomes of baseball games).

<sup>173</sup> *Baker*, 101 U.S. at 107.

<sup>174</sup> See, e.g., *Time-Saver Check, Inc. v. Deluxe Check Printers, Inc.*, 178 USPQ (BNA) 537 (ND Tex. 1978).

<sup>175</sup> 37 C.F.R. sec. 202.1(c).

<sup>176</sup> See MELVILLE NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, secs. 2.08, 2.18 (2004) (criticizing *Baker* and arguing that original forms should be copyrightable). The Nimmer treatise acknowledges that the Copyright Office regulation follows *Baker*. *Id.* at n. 22.

<sup>177</sup> See *Norton Printing Co. v. Augustana Hospital*, 155 USPQ (BNA) 133 (N.D. Ill. 1967); *Harcourt Brace & World, Inc. v. Graphics Controls Corp.*, 329 F. Supp. 517 (SDNY 1971).

are embodiments of systems for organizing information that should not be privatized through copyright law.<sup>178</sup>

**The Patent/Copyright Distinction:** The patent/copyright distinction was central to the Court's analysis of the *Baker* case. The Court perceived Selden to be trying to get exclusive rights to control practical use of his bookkeeping system through the copyright suit against Baker. The Court opined that to get exclusive rights over practical use of a useful art, one needed to apply for and comply with requirements of patent law, not just publish a book about it.

The useful article exclusion from copyright protection and the drawing/useful art distinction discussed above derive from the Court's patent/copyright distinction.<sup>179</sup> Some blank form cases have also invoked the patent/copyright distinction from *Baker*. In *Brown Instrument Co. v. Warner*, for example, the court upheld the Copyright Office's refusal to register 83 charts that Brown had designed for use with various machines to record data.<sup>180</sup> The court explained:

Both law and policy forbid monopolizing a machine except within the comparatively narrow limits of the patent system. In several patents on recording machines, the necessary printed chart is rightly claimed as one of the operative elements. Since the machines that cooperate with the charts in suit are useless without them, to copyright the charts would in effect continue the appellant's monopoly of its machines beyond the time authorized by the patent law.<sup>181</sup>

The court in *Brown* drew this principle from *Baker*.

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<sup>178</sup> See, e.g., *Bibbero Systems, Inc. v. Colwell Systems, Inc.*, 893 F.2d 1104 (9<sup>th</sup> Cir. 1990).

<sup>179</sup> See, e.g., *National Cloak & Suit Co. v. Standard Mail Order*, 191 F. 528 (S.D.N.Y. 1911) (“a manufacturer of unpatented articles cannot practically monopolize their sale by copyrighting a catalog containing illustrations of them”).

<sup>180</sup> 161 F.2d 910 (D.C. Cir. 1947). See also *Taylor Instrument Co. v. Fawley Brost Co.*, 139 F.2d 98 (7<sup>th</sup> Cir. 1943).

<sup>181</sup> *Brown Instrument*, 161 F.2d at 911.

Over time, *Baker*'s patent/copyright distinction has been questioned and qualified to some extent. The Court did not find this distinction useful, for example, in its 1954 *Mazer v. Stein* decision as applied to copyright and design patent subject matters.<sup>182</sup> Stein was the creator of several statuettes, which he registered as original works of art. Thereafter, Stein mass-produced copies of the statuettes to serve as lamp bases. After competitors copied the lamps, Stein sued them for copyright infringement. The defendants challenged the validity of Stein's copyrights, arguing that the lamp bases were unprotectable utilitarian articles, not protectable works of art.<sup>183</sup> Because Stein could have, but had not, obtained design patent protection for the statuette-lamp bases, Mazer et al. argued the statuette-lamp bases were ineligible for copyright protection.<sup>184</sup>

The Supreme Court upheld the validity of Stein's copyrights. Neither the mass-production of the statuettes nor their use as lamp bases disqualified them from copyright protection.<sup>185</sup> The Court's response to Mazer's patent/copyright exclusivity argument was that "[n]either the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted."<sup>186</sup> While this statement is literally correct, the useful article limitation on copyright protection for pictorial, graphic and sculptural works has averted conflicts between patents and copyrights in such works.

Insofar as *Baker* posits an intellectual property universe in which some intellectual creations (original writings) are the subject matter of copyrights and others (inventive useful arts) are the subject matter of patents, it seems oversimplistic. This

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<sup>182</sup> 347 U.S. 201 (1954).

<sup>183</sup> The defendants relied on *Baker* for this proposition. They also argued that the statuettes were not works of art because they had been mass-produced.

<sup>184</sup> The defendants drew this principle from *Baker* as well.

