REVIEW ESSAY

Goldstein on Copyright Law: A Realist's Approach to a Technological Age


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The treatise writer's dilemma is that while reliability requires faithful interpretation of the law as it stands, he or she must also remain sufficiently detached and forward-looking to assist decisionmakers in shaping the law as it ought to be. The better treatise writers resolve this tension by devising jurisprudential and methodological approaches that broaden the horizons of experienced practitioners in the field. Paul Goldstein's Copyright: Principles, Law and Practice1 fits this mold. His ability to use economic analysis to illuminate discrepancies between judicial decisions and legal doctrines distinguishes this major new treatise from other useful commentaries in the field.2

Professor Goldstein's treatise arrives at a time when economic and international concerns greatly influence the formulation of domestic intellectual property law.3 Authors' rights in the United States, for example, must increasingly be construed with an eye to the Revised Berne Convention.4

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1. Hereinafter cited only by volume (or supplement), section, and page number.


4. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971 [hereinafter Berne Convention]. This text and other important domestic and international documents are reprinted in volume 3 of Goldstein's treatise and the supplement.
which this country joined in 1989.5 Additional international obligations that could enhance the worldwide protection of American authors, artists, and composers may yet be written into the framework of the General Agreement on Tariffs and Trade (GATT).6

The United States leadership in the current drive to strengthen international protection of authors' rights contrasts sharply with its isolationist past, and the older treaties reflect different stages of this evolution. In 1879, for example, when Eaton Drone published his seminal treatise,7 the United States afforded no protection against the unauthorized reproduction of foreign works on its territory. Such practices were, in his words, neither "piracy, because no law [was] violated" nor "plagiarism . . . without misrepresentation as to authorship."8

By 1944, when Horace Ball launched the last major treatise before Melville Nimmer entered the scene,9 the Copyright Act of 1909 still resembled a primitive publisher's law more than the authors' rights laws of the Berne Union countries.10 Ball's task was to describe and compile both heroic decisions of universal importance, such as Bleistein v. Donaldson Lithographing Co.,11 and parochial opinions that departed from general principles recognized by most developed copyright systems, such as White-Smith Music Publishing Co. v. Apollo Co.12

Amidst this ideological uncertainty, the late Professor Nimmer's thirst for legal order produced an organizational tool of fundamental impor-

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10. See, e.g., Ringer, supra note 8, at 1051; see also Zechariah Chafee, Jr., Reflections on the Law of Copyright, 45 COLUM. L. REV. 503, 515-29 (1945). As late as 1983, the United States was "still a long way from accepting the whole range of international ideals embodied in the Berne Convention." Barbara Ringer, United States of America, in INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 480 (S. Stewart 1st ed. 1983).
11. 188 U.S. 239 (1903) (forbidding discrimination based on aesthetic merit in determining eligibility for copyright protection); see H. Ball, supra note 9, at 90, 108-09, 257.
12. 209 U.S. 1 (1908) (applying a visibility requirement to negate protection of musical works embodied in piano rolls); see H. Ball, supra note 9, at 50, 339, 388 n.83. White-Smith has been reversed statutorily. See the definition of "copy" in 17 U.S.C. § 101 (1988); id. § 102(a) (negating visibility requirement). However, some of the policy concerns underlying White-Smith led to a universally recognized compulsory license for mechanical recordings of musical works. See id. § 115; Berne Convention, supra note 4, art. 13(1).
tance. Writing in the period from 1963 to 1985, he imbued his treatise with a deep faith in the common law tradition. In time he undertook to place the technical apparatus of this tradition at the service of the revised 1976 copyright statute, which had suffered the tugs of too many special interests. Nimmer’s treatise artfully blended logic, case precedent, and statutory interpretation into a seemingly coherent body of law that courts and practitioners found manageable.

While Nimmer showed that the domestic copyright system could produce more than an array of result-oriented dogmas, his work also revealed the extent to which that system remained riddled with flawed and contradictory solutions. Congress would eventually eliminate some of the most egregious formalisms when the United States adhered to the Berne Convention in 1989. Other, deeper flaws have proved more difficult to identify and root out. The judicial approach to infringement, for example, lagged behind the times. Progress in this sphere requires the federal courts to move beyond the empty formulas that determined what constituted “copying” under the 1909 Act to a concept of authors’ rights that is more substantial than the ethical principles governing traditional unfair competition law. As matters stood, the more Professor Nimmer’s treatise strove to render domestic copyright law formally coherent, the more apparent its shortcomings as a normative and predictive legal tool became.

The challenge facing a new treatise writer is, therefore, threefold. First, a modern treatise must identify the tensions between actual decisions and established doctrinal formulas, with a view toward clarifying how the underlying policy goals of copyright law are now (and could better be) served in different contexts. Second, a treatise on domestic copyright law should reflect the links between that body of law and the world system in which the United States has lately assumed a leadership role. Third, a treatise writer conscious of the world model must nonetheless focus attention on the abiding strengths of its domestic counterpart to preserve the local “spin” that

13. See generally NIMMER ON COPYRIGHT, supra note 2.
adds variety and depth to the evolving international framework. Professor Goldstein has undertaken these tasks with a clear vision of the issues and admirable success in the elaboration.

Part I of this review discusses Goldstein’s utilitarian approach to copyright law as a whole, as evidenced by the introductory section of the treatise. Part II assesses his efforts to describe the nuances that have crept into the originality requirement since the 1976 Act was adopted. Part III tracks Goldstein’s innovative, highly contextual approach to infringement. Part IV focuses on Goldstein’s treatment of international concerns and the potential conflict between the utilitarian bias of domestic law and the broader policies underlying foreign law. Part V concludes with a positive forecast of the impact this treatise could have on the future development of domestic copyright doctrine.

I. THE UTILITARIAN APPROACH TO INTANGIBLE CREATIONS

Professor Goldstein begins with an extended overview entitled “The Topography of Copyright,” which enables practitioners of varying degrees of expertise to survey the field as a whole before entering into its subtopics in detail. In this introduction, the author emphasizes the vulnerability of those who produce information and forms of artistic expression that are intangible, indivisible, and inexhaustible. Observing that “a competitor would not have to pay for the product of the writer’s labors” in a world without copyright protection, he reminds his readers that property rights “represent the principal vehicle for enabling creators and producers to appropriate the value of their efforts.”

Goldstein acknowledges that copyright law is not the only means of addressing the problem of appropriability and that the copyright solution “inevitably conflicts with the social benefits of indivisibility.” Nevertheless,

22. Vol. 1, § 1.2, p. 10. Indivisibility means that the marginal cost of providing information to an additional user is zero. Static economic analysis would suggest that the price should also be zero, but such a price would provide insufficient dynamic incentives to produce. The copyright monopoly “solves the problem of appropriability and thereby establishes economic incentives to create and make public artistic works.” R. Benko, supra note 20, at 21; cf. Eian MacKaye, Economics of Information and Law 115-17 (1982) (discussing economics of information in general).
the overriding policy goal of copyright law, rooted in the constitutional enabling clause, is "to encourage the widest possible production and dissemination of literary, musical and artistic works." To the extent that copyright law allows creators "to capture the full value that consumers attach to their works and not just the minimum sum that . . . would . . . support their investment," it responds in part to the high risk aversion incurred by those whose livelihood depends on the dissemination of cultural products.

Although this incentive rationale accurately depicts mainstream American thinking about copyright law, it will no more account for all the peculiarities of a developed copyright system than natural rights theory or the protection-of-personality principle much in vogue abroad. For example, incentive theory cannot explain the moral rights, highly developed in some countries, that prevent even one who has paid to commercialize an author's work from doing so in a manner that could prejudice the author's honor or reputation. Nor will incentive theory adequately explain such paternalistic.

27. See W. KINGTON, supra note 20, at 83-84, 112-13 (arguing that because the copyright monopoly does not protect against independent creation, it does not adequately overcome the high risk aversion that undermines rational investment in the generation of information); David Ladd, The Harm of the Concept of Harm in Copyright, 30 J. COPYRIGHT SOC'y 421, 431 (1983) (stressing the negative influence of broad fair use exceptions on risk-taking in authorship and publishing); see also E. MacKAAy, supra note 23, at 115-17 (noting market distortions ensuing from public good problems and uncertainties that would require a higher expected return); J.H. Reichman, Design Protection and the New Technologies: The United States Experience in a Transnational Perspective, 19 U. BALT. L. REV. — [Part III]B (forthcoming) [hereinafter Reichman, Designs and New Technologies] (stressing relation between drive for copyright protection and risk aversion of investors in new technologies). But see W.R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS 238-61 (2d ed. 1989) (criticizing the incentive theory as overprotective of authors at the expense of consumers and discounting the importance of copyright law in conquering risk aversion); Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281 (1970) (questioning the economic necessity for copyright protection, even in the book trade).

28. See, e.g., Nimmer on Copyright, supra note 2, § 1.03[A] (framers did not intend "any higher standard of creation in terms of serving the public interest than that required for other forms of personal property"); H. Ball, supra note 9, at 50 (purpose of copyright is "to secure to the author the results of his own intellectual labor"); see also Alfred C. Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 OHIO ST. L.J. 517, 524-46 (1990) (criticizing incentive theory of copyright law and discussing role of natural law thinking in American copyright tradition).

For an early survey of attempts to root copyright law in different theories, including the view that its true aim is to protect embodiments of the human personality, and a finding that none of these theories adequately accounts for the range of existing doctrines, see Stephen P. Ladas, The International Protection of Literary and Artistic Property 1-12 (1938). Dissatisfaction with these and other attempts "to classify copyright under the traditional categories of private rights" led both Kohler and Picard to posit that artistic and industrial property had more in common with each other than with the older forms of property known to Roman law, and that a new class of rights in intangible creations had arisen, which they termed "intellectual property" rights. See id. at 9-10; see also Pierre Rech't, Le Droit d'Auteur: Une NOUVELLE FORME DE PROPRIÉTÉ 207-33 (1969); Geller, International Copyright: An Introduction, supra note 16, § 2[2][a] ("Copyright might well be said to be . . . a bundle of rights in search of a doctrine.").

29. The authors' rights of continental Europe grew from a deep respect for intellectual creativ-
measures in American copyright law as the right to terminate transfers\textsuperscript{30} or even the long period of protection,\textsuperscript{31} which enables living authors and their immediate heirs to partake of revenues generated many years after the creation of their works.\textsuperscript{32} The incentive theory of copyright protection thus tends to underestimate the extent to which all states, to varying degrees, have deliberately subordinated efficiency to other cultural policy goals in the market for traditional literary and artistic works.

At the same time, incentive theory serves to remind both courts and legislators that undue restraints on trade can undermine even the most fundamental policy of copyright law by pricing cultural goods beyond the reach of ordinary citizens.\textsuperscript{33} For this reason, the Berne Union countries as a group have long needed to focus greater attention on the efficient allocation of copyrightable resources. This need becomes imperative at a time when manufacturers of computer programs and other industrial products increasingly avoid competition by masquerading as providers of cultural goods entitled to copyright protection on a par with literary and artistic works.\textsuperscript{34}

Despite his belief that incentive theory best accounts for the ordinary operations of domestic law, Professor Goldstein pragmatically acknowledges the diverse cultural values that all developed copyright systems seek to implement.\textsuperscript{35} By emphasizing the need to balance social utility against private incentives to create, he avoids the fallacies of those who cast copyright law entirely in economic terms\textsuperscript{36} without due regard for the other policies that compete with and sometimes override the incentive theory pervading American law.\textsuperscript{37} However, as the Berne Convention permeates legal and artistic consciousness in this country and the task of reconciling philosophical differ-

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W. Cornish, supra note 27, at 309.

30. The 1976 Copyright Act gives the original authors (or heirs) the right to terminate a transfer or license between 35 and 40 years after the grant. The termination right is not waivable. 17 U.S.C. §§ 203, 304(c) (1988). In many countries, the copyright laws also regulate contractual conditions between authors and publishers in order to strengthen the artists' bargaining power. See, e.g., Adolfo Dietsch, Copyright Law in the European Community 190-212 (1978).

31. Under the 1976 Copyright Act, protection lasts until 50 years after the death of the last surviving author of a copyrighted work. Anonymous and pseudonymous works receive protection for the lesser of 75 years from first publication and 100 years from creation. 17 U.S.C. § 302 (1988).


33. See notes 24-25 supra and accompanying text.

34. See Anthony L. C. Haps, Patrick Lynch & Mark R. Steinberg, Silicon Epic and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs, 34 UCLA L. Rev. 1493 (1987); notes 256-237 infra and accompanying text.

35. Vol. 1, § 1.1, pp. 4-9; vol. 2, § 16.4, pp. 685-86.


ences becomes more compelling. Professor Goldstein may wish to amplify his discussion of counterthemes in future updates of his introduction.

