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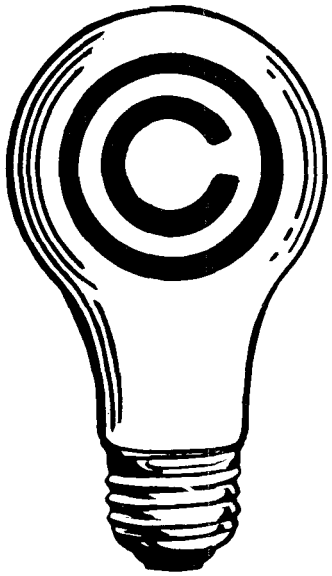
by Laura Anne Moeller

Copyright does not protect ideas, but only the expression of ideas.[1] This distinction, long recognized in copyright law as the idea-expression dichotomy, was given express statutory recognition in the 1976 Copyright Act.[2] Section 102(b) provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work."[3] While ideas have never received federal copyright protection, state law doctrines have traditionally provided protection for such creative investments, subject to supremacy clause and first amendment limitations.

Copyright preemption issues invariably arose as state law became a source of protection for intellectual property. In *Sears, Roebuck & Co. v. Stiffel Co.*[4] and *Compco Corp. v. Day-Brite Lighting, Inc.*,[5] the Supreme Court adopted a sweeping standard of federal preemption, suggesting that state protection of intellectual property would be preempted whenever it conflicted, even indirectly, with the objectives of the federal copyright and patent laws. However, in *Goldstein v. California*[6] and *Kewanee Co. v. Bicron Oil Corp.*,[7] the Supreme Court curbed the preemptive sweep of the *Sears-Compco* doctrine and allowed for state protection in all areas which Congress had left "unattended."[8]

Section 301 of the 1976 Copyright Revision Act[9] was intended to provide a statutory resolution of the copyright preemption issues. The section effectively abolished common law copyright and established that state laws regulating copyright generally would be preempted.[10] The avowed purpose was to provide "a single Federal system" of statutory copyright that "would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship."[11] Section 301 attempts to state this principle "in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection."[12] Unfortunately, this intent was not effected and the determination of preemption under Section 301 is still subject to some very diverse interpretations.



Background

The United States Constitution states, "Congress shall have the power . . . To Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[13] The constitutional limitation of copyright to works of "Authors"[14] has been construed to impose a threshold requirement of an act of authorship – the work must be original with him. This low level threshold has no real concern for aesthetic merit or creative genius, serving mainly to prevent copyrighting of public domain material.[15] Copyright is also limited to "Writings,"[16] which has been defined to include any physical renderings of the fruits of creative intellectual or aesthetic labor.[17] The primary purpose of copyright protection is to encourage contributions to recorded knowledge. Reward in the form of property rights to the author is a secondary consideration; the limited monopoly created being justified by the public interest in the creation and dissemination of intellectual works.[18] As the Supreme Court recently reiterated in *Harper & Row Publishers, Inc. v. Nation Enterprises*,[19] this limited grant achieves an important public purpose. "It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[20] The idea-expression dichotomy balances these two competing interests by limiting copyright protection to the author's expression, not the underlying ideas or facts he expresses.[21] This limit on an author's control is arguably necessary. Were an author able to prevent subsequent authors from using con-

cepts, ideas, or facts contained in his or her work, the creative process would wither and scholars would be forced into unproductive replication of the research of their predecessors.[22] First amendment principles are also brought into play, as a broad dissemination of principles, ideas, and factual information is crucial to the robust public debate and informed citizenry that are "the essence of self-government."[23]

The above-stated principles are part of the underlying problem of preemption. To allow state protection of ideas and other subject matter specifically excluded from federal statutory protection may contravene the purpose of the copyright clause and violate the constitutional allocation of powers between federal and state authority.[24] If it is determined that Congress, in balancing the competing interests in copyrighting, rejected the protection of ideas and other excluded subject matter under Section 102(b) as repugnant to the policy of the copyright clause, then preemption would be mandated under the supremacy clause,[25] regardless of whether or not it is compelled under Section 301. If, however, the object of copyrighting is "simply to separate interests the law will protect from those it will not, and define the levels and conditions of protection accorded," there would be no justification for the federal system to intrude into state common law property systems and preempt rules that serve to protect an author's investment in creative activity.[26] Professor Goldstein suggests that the only possible justification for striking down state property systems is that, under the supremacy clause, they impermissibly interfere with the objects of the federal copyright system.[27] He finds little support for such a proposition, for while the Supreme Court had adopted a presumption of interference in the *Sears-Compco* doctrine, they have since retreated from that position.[28] Advocates of hardline federal preemption argue that the subject matter of Section 102(b) was meant to belong in the public domain, and to allow state law to prohibit the copying of public domain material would contravene the federal copyright scheme.[29] Goldstein believes that this approach confuses the patent and copyright schemes. While patent has high threshold requirements for protection, copyright requires a minimal showing of originality, no more rigorous than the standards employed by state doctrines. "There is nothing in the history of . . . state laws to suggest that state courts or legislatures are any more disposed than the federal courts or Congress to extend monopolies into areas where they do not belong."[30]

Preemption Before the 1976 Act

The Supreme Court considered the question of federal preemption of copyright for the first time in *Sears, Roebuck & Co. v. Stiffel Co.*,[31] and its companion case *Compco Corp. v. Day-Brite Lighting, Inc.*[32] In each, the Court reversed a decision under state unfair competition law that prohibited the copying of an unpatentable light fixture. In *Compco*, Justice Black articulated a sweeping standard of federal preemption.