<sup>185</sup> The statuettes were not operational parts of the lamp, but rather ornamental features. *Baker* recognized that copyright was appropriate for ornamental designs that appealed to taste. *Baker*, 101 U.S. at 103.

<sup>186</sup> *Mazer*, 347 U.S. at 217. Design patents are available for original and inventive ornamental designs for articles of manufacture. See 35 U.S.C. sec. 171.

framework assumes that an intellectual creation is either a writing or a useful art (and can't be both at the same time), and that once its nature has been discerned, the innovation can be consigned to the appropriate legal regime.

Some intellectual creations, however, do not readily conform to this model.<sup>187</sup> Computer programs, for example, are “machine[s] whose medium of construction happens to be text.”<sup>188</sup> Computer program code is routinely protected by copyright law as an original work of authorship. Although programmers do not generally seek patents for computer program code, the Court of Appeals for the Federal Circuit would almost certainly regard code as patentable subject matter.<sup>189</sup> Since the mid-1980's, many patents have issued for functional design elements of programs, such as efficient algorithms or data structures, yet some cases and commentators regard structural designs of programs as protectable by copyright law.<sup>190</sup> The practical effect of patents on functional designs in programs is to limit the ability of subsequent programmers to embody the patented functionality in independently written machine-executable code. Intellectual property lawyers differ in their views about the extent to which (if at all) there is overlap in what copyright and patent protect in computer programs and the consequences of overlap.<sup>191</sup>

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<sup>187</sup> Some innovations—for example, mathematical formulas and scientific methods—may fall outside both patent and copyright subject matters.

<sup>188</sup> Pamela Samuelson, et al., *A Manifesto on the Legal Protection of Computer Programs*, 94 Colum. L. Rev. 2308, 2320 (1994).

<sup>189</sup> See, e.g., *In re Beauregard*, 53 F.3d 1583 (Fed. Cir. 1995)(software on floppy disk as patentable subject matter). See also *Story of Diamond v. Diehr*, *infra*.

<sup>190</sup> See, e.g., *Whelan Associates v. Jaslow Dental Labs.*, 797 F.2d 1222 (3d Cir. 1986)(taking a broad view of copyright protection for program structure); cf. Lloyd Weinreb, *Copyright for Functional Expression*, 111 Harv. L. Rev. 1149 (1998) (arguing against copyright protection for program structure). See also *infra* notes 205-17 and accompanying text.

<sup>191</sup> See, e.g., Pamela Samuelson, *Survey on the Patent/Copyright Interface for Computer Programs*, 17 AIPLA Q.J. 256 (1989) (showing divergence of opinion on the roles that patent and copyright law should play in the protection of program innovations); Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 Conn. L. Rev. 439 (2003)(suggesting method for distinguishing patent and copyright subject matters).

**The Idea/Expression Distinction:** Copyright cases and treatises predating *Baker* recognized the protectability of authorial expression and the unprotectability of ideas.<sup>192</sup> So, the idea/expression distinction is not wholly original to *Baker*. *Baker* does, however, contain powerful statements of this distinction. After *Baker*, it became more common to inquire whether the defendant copied the plaintiff/author's expression or her ideas, rather than whether the defendant had copied a material part of the plaintiff's work.<sup>193</sup> Yet, citations to *Baker* for the idea/expression distinction were relatively infrequent prior to the Supreme Court's decision in *Mazer v. Stein*. The Court in *Mazer* characterized *Baker* as an idea/expression case, saying that it had 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."<sup>194</sup> The Nimmer treatise interpreted *Mazer* as having narrowed the ruling in *Baker* to its statement of the idea/expression distinction.<sup>195</sup> Perhaps owing to the influence of Nimmer's treatise, *Baker* is now best known as an idea/expression case.

**Idea/Expression Merger:** The idea/expression merger doctrine is sometimes attributed to *Baker*.<sup>196</sup> The *Baker* opinion arguably supports this proposition by saying that "where the art [a work] teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the

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<sup>192</sup> The Drone treatise, which was published, the year before *Baker*, discusses caselaw concerning the unprotectability of ideas and the protectability of expression. Drone at 93, 385.

<sup>193</sup> See, e.g., *Simms v. Stanton*, 75 F. 6, 10 (C.C.N.D. Cal. 1896).

<sup>194</sup> *Mazer*, 347 U.S. at 217.

<sup>195</sup> Nimmer, *supra*, sec.2.18 [D](1).