II. A Nuanced Concept of Originality

Goldstein’s realism prompts him to recognize the tensions surrounding the doctrine of originality as codified in section 102(a) of the Copyright Act of 1976. Broadly speaking, the originality requirement of United States copyright law turns on independent creation, and, in theory, it entails “lit-


The Visual Artists Rights Act of 1990 amended § 101 of title 17 U.S.C. to include a detailed definition of “work[s] of visual art” and created a new § 106A to define visual artists’ qualified rights to attribution and integrity of those works. New subsection 113(d) addresses exceptions to § 106A rights for removal of visual artworks from buildings, while new subsection 301(f) explains to what extent § 106A preempts state laws addressing visual artists’ rights. The act also contained various minor amendments regarding actions for infringement of § 106A rights, and, more significantly, it provided that the fair use exception of § 107 also applies to § 106A rights.

The Architectural Works Copyright Protection Act amended § 101 to include a definition of an “architectural work.” It also amended § 102(a) to make architectural works eligible for copyright protection, but limited the § 106 rights attaching with new § 120. The act also amended § 301(b) to clarify that state laws regarding landmarks, historical preservation, and zoning are not preempted.

As part of the same last-minute omnibus bill, Congress also passed the Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, tit. VIII, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 5134. The act amended § 109(b) to make most unauthorized computer software rentals infringing, notwithstanding the first sale doctrine of § 109(a). It also added new subsection 109(e), which permits owners of video games to publicly perform or display the games in coin-operated equipment.


40. See, e.g., Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (circus poster that met the standard of originality was not rendered ineligible for protection simply because it served a commercial purpose); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (photograph met originality requirement); W. Cornish, supra note 27, at 270-71.

The root requirement of United Kingdom law, however, is not originality but “skill, judgment and labour” or “selection, judgment and experience” or “labour, skill and capital” expended by an author in creating a work that falls within the statutory classes of subject matter. Id. at 268. This follows from the tendency of English courts to use the copyright law as “a roving concept of unfair competition” to compensate for the lack of a general unfair competition law on the Continental model. Id. at 271.

In contrast, as Professor Goldstein notes, United States copyright law ostensibly rejects the expenditure of labor, skill, and capital as either a necessary or sufficient condition of originality. Vol. 1, § 2.2.1.3, pp. 71-72 (citing authorities). Nevertheless, some courts in some cases “involving representational works of art or telephone and business directories treat it as both a necessary and a sufficient condition.” Vol. 1, § 2.2.1.3, p. 71; see also Robert C. Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 COLUM. L. REV. 516 (1981) (compiling facts should be equivalent to a work of authorship); Leo J. Raskind, The Continuing Process of Refining and Adapting Copyright Principles, 14 COLUM.-VLA J.L. & ARTS 125, 148-50 (1990) (stressing the element of conduct in determining the eligibility of maps and compilations); notes 172-193 infra and accompanying text.
tle more than a prohibition of actual copying.\textsuperscript{41} Underlying this doctrine is the universally recognized principle of nondiscrimination that forbids any test of aesthetic merit.\textsuperscript{42}

The charity and zeal of some early decisions adopting these principles, however, must be evaluated in relation to certain peculiarities of the 1909 Act. Until 1954, for example, the United States copyright authorities had excluded all commercial designs of useful articles from protection as “works of art” under section 5(g) of that Act.\textsuperscript{43} a position from which most of their European counterparts had been forced to retreat by the end of the nineteenth century.\textsuperscript{44} The leading domestic decision that countenances a pure independent-creation standard, Alfred Bell & Co. v. Catalda Fine Arts, Inc.,\textsuperscript{45} was thus written and endorsed by judges who were unaccustomed to reviewing the assortment of useful articles bearing the chronically low levels of creative content that proved so troublesome abroad.\textsuperscript{46} Moreover, works eligible under the 1909 Act received only fifty-six years of protection at best, and that Act’s renewal provisions\textsuperscript{47} resulted in technical forfeiture of some

\textsuperscript{41} Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951) (Frank, J.) (quoting Hoague-Sprague Corp. v. Frank C. Meyer, Inc., 31 F.2d 583, 586 (E.D.N.Y. 1929)).

\textsuperscript{42} See, e.g., Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903); WIPO GUIDE, supra note 18, at 12-13 (describing similar approach in Berne Convention countries although the Berne Convention imposes no express standard of originality).

\textsuperscript{43} Mazer v. Stein, 347 U.S. 201 (1954), finally established the copyrightability of applied art without, however, providing any legal criterion for distinguishing noncopyrightable industrial designs. For a history of the troubled evolution of design protection, see generally J.H. Reichman, Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976, 1983 Duke L.J. 1143, 1146-53 [hereinafter Reichman, Designs Before 1976].

\textsuperscript{44} See Reichman, Designs Before 1976, supra note 43, at 1153-67 (discussing the “unity of art” doctrine in France and the resistance of other Berne Union countries to that doctrine). The Berne Revision Conference at Brussels in 1948 ended the drive to bring industrial designs into copyright law, but it also required member countries to recognize some works of applied art as copyrightable subject matter, a principle accepted by those forming the Universal Copyright Convention. This development, in turn, led the United States Copyright Office to allow registration for certain representational works of applied art and to argue (successfully) for judicial approval in Mazer v. Stein. See id. at 1148-53, 1164-72.

\textsuperscript{45} 191 F.2d 99, 103 (2d Cir. 1951) (Frank, J.) (originality requirement does not require novelty, only independent creation; hence plaintiff’s engravings of public domain paintings were copyrightable, even if the differences were inadvertent). But cf. Kudgel Toy, Inc. v. Pussycat-Toy Co., 183 U.S.P.Q. (BNA) 642 (E.D.N.Y. 1974) (stressing that Alfred Bell actually dealt with an artistic work in the historical sense of the term and refusing to apply its low standard to a commercial design).

\textsuperscript{46} See note 44 supra and accompanying text. In fact, Judge Frank in Alfred Bell specifically noted that commercial designs were only protected under design patent law, which imposed very high standards. 191 F.2d at 104. In contrast, Judge Frank had not hesitated to apply a quantitative creativity test to game boards and game rules (i.e., to borderline utilitarian literary works) just a few years earlier. See Chamberlin v. Uris Sales Corp., 150 F.2d 512 (2d Cir. 1945); text accompanying note 57 infra.

85 percent of active copyrights after their first 28-year term. Long-term protection of low-creativity works thus posed less of a problem for American copyright law during the period when its originality principles were developing than it did for foreign law at the corresponding period of maturation.

In Europe, the long duration of copyright protection and the often heated debate over the propriety of protecting industrial designs and other controversial matter induced most courts and legislators to apply at least a \textit{quantitative} creativity standard to borderline utilitarian works, whether literary or artistic, notwithstanding their allegiance to the principle of nondiscrimination. Although this standard varies from country to country, most foreign courts demand evidence of the distance separating allegedly creative elements of candidate works from preexisting works whenever proof of independent creation alone does not reliably demonstrate the unique stamp of an author's personality. Some foreign courts, notably those of Germany, also apply a \textit{qualitative} originality standard to exclude routine or commonplace elements embodied in industrial products such as commercial designs or, more recently, computer programs.

Since 1976, when Congress simultaneously aligned the term of protection in American copyright law with that of the Berne Union members and broadened the range of eligible subject matter, some courts in this country have logically begun to reexamine the postulates governing the originality

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48. See Barbara A. Ringer with Julius A. Culp, \textit{Renewal of Copyright}, in 1 \textit{STUDIES ON COPYRIGHT} 503, 583 (1963). The Copyright Act of 1909, with its formalities of publication with notice, registration, and deposit, its relatively short duration, and its lack of moral rights thus seems closer in spirit to the sui generis design laws enacted abroad than to the mature copyright paradigm of the Berne Union countries. See Ringer, supra note 8, at 1051.

49. See note 44 supra and accompanying text.


51. For example, French courts require the protected work to display "an original or personal character," which further implies "differences from prior works or matters, differences that originate in the author's own efforts." Robert Plaisant, \textit{France} § 2[1][b], in 1 \textit{INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 16}. The criterion codified in Germany requires "personal intellectual creations." See Adolf Dietz, \textit{Germany, Federal Republic} § 2[1][b], in id.; notes 53-54 infra and accompanying text. Italian law protects works of a "creative character" and requires that they be "the result of an intellectual effort," although the requisite degree of differentiation from prior works is unsettled. See Mario Fabiani, \textit{Italy} § 2[1][b], in 2 \textit{INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 16}.

52. See, e.g., \textit{IVAN CHERPILLOD, L'ORIT DU DROIT D'AUTEUR} 131-37 (1985); cf. Bleistein \textit{v. Donaldson Lithograph Co.}, 188 U.S. 239, 250 (1903) (Holmes, J.) (stressing "the personal reaction of an individual upon nature," and establishing the presupposition that independent creation inherently differentiates the creative product from preexisting works because "[p]ersonality always contains something unique" and because even "a very modest grade of art has in it something irreducible, which is one man's alone."). The question both here and abroad is to determine the conditions under which this premise breaks down.

53. See, e.g., Dietz, supra note 51, §§ 2[1][b], 2[4][c].

requirement. Leery of overprotecting works of low creativity that resemble items already in or en route to the public domain, they have sometimes questioned whether the uniqueness ordinarily attributed to independent creation actually occurs when external factors, such as functional exigencies or market expectations, limit a creator’s opportunities for subjective, personal expression.

In this way, some courts have modified the traditional originality standard when it seems unsuited to the subject matter at hand. In 1976, for example, the Second Circuit balked at protecting the design of a toy bank derived from a public-domain exemplar and rediscovered a quantitative creativity test that Judge Jerome Frank had devised for game rules and game boards in 1945. The same circuit sporadically extended this quest for substantial variation to commercial designs based on works still in copyright and, more recently, it found no creative expression in a rudimentary arrangement of data.

Other federal appellate courts have sometimes followed this approach

55. The legislative history accompanying the 1976 Act declared that the term “original works of authorship” was “intended to incorporate without change the standard of originality established by the courts under the present [1909] statute.” H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5664 [hereinafter 1976 ACT HOUSE REPORT]. This statement can mislead the unwary, however, because the existing standard for originality when the Act was adopted late in 1976 already included L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir.) (en banc), cert. denied, 439 U.S. 857 (1976), which applied a more stringent standard and endorsed earlier cases to the same effect.


57. See L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir.) (en banc) (citing Chamberlin v. Urs Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945)), cert. denied, 429 U.S. 857 (1976); see also Kuddle Toy, Inc. v. Pussycat-Toy Co., 183 U.S.P.Q. (DNA) 642 (E.D.N.Y. 1974) (no relief where plaintiff’s teddy bear diverged only slightly from the classic teddy bear); Gardenia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968) (no copyright on artificial flower cornices because arrangement was traditional and added features were only utilitarian); Reichman, Designs After 1976, supra note 50, at 271-75, 298-308, 312-21.

58. Durham Indus. v. Tomy Corp., 630 F.2d 905, 909-11 (2d Cir. 1980) (stating that the Batlin standard of substantial creativity applied with particular force to works derived from other works still in copyright); see also Eden Toys, Inc. v. Florelee Undergarment Co., 597 F.2d 27, 34 (2d Cir. 1982) (derivative work drawing of Paddington Bear copyrightable under Batlin as it contained “non-trivial” original contributions, even though it retained the “same aesthetic appeal”).


60. See, e.g., John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986) (logo not copyrightable for lack of any creative contribution). But see West Publishing Co. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986) (West’s arrangement of cases in its reporters copyrightable because resulting from considerable labor and judgment), cert. denied, 479 U.S. 1070 (1987); cf. Atari Games Corp. v. Oman, 693 F. Supp. 1204 (D.D.C. 1988) (holding that a video game lacked creativity and was not an original work of authorship), rev’d, 888 F.2d 878 (D.C.:
and sometimes relied on the related notion of authorship codified in section 102(a) of the 1976 Act.\textsuperscript{61} At least one court has excluded independently created elements of a computer program at the threshold of eligibility on the ground that its features were dictated by technological constraints.\textsuperscript{62} Still others, notably in the Ninth Circuit, indirectly reach comparable results at the infringement stage by declining to find any quantum of protectible matter in independently created works that defendants had closely or slavishly imitated.\textsuperscript{63} These latter opinions, although cast as judicial exclusions of matter left unprotected by section 102(b), subtly narrow Bleistein's basic presupposition that independent creation always yields some personal expression within the protective reach of section 102(a).\textsuperscript{64}

Taken together, these different lines of cases show the beginnings of a methodological convergence between domestic and foreign courts in evaluating the eligibility of borderline utilitarian productions\textsuperscript{65} whose market value is not determined by personal expression. A fuller analysis of these issues

\textsuperscript{61} See, e.g., Toro Co. v. R & R Prods. Co., 787 F.2d 1208 (8th Cir. 1986) (parts numbering system not an original work of authorship). The statutory requirement of authorship has also tempted some commentators to define originality in terms of conduct. See, e.g., Raskind, supra note 40, at 133-40 (reciting history of map copyright cases). This may lead copyright law to become a kind of ersatz unfair competition law, however, as has occurred in the United Kingdom. See note 40 supra; cf. Stephen P. Handler, Copyright Protection for Mass-Produced, Commercial Products: A Review of the Developments Following Mazer v. Stein, 38 U. CHI. L. REV. 807, 818-20 (1971) (student author) (noting some courts' tendency to lose sight of basic copyright principles and to make condemnation of appropriation or commercial piracy an end in itself).