<sup>196</sup> See, e.g., *Kern River*, 899 F.2d at 1463-64.

public.”<sup>197</sup> However, the merger doctrine did not begin to emerge until the late 1950’s and did not reach its apogee until 1983.<sup>198</sup>

*Herbert Rosenthal Jewelry Corp. v. Kalpakian*<sup>199</sup> was among the cases in this period that considered what copyright law should do when there was only one or a small number of ways to effectively express certain ideas. Rosenthal manufactured a line of gold pins in the shape of a bee encrusted with jewels. When Kalpakian began selling jeweled bees that were very similar to Rosenthal’s, Rosenthal sued his competitor for copyright infringement. Kalpakian’s main defense was that he drew his design from nature. The Ninth Circuit ruled that Rosenthal’s copyrights were invalid because “[t]here is no greater similarity between the pins of plaintiffs and defendants than is inevitable from the use of jewel-encrusted bee forms in both.”<sup>200</sup> When an idea and its expression “are thus inseparable, copying the ‘expression’ will not be barred since protecting the expression would confer a monopoly of the ‘idea’ upon the copyright owner free of the conditions and limitations imposed by patent law.”<sup>201</sup>

The merger doctrine, as such and so named, emerged in *Apple Computer, Inc. v. Franklin Computer Corp.*<sup>202</sup> in response to a *Baker*-inspired challenge to the copyrightability of machine-executable forms of Apple’s operating system programs. Franklin argued that *Baker* forbade granting copyright protection to useful arts, such as

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<sup>197</sup> *Baker*, 101 U.S. at 103.

<sup>198</sup> See, e.g., *Continental Casualty Co. v. Beardsley*, 151 F.Supp. 28 (S.D.N.Y. 1957)(no infringement despite similarities in forms providing blanket indemnity for replacement of lost stock certificates); *Morrissey v. Proctor & Gamble Co.*, 379 F.3d 675, 678-79 (1<sup>st</sup> Cir. 1967)(sweepstakes contest rules uncopyrightable); *Apple Computer, Inc. v. Franklin Computer, Inc.*, 714 F.2d 1240 (3d Cir. 1983).

<sup>199</sup> 446 F.2d 738 (9<sup>th</sup> Cir. 1971).

<sup>200</sup> *Id.* at 742.

<sup>201</sup> *Id.*

<sup>202</sup> 714 F.2d 1240 (3d Cir. 1983)

machines and machine processes.<sup>203</sup> Apple's programs were, Franklin observed, virtual machines as well as machine processes.

The Third Circuit upheld the validity of Apple's copyrights and found them infringed by Franklin's exact copying of the Apple code. The court regarded Congress as having decided to protect machine-executable forms of programs by copyright law. It construed *Baker* as denying protection to machine-executable programs only when there was a merger of idea and expression so that it was impossible for firms such as Franklin to write independently created programs to perform the same functions as the Apple programs.<sup>204</sup>

The Third Circuit extended its merger-based analysis of computer program copyrights and its narrow interpretation of *Baker* in *Whelan Associates v. Jaslow Dental Labs*.<sup>205</sup> Whelan charged Jaslow with copying the structure, sequence and organization ("SSO") of her dental laboratory programs. Jaslow claimed that program SSO was not protectable by copyright law because it constituted methods and processes that were unprotectable under *Baker* and Section 102(b) of U.S. copyright law. The Third Circuit disagreed, in part because it regarded computer programs as "literary works" under the statute. Since copyright law protects the SSO of other literary works, the court reasoned that program SSO should also be protected. It also endorsed a merger-based test for software copyright infringement, under which programmers would be liable for copyright

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<sup>203</sup> The trial court found Franklin's *Baker*-inspired defense convincing. See *Apple Computer, Inc. v. Franklin Computer, Inc.*, 545 F.Supp. 812 (ED Pa. 1982).

<sup>204</sup> *Apple*, 714 F.2d at 1253. See also *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 524 (9<sup>th</sup> Cir. 1984).

<sup>205</sup> 797 F.2d 1222 (3d Cir. 1986).

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.<sup>206</sup>

**Limited Scope for Functional Writings:** Since 1992, *Baker* has been reinvigorated by a series of decisions taking a much narrower view than *Whelan* of the scope of copyright protection in functional writings, such as computer programs.<sup>207</sup> *Computer Associates Int'l v. Altai, Inc.* initiated this trend with its criticism of *Whelan* for its overbroad interpretation of the scope of protection for computer programs.<sup>208</sup> The Second Circuit cited *Baker* in holding that functional design elements of computer programs, such as program-to-program interfaces, were not protectable by copyright law.<sup>209</sup> It directed courts to assess whether elements of programs that defendants may have copied were constrained by external factors, dictated by efficiency, or were standard programming ideas. If so, these similarities were to be filtered out before courts made a determination as to whether the defendant's program infringed.<sup>210</sup> *Altai* has displaced *Whelan* as the standard framework of analysis of the proper scope of copyright protection for computer programs.<sup>211</sup>

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

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<sup>206</sup> Id. at 1234-45. The merger doctrine has also been applied in other kinds of copyright cases. See, e.g., *Kern River*, 899 F.2d at 1463-64 (gas pipeline map).