\textsuperscript{62} Secure Serv. Technology, Inc. v. Time & Space Processing Inc., 722 F. Supp. 1354, 1363 (E.D. Va. 1989) (denying protection of communications protocol essential to interoperability of a system because "to grant a copyright to a mere rearrangement of binary digits would effectively eliminate any authorship or originality requirement from the copyright laws"); see also Manufacturers Technologies, Inc. v. Cams, Inc., 706 F. Supp. 984, 995 (D. Conn. 1989) (noted in 1990 Supplement, § 2.15.3.2, p. 20, for its suggestion that interface "designs aimed at enhancing user 'ease' should be denied copyright protection for the same reason as designs aimed at enhancing technical efficiency"). But see Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37 (D. Mass. 1990) (computer menu command structure and screen presentation held copyrightable).

\textsuperscript{63} See, e.g., Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204 (9th Cir. 1988) (similar karate computer game noninfringing because game similarities were inherent in nature of karate; protectible expression limited to scoreboard and background scenes); Frybarger v. International Business Machs. Corp., 812 F.2d 525 (9th Cir. 1987) (similar video game not infringing because each similarity of expression was dictated by an unprotectible idea); Worth v. Selchow & Righter Co., 827 F.2d 569 (9th Cir. 1987) (facts in trivia encyclopedia not copyrightable, and copying of words merely reflected those nonprotectible ideas; arrangement of entries protectible but not copied), cert. denied, 485 U.S. 977 (1988); see also Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.) (authors of factual works confined to a narrow range of expression, so copying must be nearly verbatim to constitute infringement), cert. denied, 469 U.S. 1037 (1984).

These courts found that, despite close copying, these works contained only nonprotectible matter excepted by 17 U.S.C. § 102(b) (1988), which denies protection to "any idea, procedure, process, system, method of operation, concept, principle, or discovery." It follows that the works contained virtually no elements amounting to original works of authorship within the meaning of 17 U.S.C. § 102(a) (1988) (as amended in 1990), see note 38 supra, notwithstanding independent creation.

\textsuperscript{64} See note 52 supra.

65. For the distinction between copyrightable works and noncopyrightable productions, see Berne Convention, supra note 4, art. 2(1); Geller, International Copyright: An Introduction, supra note 16, § 4[1][a].
would carry this review too far afield. The point here is not to ascertain whether Professor Goldstein approves or disapproves of this increasingly subtle treatment of the originality requirement, but rather to confirm that he does discern and describe these important developments in the law. He thus resists the tendency of some commentators to obscure the irreconcilability of many modern decisions with the purist appeal to Bleistein.

Starting from the proposition that copyright law never requires a showing of objective novelty in the manner of patent law, Goldstein proceeds to consider whether the originality requirement implies a quantitative or qualitative threshold of creativity. He reviews the lengthening list of cases that have sought some quantum of creativity beyond independent creation, and he acknowledges that some courts, wittingly or not, may have even applied a qualitative standard. Moreover, Goldstein recognizes that some courts use the authorship requirement of section 102(a) to resolve these tensions, while others sidestep a discussion of originality by systematically declining to find the quantum of protectible expression that “authorship” implies.

Professor Goldstein thus provides practitioners with helpful guidance in these matters, and he aids courts in navigating between appeals to a purist tradition and precedents breaking with that tradition for reasons that are often imperfectly articulated. His realistic appraisal of the factors that in-

66. For more, see Reichman, Programs as Know-How, supra note 56, at 683-89.
67. In general, Goldstein believes that “in close cases courts should err on the side of finding protectible expression” and limit the protection of minimally expressive works at the infringement stage. Vol. 1, § 2.3.1.2, p. 79. While this approach works well when applied to traditional literary and artistic works, it becomes less reliable when applied to borderline utilitarian works, as Goldstein recognizes. See vol. 2, §§ 8.2.1.1, 8.2.5.1 (criticizing courts for overprotecting fabric designs and functional works at the infringement stage). Courts should particularly avoid giving first-comers even colorable claims to nonprotectible matter in functional works. Otherwise, risk-averse second-comers may find it prudent to work around or license the functionally efficient solutions in the earlier works in order to avoid suit, at great cost to society at large. See Reichman, Programs as Know-How, supra note 56, at 683-86.
68. See vol. 1, § 2.2.
69. See vol. 1, § 2.2.1.1.
70. Vol. 1, § 2.2.1.2.
71. Vol. 1, §§ 2.2.1.2-2.2.1.3.
72. Vol. 1, §§ 2.2.1.2, pp. 70-71; see also Reichman, Designs and New Technologies, supra note 27, at — [Part II.B] (discussing the Second Circuit's retreat from Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980)).
73. Vol. 1, § 2.2.2, p. 72. Initially, Goldstein focuses mainly on the problem of works created by new technologies, such as computer-generated maps, in which human authorship is problematic, to the exclusion of cases that have invoked lack of authorship when denying protection to factual and functional works of a more familiar character. See notes 59-62 supra and accompanying text. He then comprehensively explores the general problems of applying the originality standard to these categories in vol. 1, §§ 2.14-2.15. Fuller citations to the growing judicial awareness of “authorship” as a distinct criterion would be helpful in the earlier discussion, especially since this tendency is now emphasized in Goldstein’s 1990 Supplement, § 2.15.3.2, pp. 19-20, with regard to functional works in general and computer-generated screen displays in particular.
74. Vol. 1, § 2.3, pp. 75-79 (emphasizing that ideas, even when original, are never protectible); see notes 62-63 supra and accompanying text.
75. Courts often speak of a lack of “originality” when, in fact, they must be referring either to a lack of creativity or to a lack of authorship, or both, because the plaintiff’s independent creation (in the sense of not copying) is uncontested. See, e.g., Financial Information, Inc. v. Moody's Investors Servs., 808 F.2d 204, 207-08 (2d Cir. 1986).
fluence eligibility comes at a time when the search for principled standards, particularly with regard to legal protection of databases and computer programs, has entered a new and highly controversial phase. As the influence of copyright law on putative industrial property expands at an alarming pace, Goldstein's treatment of the originality requirement provides a useful framework for future debate.

III. INFRINGEMENT IN A MULTI-DIMENSIONAL PERSPECTIVE

Professor Goldstein's innovative approach to infringement is the heart of his treatise, and it will undoubtedly play a major role in the future development of American copyright law. Goldstein's treatment deviates from the standard approach in four principal ways. First, he aggressively pins general infringement doctrine to the protection of the author's market interest. Second, he links the fair use exception to the author's market interest in an integrated approach to the scope of protection. Third, he jettisons the myth of a unitarian doctrine of infringement equally and uniformly applicable to all subject matters. Fourth, he relates the level of protection that courts empirically provide to the nature of the subject matter at issue and explains the specialized adjustments that courts make in terms of the policies applicable to each subject matter.

76. See Brown, supra note 37; see also Ralph S. Brown, Design Protection: An Overview, 34 UCLA L. REV. 1341, 1386-95 (1987).
77. See, e.g., Denicola, supra note 40 (approving "sweat of the brow" rationale for protection of compilations); Raskind, supra note 40 (proposing to define originality in terms of conduct); Robert A. Gormian, Fact or Fancy? The Implications for Copyright, 29 J. COPYRIGHT SOC'y 560 (1980) (rejecting "sweat of the brow" rationale for copyright protection of factual works). The most recent discussion is Jane Ginsburg, Creation and Commercial Value: Copyright Protection of Works of Information, 90 COLUM. L. REV. 1885 (1990) (describing limited scope of protection for low-authorship works at earlier period and stressing third parties' need to use contents of copyrighted compilations in other productions).
78. See, e.g., David Nimmer, Richard L. Bernacchi & Gary N. Frischling, A Structured Approach to Analyzing the Substantial Similarity of Computer Software in Copyright Infringement Cases, 20 ARIZ. ST. L.J. 625, 625-29, 642-49 (1988) (stressing lack of expressive originality in computer programs); Reischman, Programs as Know-How, supra note 56, at 683-89 (criticizing application of "pure" copyright theory when variations on prior art are minimal and dictated by function and market expectations).
79. In contrast, although Professor Nimmer recognized "a minimal requirement of creativity over and above the requirement of independent effort," he assimilated it with the older de minimis rule and confined it to artistic works. See 1 NIMMER ON COPYRIGHT, supra note 2, § 2.01[B]. However, the later revisions of his treatise recognize the dangers of protecting "physical" or "manufacturing" skill first identified in L. Battin & Son, Inc. v. Snyder, 336 F.2d 486, 491 (2d Cir.) (en banc), cert. denied, 429 U.S. 857 (1976). See 1 NIMMER ON COPYRIGHT, supra note 2, § 2.01[A], at 2-10 n.17.1 (citing Battin and Durham Indus. Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980)). This is consistent with David Nimmer's recent concerns about overprotecting nonexpressive matter in computer programs. See Nimmer, Bernacchi & Frischling, supra note 78.
80. See generally vol. 2, chs. 7-10.
81. See notes 85-106 infra and accompanying text.
82. See notes 107-134 infra and accompanying text.
83. See notes 135-146 infra and accompanying text.
84. See notes 147-237 infra and accompanying text.
A. The Market Interest as Organizing Principle

1. In general.

Anyone who has tried to predict the outcome of litigation on the basis of teachings gleaned from the classic cases on infringement knows how little they added to reasoned analysis or to the development of a distinctive copyright paradigm independent of other bodies of law.85 The ritual formula that "infringement equals access plus substantial similarity" appears unexceptionable on its face.86 As implemented in the classic cases, however, "access" often meant more than an opportunity to view the allegedly copied work. Arguably, it became a code word assimilating a variety of dirty tricks that evoked breach of confidence, theft of trade secrets, and other forms of actionable misappropriation. Absent slavish imitation, the elaborate subtests of infringement actually turned on improper access, while the formal assessment of substantial similarity became a rationalization of legal outcomes dictated by the familiar concerns of unfair competition law.87

In the nineteenth century, however, Justice Joseph Story relied partly on a less primitive approach in Folsom v. Marsh.88 Inspired by Justice Story's insights, Judge Jerome Frank formulated a mature doctrine of infringement in Arnstein v. Porter,89 which overtly linked copyright protection to a defense of the author's market interest.90 This approach to copyright protection enables an author to recoup revenues generated from all the different uses of his or her work on each of the market segments where it may be commercially exploited, either in original or derivative form.91

To the credit of the United States copyright authorities and of the con-

85. See, e.g., Cohen, supra note 17, at 722-23; Paul Goldstein, Derivative Rights and Derivative Works in Copyright, 30 J. COPYRIGHT SOC'Y 209, 220-26 (1983) [hereinafter Goldstein, Derivative Works], see also Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir.) (denoiming the tendency of copyright decisions to indulge in abstract formulations of limited practical utility), cert. denied, 423 U.S. 863 (1975).

86. See vol. 2, § 7.2.1.

87. Compare Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936) (evidence of failed negotiations; infringement upheld) with Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (no dirty tricks; no infringement because only "ideas" were taken), cert. denied, 282 U.S. 902 (1931). See also Goldstein, Derivative Works, supra note 85, at 220-26.

88. 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) ("If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto."); see also Goldstein's treatment, vol. 2, § 7.3.2, p. 32.

89. 154 F.2d 464, 473 (2d Cir. 1946) ("The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approval of his efforts."). See generally Alan L. Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1191-1204 (1990).


91. A "derivative work" is defined in the 1976 Act as:
a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elabora-
gressional committees entrusted with these matters, the general revision of 1976 implemented a scheme of protection based on the author’s market interest. While this scheme seems consistent with the teachings of *Arnstein* (which are now widely recognized, though imperfectly implemented), the leading commentators concentrate more on reconciling the post-1976 case law with preexisting tradition than on elaborating the economic implications of the codified structure as a whole. This failing helps account for the rarity of judicial opinions that securely place the economics of similarity at the forefront of attention without covert reliance on the kind of dirty tricks that influenced most decisions in the past.

17 U.S.C. § 101 (1988). Derivative works were not defined as such in the 1909 Act, but they were protected. See Act of March 4, 1909, ch. 320, § 1(b), 35 Stat. 1075, 1075 (now superseded).

Strong protection of derivative works is consistent with the philosophy and practices underlying the Berne Convention. See, e.g., Berne Convention, supra note 4, arts. 2(3), 12 (giving authors control over adaptations); S. Ricketson, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 286-87, 293-95, 394-400 (1987); WIPO GUIDE, supra note 18, at 76-77.

92. See, e.g., 17 U.S.C. § 102(a) (1988) (as amended in 1990, see note 38 supra) (granting automatic copyright protection); id. § 103 (compilations and derivative works specifically protected); id. § 106(2) (confering exclusive rights to prepare derivative works based upon the copyrighted work); id. § 107(4) (evaluation of statutory fair use defense must consider the potential market for or value of the copyrighted work); id. §§ 106-120 (as added or amended in 1990, see note 38 supra) (declining to create a blanket exception for nonprofit uses); id. § 201(d) (§ 106 rights divisible and separately transferrable).


94. For example, in Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977), the Ninth Circuit established “intrinsic” and “extrinsic” tests of infringement with reference to *Arnstein*, but recognized that it may have deviated significantly from the model established in that case. The court also implied that a finding of infringement required substantial similarity of both expression and idea. *Krofft*, 562 F.2d at 1164.

As the late Alan Latman noted in an article published posthumously, at the first level of analysis, *Arnstein* and *Krofft* “pass each other in the night” because “*Arnstein* focused on copying versus independent production,” whereas *Krofft* focused on “copying of ideas rather than copying of expression.” Latman, supra note 89, at 1203. In Latman’s view, the *Krofft* approach “was much less helpful.” *Id.* Subsequent Ninth Circuit cases have nonetheless insisted on this dubious proposition. See, e.g., Narell v. Freeman, 872 F.2d 907 (9th Cir. 1989); Aliotti v. Dakin, 831 F.2d 898 (9th Cir. 1987); Berkley v. Crichton, 761 F.2d 1289 (9th Cir.), cert. denied, 474 U.S. 826 (1985); Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).

In Olson v. National Broadcasting Co., 855 F.2d 1446, 1449 (9th Cir. 1988), the Ninth Circuit reiterated the need to “prove both substantial similarity of the general ideas . . . and substantial similarity of the prototypical expression of those ideas,” and then virtually excluded characters as a basis for comparison for determining similarity, id. at 1451-53. In contrast, the Second Circuit has applied *Arnstein*’s methodology and allowed similarities of characters as a basis of comparison. Warner Bros., Inc. v. American Broadcasting Cos., 720 F.2d 231, 239-45 (2d Cir. 1983); see also W. Patry, supra note 2, at 197 n.3 (criticizing the Ninth Circuit’s approach but praising that of the Second Circuit). For the Ninth Circuit’s most recent attempt to bring its methodology closer to that of *Arnstein*, see Shaw v. Lindheim, 908 F.2d 532 (9th Cir. 1990) (for literary works, the extrinsic (objective) test now focuses on similarities in both ideas and expression, and an affirmative finding precludes summary judgment; the intrinsic (subjective) test assesses the total concept and feel of the works at issue). For Goldstein’s treatment, see vol. 2, § 7.3, pp. 24 n.6, 25-26.

95. Decisions that properly avoid an easy conclusion of “piracy” in order to address the harder economic questions include Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc., 777 F.2d 485, 492 (9th Cir. 1985) (proof of common errors may show copying, but does not obviate need to show substantial similarity of protected expression; moreover, defendant did not infringe simply by copying general arrangement of catalog where plaintiff had tried other arrangements and failed); Warner
In contrast, Professor Goldstein identifies the market interest as the organizing principle of the infringement calculus, an interpretation foreshadowed by the prominent role he assigned incentive theory in his introduction. For example, in discussing the two tests applicable in any determination of substantial similarity, Goldstein depicts the difference between simple “copying” and “improper appropriation” in economic terms. “Copying” entails either some physical reproduction of the plaintiff’s work or a mental visualization of it when creating a later work.

“Improper appropriation,” on the other hand, has two subtests. First, competing authors may freely use nonprotectible ideas underlying independently created expression, an aspect Goldstein links with the originality doctrine. The “protected expression” subtest consequently “ensures that the copyright owner will not enjoy a monopoly over subject matter that she did not originate, nor economic rewards from an audience that should not belong exclusively to her.” Second, “copying” only amounts to “improper appropriation” when the second-comer “capture[s] the audience, and thus the economic rewards, that would otherwise belong exclusively to the plaintiff.” It follows that the audience subtest is but a “practical implementation of copyright law’s traditional object: to secure to authors the exclusive market . . . for their protected expression.”

In this scheme, rights in derivative works deserve particular attention because they “contemplate an array of different, though overlapping, audiences for the underlying copyrighted work.” The vindication of these rights turns on economic tests of substitution or saturation—labeled “audience displacement” tests—which a plaintiff cannot trigger without demonstrating that the defendant appropriated the protected matter. By the same token, the irrepressible dirty tricks of classical infringement lose

Bros., Inc. v. American Broadcasting Cos., 720 F.2d 231 (2d Cir. 1983) (disregarding failed negotiations as a basis of decision, allowing similarities of characters to weigh in evaluation of illicit appropriation, but finding that the bumbling television superhero character was not substantially similar to Superman and that borrowing of well-known phrases merely highlighted the differences between the two); Kepner-Trego, Inc. v. Carabio, 203 U.S.P.Q. (BNA) 124 (E.D. Mich. 1979) (discounting defendants’ dirty tricks because of plaintiff’s overwhelming market power, excluding bulk of management training materials as generic or necessary expression, identifying illicit appropriation only in specific sentences, and imposing only remedy of correction in order to stimulate competition); cf. Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir. 1982) (absence of dirty tricks did not excuse defendant when plaintiff’s market interest depended on its unconventional interpretation of stock video game characters, which the defendant appropriated). But cf. Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977) (adopting a version of the Arnslein doctrine, but the panel may in fact have been swayed by dirty tricks).

96. See, e.g., vol. 2, §§ 7.1.2, 7.3.2.
97. See vol. 1, § 1.1; notes 23-38 supra and accompanying text.
101. Id.
104. See vol. 2, §§ 7.4.1-7.4.2.
much of their former bite because, for example, "[p]roof of [failed] prior negotiations is no substitute for proof that protected expression has been taken."\textsuperscript{105} In short, Goldstein's analysis reduces the subtext of access to its proper function of determining the defendant's opportunity to copy, without covertly allowing access issues to contaminate the crucial legal and economic evaluation of substantial similarity as such.\textsuperscript{106}

2. The fair use exception.

Professor Goldstein's faith in the incentive theory of copyright protection serves him well in trying to fashion a workable interpretation of the fair use doctrine,\textsuperscript{107} which has greatly troubled American copyright courts in recent years.\textsuperscript{108} Congress expressly recognized the market interest in section 107(4) of the 1976 Act,\textsuperscript{109} and some court decisions view this reference to the market interest as the dominant factor in the codified list of variables.\textsuperscript{110} Moreover, Goldstein's analysis builds on earlier work by Professor Wendy

\textsuperscript{105} Vol. 2, § 8.1.2, p. 62. A good example is Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197 (9th Cir. 1989), in which an expressed interest in copying at one stage did not necessarily outweigh the fact that only nonprotectible elements may have been taken in the end. But see Shaw v. Lindheim, 908 F.2d 531, 539 (9th Cir. 1990) (sustaining dubious "inverse ratio rule," which permits lower threshold of proof of substantial similarity if clear and convincing evidence of "access" is demonstrated).

\textsuperscript{106} See notes 86-87 supra and accompanying text.


\textsuperscript{108} See, e.g., Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984) (home videotaping is fair use); Harper & Row Publishers v. Nation Enters., 471 U.S. 539 (1985) (anticipating, paraphrasing, and quoting core sections of ex-President's memoirs was not fair use); Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 448 (9th Cir. 1986) (minister's unauthorized copy of parody for purposes of fundraising and to rebut parody of himself was fair use); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) (use of author's unpublished letters that recipients had donated to various libraries in an unauthorized biography of that author was not fair use); New Era Publications, Int'l v. Henry Holt & Co., 873 F.2d 576 (2d Cir.), reh'g denied, 884 F.2d 659 (2d Cir. 1989), cert. denied, 110 S. Ct. 1168 (1990) (extensive reproduction of unpublished writings of founder of scienology in a critical biography was not fair use).

\textsuperscript{109} 17 U.S.C. § 107(4) (1988) (factors applicable to determining fair use shall include "the effect of the use upon the potential market for or value of the copyrighted work"). Other factors that must be considered include the "purpose and character" of the use, the nature of the copyrighted work, and the absolute and relative amount copied. See id. § 107(1)-(3); cf. Berne Convention, supra note 4, art. 9(2) (authorizing certain derogations from the exclusive reproduction right of art. 9(1) provided that they do "not conflict with a normal exploitation of the work and . . . [do] not unreasonably prejudice the legitimate interests of the author").

\textsuperscript{110} See, e.g., Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 566 (1985); Naneel v. Freeman, 872 F.2d 907, 913 (9th Cir. 1989); Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155 (9th Cir. 1986). In this respect, Professor Nimmer's view has been influential. See 3 NIMMER ON COPYRIGHT, supra note 2, § 13.05[A][4], at 13-80 to 13-81 ("If one looks to the fair use cases, if not always to their stated rationale, this emerges as the most important, and indeed, central fair use factor.").
Gordon, who characterized fair use as a response to market failure.\textsuperscript{111}

For example, Goldstein links the “private benefits” flowing from the fair use exception to uses that the copyright owner would have licensed but for insurmountable transaction costs.\textsuperscript{112} Search and negotiation costs present the typical case, although he warns that technical advances (such as computer retrieval systems) or institutional innovations (such as clearinghouses) could drastically lower these and other transaction costs over time, and thereby alter the legal result. Indeed, he suggests that judicial restraint in finding fair use could stimulate these very advances.\textsuperscript{113}

But Goldstein also recognizes that simple market failure analysis will not necessarily resolve “public benefit” claims that tend to “excuse a use, even in the absence of transaction costs, if the social benefit of the use outweighs the loss to the copyright owner.”\textsuperscript{114} He gives the example of a teacher who encounters no serious transaction costs in seeking a license to photocopy a chapter from a book for use in class. Yet the small amount of royalties collectible for this use, if any, might not persuade the copyright owner to grant the license.\textsuperscript{115} Under the public benefit approach, the use could be deemed fair as contributing to an educated citizenry. Goldstein even characterizes it as resulting from market failure due to externalities: “transaction costs prevent the copyright owner from collecting a fee from all who benefit from the use—both the immediate user and society at large.”\textsuperscript{116}

The danger, of course, is that so-called public benefit analysis could simply swallow the exclusive rights whole because one can always characterize access to the copyrighted culture at reduced costs as promoting the public interest, at least in the short term.\textsuperscript{117} Professor Goldstein thus proposes to

\textsuperscript{111} See Gordon, supra note 107.

\textsuperscript{112} Vol. 2, § 10.1.1, pp. 190-93.

\textsuperscript{113} Vol. 2, § 10.1.1, pp. 190-93. The Nimmer go one step further and reject the market failure approach altogether on the grounds that it would, at most, justify “a compulsory license or judicially imposed royalty rather than an abdication of copyright under the banner of fair use.” 3 NIMMER ON COPYRIGHT, supra note 2, § 13.05[A], at 13-73 n.26.1.

\textsuperscript{114} Vol. 2, § 10.1, p. 190.

\textsuperscript{115} Vol. 2, § 10.1, pp. 193-94.

\textsuperscript{116} Vol. 2, § 10.1.3, p. 195. However, transactions costs analysis is at best a clumsy method for dealing with the problem of fair use in the context of factual or functional works. Here the exclusive reproduction rights may block access to noncopyrightable matter excluded by 17 U.S.C. §§ 102(b), 103(b) (1988), unless some override ensures the permisibility of partial or total reproduction for certain kinds of uses. See, e.g., Narell v. Freeman, 872 F.2d 907, 914 (9th Cir. 1989) (“The scope of permissible fair use is greater with an informational work than a creative work.”); see also notes 178-193 infra and accompanying text.

Such an override becomes particularly important in the domain of functional and utilitarian works, where it preserves a competitor’s rights to analytical use and may even authorize reverse engineering to foster incremental innovation. See, e.g., LaST Frontier Conference Report on Copyright Protection of Computer Software, 30 JURIMETRICS J. 15, 24-25, 28 (1989) [hereinafter Conference Report]; cf. Leo J. Raskind, Reverse Engineering, Unfair Competition, and Fair Use, 70 MINN. L. REV. 385 (1985). Historically, this was a function of Baker v. Selden, 101 U.S. 99 (1879), which allowed a specialized form of fair use applicable to books on science or the useful arts. See H. BALL, supra note 9, at 274-75; notes 206-207 & 223 infra and accompanying texts. For Professor Goldstein’s express recognition of a “reverse engineering” limitation on the protection of computer programs, see 1990 Supplement, § 5.2.1.4, pp. 60-66.