<sup>207</sup> The *Whelan* analysis was initially influential in other computer program cases. See, e.g., *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9<sup>th</sup> Cir. 1989); *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 67 (D. Mass. 1988).

<sup>208</sup> 982 F.2d 693, 705-06 (2d Cir. 1992).

<sup>209</sup> Id. at 703-04.

<sup>210</sup> Id. at 707-11.

<sup>211</sup> 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*).

was the First Circuit in *Lotus Dev. Corp. v. Borland Int'l.*<sup>212</sup> Lotus charged Borland with copyright infringement because it copied the command hierarchy of the Lotus 1-2-3 program in an emulation mode of its competing spreadsheet program. Borland argued that this hierarchy constituted an unprotectable functional system or method under *Baker* and Section 102(b) because the hierarchy was indispensable to users' ability to construct compatible "macros" for commonly used sequences of operations. The First Circuit, invoking Section 102(b) and *Baker*, decided that Lotus' command hierarchy was an unprotectable method of operating a computer to perform spreadsheet functions.<sup>213</sup>

*Sega Enterprises Ltd. v. Accolade, Inc.* sought to ensure that copyright law would not indirectly protect functional elements of programs.<sup>214</sup> Reverse engineering of program code for purposes such as getting access to functional design elements of programs, such as interfaces, was held to be fair use. 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,"<sup>215</sup> 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."<sup>216</sup> Although the Ninth Circuit did not cite *Baker* for this proposition, the statement resonates with the Court's decision in *Baker*. The Ninth

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<sup>212</sup> 49 F.3d 807 (1<sup>st</sup> Cir. 1995).

<sup>213</sup> *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 211, at 131 (relying on *Baker*).

<sup>214</sup> 977 F.2d 1510, 1527-28 (9<sup>th</sup> Cir. 1992).

<sup>215</sup> *Id.* at 1526.

<sup>216</sup> *Id.*

Circuit also agreed with *Altai* that functional works such as computer programs and those describing bookkeeping systems were entitled, as *Baker* had long ago held, to only “thin” protection from copyright law.<sup>217</sup> Other cases have followed *Sega*, although some controversy still exists about the proper scope of copyright protection for computer programs and the extent to which *Baker* limits the scope of copyright for functional writings.<sup>218</sup>

**Conclusion:** *Baker v. Selden* was a watershed case in the history of American copyright law. Although the distinction between expression and ideas was long-standing in copyright law, the Court’s decision in *Baker* affected how courts interpreted this rule thereafter because it directed courts to focus more precisely on what the defendant had actually copied from the plaintiff’s work. Copying ideas or useful arts, even when embodied in copyrighted works, was fair game as a matter of copyright law, although copying an author’s explanation or illustration of those ideas or useful arts was not. This rule applied even if the most valuable aspect of an author’s work—such as Selden’s bookkeeping system—was the useful art itself. The Court perceived in the lower court ruling in *Baker* and in *Drury v. Ewing* a deep confusion about the nature of copyright and of patent law and the respective roles of these laws in the protection of intellectual creations. It sought to dispel this confusion by making a sharp distinction between copyright and patent subject matters and giving numerous examples to illustrate this distinction. Courts in subsequent cases have generally followed *Baker* in this and several other respects, as the review of *Baker*’s legacy has shown.

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<sup>217</sup> Id. at 1524.

<sup>218</sup> See, e.g., *Symposium, Toward a Third Intellectual Property Paradigm*, 94 Colum. L. Rev. 2307 (1994).

This Story of Baker and Selden illustrates why copyright law should allow second comers such as Baker to build upon a first author's work, or put another way, why authors of functional writings should not have too much control over subsequent adaptations of their work. Selden's forms may have been a substantial improvement over the old-fashioned bookkeeping system previously used in Ohio, but they represented only one stage in the evolving art of bookkeeping. Selden's death meant that any further innovation in this field would have to come from others. Baker advanced the state of the art when he realized that county officials wanted to keep closer track of accounts than Selden's forms permitted. Baker's forms accommodated this interest which is probably why Baker attracted more customers than Selden did. When Mrs. Selden challenged him as a pirate, Baker not only stood his ground, but also continued to improve his system and to write additional books explaining the principles of bookkeeping, thereby contributing to the growth of knowledge in this important field. Had Mrs. Selden prevailed, further improvements to the "art" of bookkeeping might well have been thwarted until Selden's copyrights expired. This outcome would have disserved both patent and copyright goals because it would have slowed progress in the useful art of bookkeeping and would even have impeded fellow bookkeepers from explaining better than Selden had how to use his eponymous system.