\textsuperscript{117} See, e.g., R. BENKO, supra note 20. Benko states that technological change

\textsuperscript{117}
confine public benefit analysis to the kinds of uses enumerated in the preamble to section 107.118 In his view, even these uses should normally have to satisfy a market failure test of one kind or another.119

Professor Goldstein impliedly prefers to read this preamble narrowly—as requiring that before a use may be tested against the four criteria of section 107, a defendant must show that its use is “one that specifically serves political or educational values.”120 He notes that this would proscribe home videotaping of copyrighted entertainment programs off the air, contrary to Sony Corp. of America v. Universal City Studios.121 However, he acknowledges that the preamble can be read broadly to encompass all situations in which

the social, political and cultural benefits of the use will outweigh any consequent losses to the copyright proprietor, and in which the time and expense of negotiations—or in the case of criticism and comments, the unwillingness of the copyright owner to permit these uses at an acceptable price—will often foreclose a negotiated transaction.122

He observes that this broader reading could permit home videotaping of copyrighted entertainment programs off the air, consistent with Sony.123 And in his first update to the treatise, he argues the case for a “reverse engineering” limitation on the protection of computer programs, cast in terms of “research,” that under proper conditions could ensure that such works were put “to their socially most beneficial use.”124

On either reading of the preamble, Goldstein renders an eloquent plea for judicial restraint.125 Those who favor a broad fair use doctrine, espe-

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118. Vol. 2, § 10.1.4, pp. 196-98 (discussing 17 U.S.C. § 107 (1988) (later amended in 1990, see note 38 supra), whose preamble identifies such potentially privileged uses as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”).
120. Vol. 2, § 10.2.1, p. 206 (emphasis added); cf. Vol. 2, § 10.1.4, p. 198 (approving public benefit approach only for uses of the type listed in the preamble).
123. Id.
124. 1990 Supplement, § 5.2.1.4, pp. 60-66; see also notes 221-225 infra and accompanying text. On either reading, Goldstein rejects the “productive” versus “ordinary” use distinction, which would trigger infringement if a second author made copies to use a work for its “intrinsic purposes,” but not for “productive purposes.” Vol. 2, § 10.2.1, p. 204 n.5. He sees this criterion as inconsistent with the fundamental goal of copyright law: to put copyrighted works to their most beneficial uses. Vol. 2, § 10.2.1, p. 204 n.5. But see Leon E. Seltzer, Exemptions and Fair Use in Copyright 24 (1978); cf. 1 Nimmer on Copyright, supra note 2, § 13.05[A], at 13-65 n.16 (finding the approach “original and insightful”).
125. See, e.g., vol. 2, § 10.1.3, p. 198 (“[A]lthough the public benefit approach occupies a secure corner in fair use doctrine, the corner is a small one; the political judgments . . . are generally better left to the legislative process.”).
cially one linked to first amendment considerations,\textsuperscript{126} will hardly admire it, whatever their views of a market failure test. But this camp perennially downplays the underlying policies of the constitutional enabling clause, which charges the copyright and patent systems with the task of securing the larger public interest through statutory incentives to authors and inventors.\textsuperscript{127} Accepting this mandate, Goldstein believes that federal judges should not lightly tamper with these incentives in order to promote particular interests.\textsuperscript{128} Rather, parties seeking public use exceptions should petition Congress to enlarge the list of immunities and exemptions already recognized in sections 108 through 120 of the 1976 Act.\textsuperscript{129}

In this respect, Professor Goldstein's narrow interpretation of the fair use exception squares with the approach of the Berne Convention,\textsuperscript{130} with which the domestic copyright law was structurally aligned in 1976.\textsuperscript{131} The Berne Convention discourages parochial exceptions to international minimum standards that are not sanctioned by widespread international practice.\textsuperscript{132} Such restraint seems especially commendable during a period in which competition in international markets obliges all industrialized countries to maximize their comparative advantages in the production of intellectual goods.\textsuperscript{133} Unless the federal courts keep fair use within the narrow confines of the preamble to section 107, as Goldstein advises, the United States could risk international censure, especially if trade negotiations should empower states adversely affected by a pattern of ad hoc domestic copyright decisions to seek review within the GATT's dispute-settlement apparatus.\textsuperscript{134}


\textsuperscript{127} See, e.g., Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 558 (1985) ("it should not be forgotten that the Framers intended copyright itself to be the engine of free expression"); Mazer v. Stein, 347 U.S. 201, 219 (1954) (philosophy behind the constitutional empowering clause is "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare"); notes 21-28 supra and accompanying text; cf. S. RICKETSON, supra note 91, at 477 ("Above all, ... the very fact that copyright protection exists, both at a national and international level, is an express recognition of the strong public interest that there is in the promotion of cultural, social and economic progress.").

\textsuperscript{128} See vol. 2, § 10.1.4.


\textsuperscript{130} See Berne Convention, supra note 4, arts. 9(2), 10, 10\textsuperscript{th}, 11\textsuperscript{th}(2), 13; S. RICKETSON, supra note 91, at 477-548; note 109 supra.

\textsuperscript{131} See 1976 ACT HOUSE REPORT, supra note 55, at 62-63 (noting that the shift from a "for profit" test of the public performance right to a system of specific exemptions for educational and other nonprofit uses resembles the approach "in many foreign laws"). Both systems recognize the need to restrict authors' rights in some cases. Compare 17 U.S.C. §§ 108-120 (1988) (as added or amended in 1990, see note 38 supra) with Berne Convention, supra note 4, arts. 9(2), 10, 10\textsuperscript{th}, 11\textsuperscript{th}(2), 13. See also Ginsburg & Kernochan, supra note 16.

\textsuperscript{132} See, e.g., S. RICKETSON, supra note 91, at 477-78.


\textsuperscript{134} See, e.g., Geller, supra note 6, at 195; Reichman, Intellectual Property in International Trade, supra note 6, at 861 ("decisions ... by beefed up GATT panels could become binding interna-
B. Relating Scope of Protection to Specific Subject Matters

1. Discarding the unitarian myth.

Although the late Professor Alan Latman noticed the extent to which the scope of copyright protection varied with the subject matter at issue,\(^{135}\) the thesis that a single standard of infringement pervades the whole field is seldom called into question.\(^{136}\) The tenacity of this thesis seems remarkable in view of the overwhelming empirical evidence against it.

Treatises must, of course, deal with eligibility under different subject matter headings because section 102(a) of the 1976 Act expressly divides protectible "works of authorship" into eight overlapping and nonexhaustive categories.\(^{137}\) The 1976 Act also varies some of the section 106 exclusive rights by subject matter,\(^{138}\) and virtually all the immunities and exemptions that sections 108 through 120 have grafted onto the exclusive rights of section 106 are likewise specified by subject matter.\(^{139}\)

Nevertheless, section 501 of the 1976 Act introduced a deceptively simple and apparently unitary concept of copyright infringement. It brands anyone "who violates any of the exclusive rights of the copyright owner" or anyone "who imports copies or phonorecords into the United States in violation

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136. See, e.g., W. Patry, supra note 2, at 196 n.31 ("There is no reason, factual or legal, justifying the establishment of a different standard of substantial similarity for any class of work.").

137. As recently amended to include architectural works, § 102(a) reads, in part:

Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.


Article 2(1) of the Revised Berne Convention, supra note 4, includes most of these subcategories within its coverage of "literary and artistic works." The works specified in article 2(1) "shall enjoy protection in all countries of the Union" by virtue of article 2(6). However, the sound recordings recognized in 17 U.S.C. § 102(a)(7) are not mentioned in article 2(1) of the Berne Convention, and most countries confine them to "neighboring rights" laws that fall outside the domestic copyright laws as such. See Geller, International Copyright: An Introduction, supra note 16, § 2[3][c]. See generally S. Ricketson, supra note 91, at 228-317 (1987).

tion of section 602" as "an infringer of the copyright." The commen-
tators customarily treat this provision as carrying forward the prior law of
infringement except as modified by specific statutory provisions. Accordingly, no treatise writer has heretofore systematically differentiated among
the infringement doctrines applied to various subject-matter categories in
actual practice. In contrast, Professor Goldstein begins his exposition with a characteristic dose of realism: "In practice, courts apply the tests and subtests [of standard infringement doctrine] differently to different classes of works." They do so because judicial application of the subtests—especially the protected expression test—usually takes the nature of the work into account; because certain types of claims crop up repeatedly in relation to specific subject matters and are resolved in like fashion; and because different policy variables emerge as cases move across the spectrum from traditional literary and artistic works to borderline categories that implicate other bodies of law.

2. Specific applications.

Professor Goldstein renders the practical ramifications of this insight more accessible to bench and bar alike by applying his refined infringement

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141. The legislative history neither confirms nor rejects this interpretation, but states only that the "bill, unlike the present law, contains a general statement of what constitutes infringement of copyright." 1976 ACT HOUSE REPORT, supra note 55, at 158. However the legislative history pertinent to § 106 carries a protective thrust that seems inconsistent in spirit with many of the older precedents:

[A] copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author's "expression" rather than merely the author's "ideas" are taken.

Id. This protective thrust depends, in turn, on the vigor with which the exclusive right to prepare derivative works is enforced under 17 U.S.C. § 106(2) (1988). See, e.g., Cohen, supra note 17, at 721-22.

142. The 1990 revision of the Nimmers' treatise does single out computer programs for a separate, detailed discussion of the idea-expression distinction. See 3 NIMMER ON COPYRIGHT, supra note 2, § 13.03[1][f] (discussing a "Successive Filtering Method to Determine Substantial Similarity of Computer Programs"). This specialized treatment of computer programs is based upon a perceptive article recently co-authored by David Nimmer, which emphasizes the nonprotectibility of program elements dictated by logic, efficiency, or external considerations, and of elements taken from the public domain. See generally Nimmer, Bernacchi & Frischling, supra note 78.

Yet the problems David Nimmer identified regarding computer programs apply in varying degrees to all utilitarian works, including applied art and commercial designs, rules, plans, games, toys, and the like, as Professor Goldstein recognizes. See vol. 2, § 8.5.1.2; notes 163-237 infra and accompanying text. Ironically, Goldstein's treatise may turn out to be more receptive to computer programs than the Nimmers' treatise as revised in 1990. See text accompanying notes 217-220 infra.

analysis to specific subject matter categories, with a view toward clarifying the subtleties of different protective environments.¹⁴⁷ He singles out five broad subject-matter categories for special attention¹⁴⁸ and examines in detail the play of different exclusive rights in each of these categories and within selected subcategories as well.

*Literary, artistic, and musical works.* The treatment of traditional literary works is typical. After surveying the effects of basic infringement doctrine as applied to these works in general,¹⁴⁹ the treatise reviews the specific application of the reproduction, performance and display rights¹⁵⁰ to stories,¹⁵¹ novels,¹⁵² and dramatic works.¹⁵³ Discussion of the right to prepare derivative works is reserved for a separate section covering these same subject-matter subcategories, with particular emphasis on the need for judges to look beyond the "lowest common denominators" when evaluating the facts of each case.¹⁵⁴

Professor Goldstein applies a similar methodology to "pictorial, graphic, sculptural, and audiovisual works,"¹⁵⁵ and he undertakes a searching analysis of "musical works" that even seasoned industry lawyers should find illuminating.¹⁵⁶ He subdivides the former category into "paintings, photographs, labels, and fabric designs,"¹⁵⁷ "characters, video games, and motion pictures,"¹⁵⁸ and "toys, dolls, jewelry and figurines."¹⁵⁹ Among other insights, this approach reveals the incongruities perpetuated by judicial management of the many commercial designs that still qualify as copyrightable works of applied art under *Mazer v. Stein,*¹⁶⁰ even though the separability test codified in section 101 altogether excludes the bulk of modern industrial design from copyright law.¹⁶¹ Professor Goldstein's analysis

¹⁴⁷. This task is especially important because "the substance of the 'idea-expression' distinction differs with the nature of the work . . . and the principal source of the differences . . . lies in the nature of the subject matter itself." Vol. 2, § 8.0, p. 48.

¹⁴⁸. The major categories are literary, visual, musical, factual, and functional works. The specialized subcategories of factual and functional works, though technically part of the general category of literary works, are treated separately. *See* notes 163-234 *infra* and accompanying text. Such an approach aims to ensure that the more restrictive precedents applicable to these subcategories are not carried over uncritically to works at the more creative end of the spectrum.


¹⁵⁴. Vol. 2, § 8.1.2, pp. 60-61 (criticizing judges' tendency to downplay style, scenic description, and psychological insight in favor of plot, character, and setting when determining whether a motion picture or play has appropriated protected expression from a story or novel).


¹⁵⁹. Vol. 2, § 8.2.1.3.

¹⁶⁰. 347 U.S. 201 (1954); *see* vol. 1, §§ 2.11.1, 2.11.2.

¹⁶¹. 17 U.S.C. § 101 (1988) limits "pictorial, graphic, and sculptural works" to include [the listed types of] works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and
should therefore caution practitioners and scholars against contaminating general principles of copyright law by uncritical reference to ad hoc solutions devised to limit copyright protection of commercial designs.\footnote{162}

**Factual works.** Professor Goldstein devotes separate chapters to the infringement of "factual works" and "functional works."\footnote{163} Although such works typically fall within the broad definition of literary works set out in section 101 of the 1976 Act,\footnote{164} their proper scope of protection has become highly controversial.\footnote{165} Goldstein subdivides factual works into "maps,"\footnote{166} "directories and catalogues," "case reports, digests, manuals and texts," and "news stories, history, and biography."\footnote{167} He then characterizes the tension underlying this entire class of works as a tendency either to "overprotect[ ] the copyright owner by giving it rights in the facts its work depicts" or to "underprotect[ ] the copyright owner by allowing defendant to use not only the facts depicted but also the protectable expression in which the depiction is cast."\footnote{168}

From this angle, Goldstein criticizes the chronic underprotection of historical works that has resulted from the Second Circuit's restrictive opinion in *Hoehling v. Universal City Studios.*\footnote{169} In his view, "there is no reason to treat the historian or biographer who has artfully arranged and expressed

\begin{quote}
only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.
\end{quote}

\footnote{162. See also Reichman, Designs and New Technologies, supra note 27, at — [Parts II.B, III.A].}

\footnote{163. See vol. 2, §§ 8.4, 8.5. Goldstein's use of the term "fact works" is consistent with that of Professor Nimmer. Compare 1 Nimmer on Copyright, supra note 2, § 2.11. However, Goldstein's designation "functional works" contrasts with Nimmer's "works of utility," see 1 id. § 2.18, and this nomenclature foreshadows the restrictive scope of protection that Goldstein advocates and Nimmer disavows. See also notes 194-214 infra and accompanying text.}

\footnote{164. See 17 U.S.C. § 101 (1988), which defines "literary works" as works, other than audiovisual works, expressed in words, numbers or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

Compilations constitute a distinct subject-matter category under id. § 103(a), with the proviso that the copyright in a compilation "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material," id. § 103(b).


\footnote{166. Technically, maps are considered "pictorial, graphic, and sculptural works" under the definition of that term in 17 U.S.C. § 101 (1988).

\footnote{167. See vol. 2, § 8.4. As with the earlier categories, Goldstein examines each subcategory in terms of the reproduction, performance, and display rights, vol. 2, §§ 8.4.1-8.4.4, and then discusses the right to prepare derivative works for the category as a whole, vol. 2, § 8.4.2.


\footnote{169. 618 F.2d 972 (2d Cir. 1980) (holding that a description of a historical hypothesis on the Hindenburg disaster was not copyrightable, and, in dicta, broadly limiting the scope of protection of historical works to bodily appropriation); see also Miller v. Universal City Studios, 650 F.2d 1365}
historical matter any less generously than the fiction writer who has artfully expressed and arranged old plots and stock characters.”

Conversely, he derides the overprotection of derivative works that occurs when courts confuse the large amount of material that defendants add to their works with the amount they actually take from the plaintiffs’ works.

Professor Goldstein appears to reject the “sweat of the brow” rationale, which Professor Denicola boldly defended in 1981 and the Seventh Circuit has enthusiastically applied. These latter authorities fear that unless afforded protection by copyright law, one who uses diligence and effort to compile facts remains vulnerable to instant duplication by second-comers who make no comparable investment of time and money. In an age when databases are of fundamental importance to science and industry, this vulnerability could unduly diminish publishers’ incentives to invest in compilations.

According to Professor Goldstein, factual works “differ from works of art in degree, not kind,” and it is only “the rare fact work that does not bear some trace of the author’s hand.” He integrates his treatment of facts with that of ideas generally, urging courts to apply the standard tools of analysis and to look for protectible expression in the “ordering and elaboration” of the factual material. At the same time, the courts must avoid

(5th Cir. 1981) (allowing filmed adaptation of docudrama for purpose of entertainment without payment to author of “research”).


172. See Denicola, supra note 40, at 531.

173. See, e.g., Illinois Bell Tel. Co. v. Haines & Co., 905 F.2d 1081 (7th Cir. 1990) (compiler’s copyright extends to other uses of directories by third parties, such as rearranging data by address rather than by name), petition for cert. filed, 59 U.S.L.W. 3374 (U.S. Nov. 2, 1990) (No. 90-731); Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., 768 F.2d 145, 149-50 (7th Cir. 1985) (criticizing defendant’s use of plaintiff’s map as a “starting point” and requiring defendant to undertake its own “industrious collection”), cert. denied, 474 U.S. 1061 (1986); Schroeder v. William Morrow & Co., 566 F.2d 3, 6 (7th Cir. 1977) (reproduction of names and addresses that were the core facts in gardening guide was copyright infringement); National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89, 94 (N.D. Ill. 1982) (developing mailing lists from copyrighted credit reports found to infringe); see also United Tel. Co. of Mo. v. Johnson Publishing Co., 855 F.2d 604 (8th Cir. 1988) (using the white pages of a phone directory as an initial reference for updating a competitor’s directory infringed); Rural Tel. Serv. Co. v. Feist Publications, Inc., 663 F. Supp. 214 (D. Kan. 1987) (use of white pages to prepare directory without independent canvass held an infringing use), aff’d, 916 F.2d 718 (10th Cir. 1990) (unpublished opinion), cert. granted, 111 S. Ct. 40 (1990).

174. See, e.g., Ginsburg, supra note 77, at 1907-16; Denicola, supra note 40, at 531 (stressing the need to protect databases by protecting the assemblage of information itself, not simply the arrangement).


protecting “so much of the work that other authors are disabled from writing about facts or events first described by others.”

Although Professor Goldstein's approach aims to mediate between the need for incentives and the perceived lack of original authorship, he does not resolve the conflicting interests that arise in the hardest cases, such as those concerning telephone directories. These cases pit the competitor's wholesale appropriation of factual content against the compiler's lack of original expression, and they raise troublesome questions about a competitor's need to use the compiler's data to publish additional compilations of a more specialized character. On the one hand, a considerable investment of time and money does not give rise to a work that bears the stamp of the author's personality; on the other, free-riding threatens to undermine the collection and dissemination of valuable information.

Faced with this dilemma, foreign legislatures have sometimes provided short-term protection for noncopyrightable compilations, apparently without undermining copyright protection for those compilations that do satisfy the normal threshold requirements. In a recent article, Professor Jane Ginsburg criticizes the “predominant unitary approach to copyright” law built around the expression of an author's personality and calls for “a compulsory license enabling competitors to access, copy, and reorganize data gathered by the first compiler” in return for reasonable compensation. In

178. See cases cited in note 173 supra.
179. See, e.g., Ginsburg, supra note 77, at 1868-71, 1902-07; Patterson & Joyce, supra note 171, at 798-813.
180. See, e.g., Gunnar Karmell, Sweden §§ 2(1)[b], 3(2)[a], in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 16 (catalogs, tables, databases and other low-authorship compilations allowed ten years of protection unless qualified as an original work for purposes of full copyright protection); Agne Henry Olsson & Karin Hökborg, The Nordic Countries, in INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 468, 475 (S. Stewart 2d ed. 1989) (similar provisions in Denmark, Finland, and Norway).
181. Ginsburg, supra note 77, at 1870-71. Professor Ginsburg points to historical evidence that Anglo-American copyright laws at times disregarded the demand for works that bore the imprint of an author's personality and instead sought to reward creative labor. See id. at 1873-93. But her appeal discounts the relation between the generous modalities of protection in the Berne Union countries and their dominant aim to protect creative personal expression. See vol. 2, § 16.4; S. Ricketson, supra note 91, at 231-32 (noting constant disputes about borderline productions). In contrast, the grudging United States 1909 Act—with its formalities, its technical forfeiture, and its relatively short term of protection—could accommodate a broader array of low-authorship works without necessarily overprotecting them. Cf. notes 43-48 supra and accompanying text; Reichman, Designs and New Technologies, supra note 27, at — [Part III.A].

Her argument seems also to confuse the goals of a copyright system with those of unfair competition law. See, e.g., Patterson & Joyce, supra note 171, at 730, 802-06; see also Douglas G. Baird, Common Law Intellectual Property and the Legacy of International News Service v. Associated Press, 50 U. CHI. L. REV. 411 (1983) (discussing the evolution of the common law misappropriation action). This confusion is endemic in Anglo-American countries, where legislators pretend to abhor unfair competition laws that prohibit misappropriation as such, while courts increasingly rely on copyright and trademark laws to repress misappropriation in practice. See, e.g., note 40 supra (English law); Reichman, Designs and New Technologies, supra note 27, at — [Part II.C] (describing current protection of product configurations as “appearance trade dress” by U.S. federal appellate courts). Nevertheless, Professor Ginsburg’s interesting proposal to subject the compiler's data to a compulsory license that would favor certain productive uses could fit nicely within a modified copy-
United States judicial practice, however, federal courts tend to repress slavish imitation but prohibit no more than literal copying.\footnote{182}{182} Professor Goldstein reluctantly endorses this result when all else fails,\footnote{183}{183} although he would sometimes allow an adjustment of remedies limiting relief to damages when full copyright protection appears overprotective in terms of the incentive rationale.\footnote{184}{184} But neither Goldstein nor the courts that limit infringement to slavish imitation explain why the infringer's methodology should retroactively transform a factual compilation devoid of creative authorship into quasi-artistic property.\footnote{185}{185} Under the prevailing judicial approach, as Professors Patterson and Joyce have shrewdly observed, the compiler is not protected from harm because of his copyright, but is found to possess a copyright because he has suffered harm.\footnote{186}{186}

That Anglo-American decisionmakers formally shy away from the misappropriation rationale of unfair competition law\footnote{187}{187} hardly justifies this reverse reasoning. One may concede that the indefinite duration, lack of standards, and hit-or-miss approach of unfair competition law makes it a poor vehicle for balancing incentives to create against the public's need to know or to use the compiler's end product.\footnote{188}{188} Nevertheless, the well-documented shortcomings of copyright protection for factual works hardly makes this body of law an adequate substitute.

The Supreme Court will probably fail to resolve these tensions in the telephone directory case pending before it,\footnote{189}{189} but the Court may clarify the rights of second-comers to put the data contained in copyrighted compila-

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\footnote{182}{See, e.g., Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc., 777 F.2d 485, 491-92 (9th Cir. 1985) (stressing narrow range of protectible expression in factual works); Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488-89 (9th Cir.) (similarity of expression must be nearly verbatim to infringe copyright in factual works), cert. denied, 469 U.S. 1037 (1984); cases cited in note 173 supra; see also Eeckes v. Card Prices Update, 736 F.2d 859, 862 (2d Cir. 1984) ("the sweat of a researcher's brow does not merit copyright protection, absent, perhaps, wholesale appropriation"). But see, e.g., Worth v. Selchow & Righter Co., 827 F.2d 569 (9th Cir. 1987) (ostensibly rejecting "sweat of the brow" rationale even in the presence of slavish imitation), cert. denied, 485 U.S. 977 (1988).}

\footnote{183}{See vol. 2, § 8.4, p. 99 ("inherent limits on variety in fact works will sometimes dictate that infringement be found only if the defendant's work is identical or virtually identical to plaintiff's" although "][here are few less tractable questions in copyright").}

\footnote{184}{Vol. 1, § 2.14.2, p. 186.}

\footnote{185}{Eligibility thus depends on "the extensiveness of the defendant's copying; true sloth and great greed... will confer copyright upon... otherwise unprotected labor." Ginsburg, supra note 77, at 1897. With this approach, compare the tendency of the Seventh Circuit to link eligibility with the piling of fact on fact, which gives compilations a protective edge over historical works and other forms that convey research results. See notes 172-173 supra and accompanying text.}

\footnote{186}{See Patterson & Joyce, supra note 171, at 729.}


tions to certain productive uses. Legislative initiatives to provide short-term protection for low-authorship compilations on the model of Nordic law would likely meet stiff opposition from publishers who feared a weakening of their claim to eligibility in copyright law. This fear would be reinforced by the hostility of certain computer software manufacturers to comparable sui generis legislation. Thus any long-term solution to the problem of protecting investment in factual compilations, especially those with industrial applications, seems bound up with the larger problem of protecting diverse forms of applied scientific know-how, as discussed below.

Functional works. Professor Goldstein subdivides functional works into "plans, forms and rules" and "computer programs." Here tensions arise because functional works include nonexpressive, utilitarian features that fall at least nominally within the sway of the patent law, which conditions its powerful legal monopolies on more exacting standards of novelty and non-obviousness than the originality requirement of literary and artistic property law. Goldstein acknowledges that even highly functional works sometimes contain expressive elements eligible for copyright protection. But he stresses that once optimum efficiency has been reached, consumers may have little interest in seeing a particular functional result expressed differently.

Although experienced practitioners may find these axioms self-evident, their formal recognition in a major new treatise should help to clarify a number of historical misconceptions. For example, when the Second Circuit lowered the threshold barriers to the copyrightability of business forms and other functional works in Continental Casualty Co. v. Beardsley, it also implied that the scope of protection afforded these works should be limited virtually to repressing slavish imitation. Subsequent cases followed this

of white pages to prepare directory without independent canvass was copyright infringement), aff'd, 916 F.2d 718 (10th Cir. 1990) (unpublished opinion), cert. granted, 111 S. Ct. 40 (1990).
190. The writ of certiorari seems to focus on the scope of protection issues. Rural Telephone, 111 S. Ct. at 40.
191. See note 180 supra and accompanying text.
193. See notes 228-235 infra and accompanying text.
194. Vol. 2, §§ 8.5-8.5.2.2. After a general survey, vol. 2, § 8.5, these subcategories are again viewed first in terms of the reproduction, performance and display rights, vol. 2, §§ 8.5.1, and then in terms of the right to prepare derivative works, vol. 2, § 8.5.2.
196. See notes 217-220 infra and accompanying text.
198. 253 F.2d 702 (2d Cir.) (when use and explanation are wedded, copyright protection will lie, notwithstanding Baker v. Selden, 101 U.S. 99 (1879)), cert. denied, 358 U.S. 816 (1958).
199. Continental Casualty. 253 F.2d at 706. This and similar decisions responded in part to Mazer v. Stein, 347 U.S. 201 (1954), which declined to allow copyrightability to turn on the intended use of the work. For Goldstein's treatment, see vol. 2, § 8.5, p. 118 & n.8.

A more recent case with a similar holding is Affiliated Hosp. Prods., Inc. v. Merdel Game Mfg. Co., 513 F.2d 1183, 1189 (2d Cir. 1975) (copyright on rulebook not infringed by defendant's goodfaith use in preparing improved version of rulebook for public-domain game). But see International
lead, in part because the result seemed consistent with the spirit of the Supreme Court’s landmark decision in Baker v. Selden.200

By 1979, one astute district court deemed it an open secret that functional works obtained only “thin” protection from copyright law, a finding that Professor Goldstein implicitly approves.201 Professor Melville Nimmer, however, criticized this line of cases for derogating from the standard infringement calculus.202 His treatise confined Baker v. Selden to the much older idea-expression distinction and rejected the notion that the scope of protection should vary with the class of works in question.203 Nimmer’s treatise also made no direct reference to the doctrine of “thin” protection.

Perhaps due to Nimmer’s influence and participation, the 1978 Final Report of the National Commission on New Technological Uses of Copyrighted Works (CONTU) likewise limited Baker v. Selden to the idea-expression dichotomy codified in section 102(b) of the 1976 Act.204 The Final Report thus made no mention of either the “thin” copyright tradition derived from Continental Casualty205 or of the older tradition authorizing

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200. 101 U.S. 99 (1879) (use of bookkeeping system from copyrighted book held not to infringe). Professor Goldstein rightly attributes this line of cases to Baker v. Selden. See vol. 2, § 8.5, pp. 117-18; vol. 2, § 8.5.1.1, p. 122 n.19. However, Baker v. Selden stands for several different propositions, see notes 206-214 infra and accompanying text, and this line of cases is too readily confused with a strained but popular reading of Baker v. Selden as a straightforward application of the idea-expression dichotomy. This reading is the one that Professor Nimmer endorsed, although he disapproved of the tendency to restrict the protection of functional works to slavish imitation, as the Continental Casualty line of cases holds. See 1 Nimmer On Copyright, supra note 2, §§ 2.15[C], 2.18[D]; notes 202-208 infra and accompanying text.


202. See 1 Nimmer On Copyright, supra note 2, § 2.18[C] (criticizing cases that narrowed the protection of functional works).

203. Id. Indeed, Professor Nimmer took the extreme view that the reproduction right prevailed in all cases, even when that resulted in indirectly protecting the work against use by third parties: “Thus, the mere fact that rights granted under the Copyright Act may indirectly result in a monopoly of use of the copyrighted work will not prevent the enforcement of such rights, notwithstanding the absence of an expressly granted ‘right of use.’” Id. § 2.18[A], at 2-196.


205. See CONTU Report, supra note 204, at 18-23. But cf. Pamela Samuelson, CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form, 1984 Duke L.J. 663 (criticizing the basic premises and methodology of the report). Although CONTU acknowledged Continental Casualty and stressed the exclusionary force of § 102(b), see CONTU Report, supra note 204, at 19-21, its report expressly embraced Professor Nimmer’s interpretation of Baker v. Selden as a precedent he thought was “properly confined” to applications of the idea-expression doctrine, see 1 Nimmer On Copyright, supra note 2, § 2.18[D]. See also note 208 infra (comparing the CONTU Report and Nimmer in this respect). Professor Nimmer, as a
reproduction for the purpose of reverse engineering that Professor Benjamin Kaplan and earlier writers had rightly attributed to Baker v. Selden. On the contrary, the CONTU Report blandly reassured its readers that copyright law had always managed to accommodate utilitarian works; it brushed aside any further obstacles stemming from Baker v. Selden and progeny by explicitly adopting Professor Nimmer's restrictive view of that decision.

One may justifiably wonder if copyright law would have appeared so attractive to those who advocated its wholesale application to computer programs had Professor Goldstein's treatise been available for CONTU's consultation at that time. Goldstein's own treatment of Baker v. Selden does not set the record entirely straight, however, even as to functional works in general. Professor Nimmer arbitrarily narrowed that precedent to fit the idea-expression analysis he preferred to adopt in all cases. Professor Goldstein, instead, gingerly acknowledges that, in proper circumstances, the Baker-Mazer heritage should require a court to strike a balance between the copyright owner's need for a return on investment and a competitor's freedom to emulate function. According to Goldstein, this balancing may "excus[e] the defendant who dips beneath surface details into functional elements of a copyrighted work, while outlawing literal copying of surface details." He thus fails to consider that Baker had authorized a

CONTU commissioner, nonetheless expressed misgivings of his own in a separate concurring opinion. See CONTU REPORT, supra note 204, at 26-27.

206. See, e.g., Combustion Eng'g, Inc. v. Murray Tube Works, 222 U.S.P.Q. (BNA) 239, 244 (E.D. Tenn. 1984); Muller v. Triborough Bridge Auth., 43 F. Supp. 298 (S.D.N.Y. 1942); vol. 1, § 5.4.1, pp. 584-85 (citing other cases).

207. See, e.g., BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 63-66 (1967) (stating that "the privilege extends to exact copies" and criticizing the "regrettable backsliding" to idea-expression in Continental Casualty, and approving precedents indicating that "buildings . . . may . . . be copied down to the last square foot of glass-front" despite the existence of copyrighted blueprints); id. at 49, 57 (disapproving any notion of a right to control end use); A. LATMAN, supra note 135, at 31-32 (Baker "held that the bookkeeping system was uncopyrightable and/or that using the system does not infringe") (emphasis added); see also H. BALL, supra note 9, at 274-78 (citing Baker as authority for fair use in regard to books on science or the useful arts). See generally Reichman, Programs as Know-How, supra note 56, at 693 & n.288 (demonstrating that the idea-expression doctrine predated Baker and that the Supreme Court actually intended to override the reproduction rights when this became necessary to reverse engineer or otherwise permit use of the functional features embodied in utilitarian works).

208. See CONTU REPORT, supra note 204, at 14-16, 20-21. Compare id. at 19 ("As Professor Nimmer observes, Baker v. Selden . . . stands for the proposition that using the system does not infringe the copyright in the description. This rule is found in Section 102(b) of the new law.") (emphasis added) with 1 NIMMER ON COPYRIGHT, supra note 2, § 2.18[D] ("The Proper Limits of Baker v. Selden").

209. Cf. Brown, supra note 37, at 601 (observing that the push for copyright protection of computerized processes was logical "because any time the arduous achievement of a short-lived patent can be turned into the painless acquisition of a seventy-five year copyright, a line will form to try it, and an academic cheering section can even be mustered"). For Professor Goldstein's attempt to adapt copyright law to computer programs, see notes 215-237 infra and accompanying text.

210. See vol. 2, § 8.5; see also vol. 1, §§ 2.15, 5.4.4.

211. See notes 202-203 & 208 supra and accompanying texts.

“fair use”-like power to excuse even total reproduction of a functional work for limited functional uses before the success of Nimmer’s expurgated version hid this meaning from view.213

Nevertheless, Goldstein rightly detects the twin dangers that attend all judicial applications of Baker and its progeny, dangers that increasingly seem to afflict the legal protection of factual works, too. One is a tendency to underprotect those expressive elements that sometimes do enrich functional features. The other is a disposition to overprotect the modicum of expressive content embodied in most functional works even when it can only be expressed in a limited number of ways without loss of utility or consumer confidence.214

Computer programs. In the separate chapter devoted to computer programs,215 Professor Goldstein observes that they, like functional works generally, “come dangerously close to the [Copyright] Act’s prohibition against protection for any ‘idea, procedure, process, system, method of operation, concept, principle or discovery.’”216 He nonetheless has come to believe that computer programs may harbor substantially more expressive potential than other utilitarian works, such as plans, forms, and rules,217 and he envisions a correspondingly broader scope of protection in the appropriate circumstances.218

What troubles Professor Goldstein is that application programs are not necessarily subject to the same constraints as operating system programs.219 For this reason, the former deserve a broader scope of protection commensurate with the expressive elements they contain. He concedes that the expressive content of operating systems programs is inherently limited. He would thus allow these programs only a very narrow scope of protection, lest the copyright owner monopolize “a single, powerful marketplace” by inhibiting compatibility and the benefits of interoperability.220

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213. See notes 206-207 supra; see also Steven W. Lundberg, George H. Gates III & John P. Sumner, Baker v. Selden, Computer Programs, 17 U.S.C. Section 102(b) and Whelan Revisited, 13 Hamline L. Rev. 221 (1990). In his first supplement, however, Professor Goldstein develops an ad hoc fair use argument, without invoking Baker v. Selden, that aims to liberate nonprotectible features of computer programs from exclusive reproduction rights in certain situations. See 1990 Supplement, § 5.2.1.4, pp. 60-66 (discussing a reverse engineering limitation); notes 221-225 infra and accompanying text.


218. This apparently represents a refinement of the “thin” copyright doctrine that Professor Goldstein thought applicable to computer programs in 1986. See Paul Goldstein, Infringement of Copyright in Computer Programs, 47 U. Priy. L. Rev. 1119, 1123-26 (1986) (hereinafter Goldstein, Computer Programs), in which Professor Goldstein warned that “[n]o protect against too wide a range of equivalents runs the risk of monopolizing all expression of the underlying function and thus, of monopolizing the function itself.” Id. at 1124.


220. Vol. 2, § 8.5.1, p. 131; see also Conference Report, supra note 116, at 21-25, 27-32; Samu-
In the first supplement to his treatise, moreover, Professor Goldstein strikes a blow for the competitor’s right to reverse engineer “a lawfully obtained copy of a copyrighted work in order to extract the work’s unprotected elements and, subsequently, to incorporate those elements in a competing work.” Arguing that disassembly, decompilation, or other analytical uses of a copyrighted program constitute a form of “research” within the preamble to section 107, he shows that the four tests of fair use codified there can excuse the making of a copy as “an intermediate step in the design of a competing but noninfringing program.” As regards the market factor of section 107(4), Goldstein observes that if “the intermediate copy . . . does not enter the marketplace, it cannot be said to impair the plaintiff’s potential market or reduce the value of its copyrighted expression.” By the same token, if the second product “contains no infringing material, it will be excused—not because section 107 makes this use fair, but for the more fundamental reason that the product does not infringe.”

In this way, Professor Goldstein’s approach, as refined by his first supplement, largely succeeds in reconciling the protection of computer programs with established copyright principles, as Congress ordained, despite his misgivings about the wisdom of that legislative decision. Nevertheless, his analysis underestimates the extent to which even apparently expressive components of application programs may be determined by such external factors as functional efficiency, standardization, human factors engineering, and market expectations. It also downplays the extent to which


221. 1990 Supplement, § 5.2.1.4, pp. 61-62.
222. See note 118-125 supra and accompanying text.
226. For an effort by ten law professors (including Professor Goldstein) to apply copyright principles to computer programs with a degree of consensus, see Conference Report, supra note 116. For Goldstein’s personal misgivings about copyright as a protective vehicle, see Goldstein, Computer Programs, supra note 218, at 1120-23.

In his first supplement, Professor Goldstein shows a greater awareness of and concern for these factors by devoting several pages to the theme of “constraints on protection.” See 1990 Supplement,
the underlying structural design of any computer program, like other forms of technological innovation, represents as perfect a synthesis of idea and expression as the software engineer can muster. In some situations, full protection even of application programs could thus invest the copyright owner with excessive power in the products market and even deter competitors from acquiring the know-how they need to maintain the pace of incremental advances in the art.\textsuperscript{230}

In a larger perspective, Professor Goldstein's analysis insufficiently appreciates that the expressive content of application programs typically constitutes a particular form of industrial design.\textsuperscript{231} Both industrial designs and the user interfaces of computer programs can be reduced to innocuous two-dimensional representations that aim at attractiveness as well as efficiency. However, their routine embodiment in three-dimensional supports that enter products markets enables copyright holders to undercut the level of competition that the patent law normally demands in such markets.\textsuperscript{232} For this and other reasons, the quest for legal protection of industrial design historically rejects the wholesale adoption of either the copyright or the patent paradigms as inconsistent with the needs of a competitive economy.\textsuperscript{233} By tacitly acquiescing in the artificial distinction between industrial art and industrial literature that entered the copyright law in 1976,\textsuperscript{234} Goldstein overcompensates in his treatise, Professor Goldstein also notes that "instruction manuals are essentially functional" and that "[r]o give them too broad a scope of protection in infringement actions may improperly curtail competition in functional elements that have not met the patent law's rigorous standards of novelty, nonobviousness and utility."\textsuperscript{228} Vol. 2, § 8.4.1.3, p. 109.

\section*{Footnotes}

\textsuperscript{228} Goldstein's first supplement acknowledges this problem and tilts toward competition rather than protection:

Should a firm that adopts an arbitrary configuration which later becomes an industry standard be allowed to control all subsequent copies of the configuration? \ldots{} The case for copyright \ldots{} may appear weak—at least to the extent that the tribute to be exacted from licensing interface standards will dwarf the sums invested in designing the interface.

\textsuperscript{229} For the historical anomalies that result whenever copyright law is allowed to disrupt the role of patent law in regulating the products market, see Reichman, \textit{Designs and New Technologies}, supra note 27, at — [Part III A.] ("excesses of the copyright approach" and "the two market conundrum").


\textsuperscript{232} See note 229 supra: 1990 Supplement, § 2.15.3.2, p. 20.


\textsuperscript{234} Compare 17 U.S.C. § 101 (1988) (defining " pictorial, graphic, and sculptural works" only to include "art that is "separable" from utilitarian aspects") and id. § 113(b) (permitting use or reverse engineering of useful articles portrayed in two-dimensional form, notwithstanding the need to make an unauthorized reproduction, see Reichman, \textit{Designs Before 1976}, supra note 43, at
sates for the expressive potential that function largely determines, and thus inadvertently obscures the need for a special law to protect advanced technical and scientific know-how as such.235

These criticisms, however, hardly detract from the quality of the overall contribution that Professor Goldstein makes to a debate that shows no sign of diminishing. His efforts to apply copyright law to computer programs without eviscerating the competitive mandate of the patent system236 give mostly cold comfort to the maxi-protectionists. His admonitions concerning the dangers and limits of extending artistic property law to this new technology are so sobering and detailed that, over time, they will inevitably help to curb the judicial appetite for exorbitant protection.237

IV. INTERNATIONAL COPYRIGHT AND JURISPRUDENTIAL CONSIDERATIONS

The final chapter of Professor Goldstein’s treatise238 contains a succinct account of the United States’s international copyright relations from the dark days when foreign works were systematically pirated in the name of territorial sovereignty239 to the signing of the Berne Convention in 1989.240 This chapter raises major themes such as the historical tension between the principles of national treatment and material reciprocity,241 and it adequately differentiates the “copyright” and “authors’ rights” traditions.242 However, its treatment of the multilateral conventions is not consistently as detailed or comprehensive as one would like.

Professor Goldstein’s structural overview of the Universal Copyright Convention,243 which continues to play a considerable role in United States copyright relations,244 identifies those aspects of the treaty that are of most

1201-11 (citing authorities)) with id. § 101 (defining “literary works” to include industrial literature without reservation or reference to separability from utilitarian functions, and defining “useful articles” to exclude articles that “convey information”) and id. § 115(b) (no express limitation on the reproduction rights with regard to verbal or symbolic portraits of mechanical or utilitarian articles). But cf. Baker v. Selden, 101 U.S. 99, 103 (1879) (rejecting any distinction between verbal and graphic blueprints for these purposes).


237. "Specifically, a court should extend copyright protection to a functional work only if, and to the extent that, the court concludes that such protection will serve society's interest in differentiated expression more than it will deter society's interest in having free access to technological solutions that are unprotected by patent or trade secret law." Vol. 1, § 2.15, p. 198.

238. Vol. 2, ch. 16.

239. See vol. 2, § 16.1, pp. 678-89; notes 7-8 supra and accompanying text.

240. See vol. 2, § 16.7, pp. 697-98; notes 4-5 supra and accompanying text.


243. See Universal Copyright Convention, supra note 8.

244. The Universal Copyright Convention still governs relations between the United States and those countries that adhere to the Universal Copyright Convention but not to the Berne Con-
interest to general practitioners. The same is true of the two “neighboring rights” conventions to which the United States adheres: the Geneva Phonograms Convention and the Brussels Satellite Convention. In contrast, Goldstein’s treatment of neighboring rights in foreign law generally and of the Rome Convention in particular seems abbreviated considering the economic importance of these subjects. He ignores the current tendency to view neighboring rights laws as a possible basis for international accommodation of new technologies unsuited to either the copyright model of Berne or the patent model underlying the Paris Convention for the Protection of Industrial Property.

Convention, such as the Soviet Union. See vol. 3, app. B-1, pp. 638, 645. Relations between countries that belong to both treaties are generally governed by the Berne Convention. See Universal Copyright Convention, supra note 8, art. XVII, Appendix Declaration to art. XVII. As between these countries, however, the Universal Copyright Convention may still determine whether existing works entered the public domain before they could be rescued by the retroactivity clause of the Berne Convention. See, e.g., Universal Copyright Convention, supra note 8, arts. II, III, VIII, Appendix Declaration to art. XVII; Berne Convention, supra note 4, art. 18. The precise mesh between the Universal Copyright Convention and the Berne Convention as it will affect future United States copyright relations is controversial and beyond the scope of this article. See generally Geller, Copyright Protection in the Berne Union: Analyzing the Issues, supra note 16, at 452-53.

See vol. 2, § 16.6, pp. 688-95.


250. Neighboring rights typically “provide the legal mechanism through which countries adhering to the author’s rights tradition protect sound recordings, performances and broadcasts without diluting the author’s right regime.” Vol. 2, § 16.5, p. 687.


The broad coverage of the Paris Convention arguably poses a serious obstacle to experimentation with a neighboring rights approach to new technologies, at least when the moving state seeks to condition its protection of foreigners on material reciprocity, as the United States did in the Semiconductor Chip Act, see 17 U.S.C. §§ 902, 914(a) (1988). Although other countries have followed a
Internal evidence suggests that Professor Goldstein's treatise was over-taken in midstream by the United States's decision to adhere to the Berne Convention. As a result, his treatment of that Convention\textsuperscript{253} synthesizes its main provisions without going beyond the level of detail that characterizes his approach to international copyright matters in general. He fulfills his stated purpose by attempting "no more than to bring the United States copyright owner to the door of the foreign courthouse," at which point the applicable foreign sources are best consulted.\textsuperscript{254} Nevertheless, one hopes that future supplements will push beyond a structural overview of the Berne Convention to an examination of its legislative and judicial implementation in domestic law.\textsuperscript{255}

In carrying out this task, Professor Goldstein may find economic analysis a less reliable tool than it was in the past. This is not because the Berne Union countries remain altogether indifferent to the incentive rationale of copyright protection. On the contrary, the more these countries are pushed or pulled toward protecting borderline, utilitarian subject matter, the more attentive their scholarly and administrative circles have become to the adverse effects of overly broad legal monopolies.\textsuperscript{256} In this vein, the law and economics movement abroad has spawned a considerable body of literature on current intellectual property issues.\textsuperscript{257}

\textsuperscript{253} Vol. 2, § 16.7.


\textsuperscript{256} See, e.g., COMMISSION OF THE EUROPEAN COMMUNITIES, GREEN PAPER ON COPYRIGHT AND THE CHALLENGE OF TECHNOLOGY: COPYRIGHT ISSUES REQUIRING IMMEDIATE ACTION 171-75 (COM (88) 172, Brussels, June 7, 1988) (Discussing appropriate scope of protection for computer programs and software); W. KINGSTON, supra note 20, at 79-133; ANDRÉ LUCAS, GENERAL REPORT: DATA BASES AND COPYRIGHT, IN ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE, L'INFORMATIQUE ET LE DROIT D'AUTEUR 332 (1990) (Proceedings of the Annual Congress, Quebec, Canada, September 26-30, 1989); see also John M. Kernochan, Imperatives for Enforcing Authors' Rights, 11 Colum.-VLA J.L. & Arts 587, 592-96 (1987) (urging Berne countries to rethink basic goals of protection for core works, which remain unfulfilled, while avoiding confusion with other forms of creativity that entail a different legal and economic logic).

Still, as to traditional literary and artistic works, a fuller inquiry into the policies and philosophy underlying the mature copyright systems of leading Berne countries would doubtless reveal the limits of a solely utilitarian approach.\textsuperscript{258} For example, greater efforts to reconcile the natural rights bias of the Berne countries with the traditional incentive theory of domestic law seem advisable,\textsuperscript{259} if only to forestall developing countries from appealing to generous "public interest" exceptions over here as justifications for lax protection under their own laws.\textsuperscript{260} Similarly, many foreign copyright laws operating within the flexible parameters of Article 6\textsuperscript{bis} of the Berne Convention\textsuperscript{261} elevate the protection of the artist's personality interests to a first principle. The other Berne Union members are unlikely to tolerate American indifference to these nonpecuniary values,\textsuperscript{262} as the American delegation has painfully discovered during the current GATT negotiations.

How Professor Goldstein will respond to this challenge remains to be seen from subsequent supplements and revisions. Given his interest in comparative law\textsuperscript{263} and his keen sense of how the world copyright system actually operates, his future analyses of these topics are likely to command respect.

V. COMPETITION IN THE COPYRIGHT FORUM

While this reviewer sees Professor Goldstein's novel approach to infringement as his most noteworthy achievement, the lucidity of his treatise as a whole and its usefulness to the general copyright practitioner appear even in seemingly mundane technical discussions. For example, Goldstein explains the crucial requirement of publication with notice under the 1909 Act (which will continue to destroy copyrights long after the logic of the


\textsuperscript{258} See notes 28-34 supra and accompanying text.

\textsuperscript{259} See, e.g., Yen, supra note 28, at 519-21, 546-59.

\textsuperscript{260} Cf. notes 130-134 supra and accompanying text; note 252 supra (discussing the Semiconductor Chip Protection Act as a precedent that justifies derogations from the Paris Convention).

\textsuperscript{261} Berne Convention, supra note 4, art. 6\textsuperscript{bis}(1), reprinted in vol. 3, app. B-6, p. 705: Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. Article 6\textsuperscript{bis}(3) entrusts the safeguarding of these moral rights to the laws of the country where protection is claimed. \textit{Id.} art. 6\textsuperscript{bis}(3), reprinted in vol. 3, app. B-6, pp. 705-06. See generally S. Ricketson, supra note 91, at 455-76.

\textsuperscript{262} See, e.g., Geller, supra note 6, at 195-96. See generally Reichman, Intellectual Property in International Trade, supra note 6, at 837-61.

"dual system" of protection has been forgotten) in terms that younger generations of lawyers can readily understand despite their lack of experience in these matters.\textsuperscript{264} Another example is Goldstein's ability to clarify federal-state tensions affecting copyright law by distinguishing the uncertain tests of statutory preemption under section 301 of the 1976 Act\textsuperscript{265} from the residual tests of constitutional preemption\textsuperscript{266} under the Sears and Comco decisions of 1964.\textsuperscript{267} This analysis proves particularly helpful now that the Supreme Court's Bonito Boats decision\textsuperscript{268} has once again thrust the relation of copyright law to other state and federal laws into the forefront of attention.\textsuperscript{269}

Apart from the intrinsic merit of its technical and scholarly contributions, Professor Goldstein's treatise benefits the copyright community simply by injecting a healthy dose of competition into the marketplace for authoritative commentary on copyright law. Until now, a single treatise, the Nimmers', dominated judicial thinking in this country, in part because of its excellence and in part because judges and practitioners increasingly mistook it for the law. David Nimmer's updates and innovative expansion of his father's work combined with Paul Goldstein's contemporaneous and equally ambitious new work bode well for the development of copyright law in this country.

It means, for example, that future litigants will increasingly have conflicting authoritative viewpoints to choose from, as each treatise writer draws his own conclusions from the legislative and jurisprudential evidence. Such diversity should impel both practitioners and judicial clerks to a more diligent consultation of the literature spawned by the 1976 Act. That, in turn, should enhance the quality of decisionmaking in an era when intellectual property has become of vital economic importance. Unfortunately, none of the existing treatises systematically guides users to a representative selection of the literature on each topic, although both Goldstein's treatise and the Nimmers' treatise, in its present form, are better in this respect than any copyright treatise available five years ago.\textsuperscript{270}

\textsuperscript{264} See vol. 1, § 3.2.
\textsuperscript{266} See vol. 2, § 15.3 (stressing the continuing relevance of constitutional preemption doctrine).
\textsuperscript{267} Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) (state unfair competition law preempted by federal patent law to the extent that states may not apply misappropriation theory to extend protection to matter covered by invalidated design patents); Comco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) (same); see Howard B. Abrams, Copyright. Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection, 1983 Sup. Ct. Rev. 509; Goldstein, Competitive Mandate, supra note 236.
\textsuperscript{268} Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (finding a state law banning duplication of functional designs by the direct molding process preempted by federal patent law, which mandates free competition unless equally valid federal laws apply).
\textsuperscript{270} The most commendable treatise in this respect is M. Leaffer, supra note 2. However, none of the treatise writers approach the bibliographical standard set by Ralph S. Brown & Robert C. Denicola, Cases on Copyright (5th ed. 1990), nor even the standard, say, of certain treatises on contracts and commercial law, see, e.g., James J. White & Robert S. Summers, Uni-
When all of the useful treatises on this difficult subject are assembled on a single shelf and compared, the strength of Professor Goldstein's work stems from his realist understanding of how courts actually apply copyright law and his ability to explain the empirical results of his inquiry in terms of the economic concerns that dominate American intellectual property law. While respectful of the formalist tradition in treatise writing, Professor Goldstein prefers analytical methods that clarify what the copyright community has actually accomplished, even if this sometimes deviates from what it thought it was doing or from what ought to be done. Conscious of copyright law's origin and of how it evolved along the way, he constantly explores the underlying policy issues that are certain to determine its future evolution.

Inevitably, many observers will disagree with Professor Goldstein's conclusions on particular topics, and some will dispute the premises from which they are drawn. But no one working in copyright law can afford to ignore them for very long. There is simply no mistaking the fact that Paul Goldstein's new treatise constitutes a major contribution that is destined to elevate the level of discourse in this field for decades to come.

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