> When an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.[33]

Copyrights and patents were envisaged as the only two constitutionally authorized exceptions to a pervasive federal scheme of free competition and imitation.[34] State courts, dissatisfied with the results in *Sears-Compco*, resorted to artificial distinctions between "copying" and "misappropriation" to evade federal preemption.[35]

Goldstein v. California[36] and *Kewanee Oil Co. v. Bicron Corp.*[37] curbed the *Sears-Compco* preemptive sweep. In *Goldstein*, Chief Justice Burger upheld the validity of a state criminal law, even though the law extended protection equivalent to copyright to subject matter that had not yet received federal copyright protection. The standard used to determine whether the federal statute required preemption was found in *Hines v. Davidowitz*: whether the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[38] The Court held that the Constitution's grant of copyright power was not exclusive and that states were free to protect published "writings" that did not fall within the scope of federal copyright law.[39] The scope of the federal law was to be measured by the coverage of the statute rather than the purpose of the constitutional clause. The Court recognized, however, that "a conflict would develop if a state attempted to protect that which Congress intended to be free from restraint or to free that which Congress had protected."[40] *Goldstein* has been criticized because it justifies state law protection regardless of the subject matter and ignores the copyright clause limitation on monopoly to "limited times."[41] Professor Goldstein applauds both *Goldstein* and *Kewanee* for restoring federal laws to their historically limited ambit and renewing the vigor of state doctrines.[42]

Kewanee allowed trade secret protection for processes that were disqualified from federal patent protection under one of the patent law's novelty requirements.[43] The Court expanded the potential scope of state intellectual property legislation even further than had been done in *Goldstein* when it concluded that the "only limitation on the states is that in regulating the area of patents and copyrights, they do not conflict with the operation of the laws in this area passed by Congress."[44] Thus it would seem that even if the *Goldstein* inquiry showed that a subject matter has not been left unattended by Congress, a further inquiry must be made. *Kewanee* compared the respective economic objectives and effects of the state and federal law, and the fundamental preemption issue thereby became "not whether state law reaches matters also subject to federal regulation, but whether the two laws function harmoniously rather than discordantly."[45]

The Effect of Section 301

In the wake of the liberal authorization of state intellectual property protection afforded by *Goldstein* and *Kewanee*, Section 301 of the 1976 Copyright Act was enacted.[46] The section is intended "to make clear, consistent with the 1964 Supreme Court decisions in *Sears* . . . and *Compco* . . . that preemption does not extend to causes of action, or subject matter outside the scope of the revised Federal Copyright Statute."[47] Legislative history on the preemptive purpose behind Section 301 is less than satisfactory due in part to a last minute deletion of a list of state doctrines deemed non-equivalent to copyright, and therefore not subject to preemption.[48] The deletion was apparently intended to conform the section to the Justice Department's opinion that continued viability of the misappropriation doctrine would nullify the preemptive effect of the section. However, this purpose was lost in the ensuing discussion. The Congressman that proposed the deletion agreed that he was not trying to change the laws of the states that had already adopted the misappropriation doctrine, stating "I am trying to have this bill leave the state law alone."[49]

The muddled legislative history regarding the intended preemptive scope of Section 301 places even more emphasis on dealing with the section as enacted. Section 301 creates a two-pronged test to determine preemption: (1) Does the subject matter under consideration come within

the subject matter of copyright as specified by Sections 102 and 103? (2) Is the state right involved equivalent to any of the exclusive rights provided under Section 106? Both of these questions must be answered in the affirmative for a state law to be preempted. If either question is answered in the negative, Section 301 offers no impediment to the exercise of state power.

(1) The Subject Matter of Copyright

Under Section 301(a), state-created rights, even if "within the general scope of copyright," are not subject to preemption unless they vest in "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103."[50] Nimmer suggests that this is a codification of *Goldstein* which indicates that "categories of writings which Congress has . . . brought within the scope of the federal statute" are no longer eligible for protection.[51]

The subject matter of copyright is never explicitly defined. Section 102(a) sets out the general area of copyright subject matter. It states that copyright protection subsists "in original works of authorship fixed in any tangible medium of expression," and lists seven categories for "works of authorship." Section 102(b) provides that "copyright protection for an original work of authorship does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is embodied." Since copyright protection is not available for these matters, they are arguably not within the subject matter of copyright, and state law protection of them would not be preempted. Whereas *Goldstein* would require an inquiry to determine whether Congress had left the area unattended or had expressly decided to deny protection, thereby preempting state protection, Section 301 provides no basis for such an inquiry. "Even if Congress considered protecting certain subject matter and consciously and explicitly determined that such subject matter should best be left unprotected, the language of Section 301 by itself would not require preemption."[52] Therefore, the crucial issue is whether the items listed in Section 102(b) fall within the subject matter of copyright.

Abrams and Nimmer both subscribe to the view that the items listed in Section 102(b) are "works of authorship" as used to describe the subject matter of copyright. Section 102(b), as the codification of the idea-expression dichotomy, serves as a limitation on the protection extended by the statutory monopoly of copyright to subject matter included under Section 102(a), not a definition of excluded subject matter.[53]

Professor Goldstein is of the opinion that Section 102(b) specifies certain elements contained in original works of authorship which are not protected.[54] Since these elements are excluded from "works of authorship" under Section 102(b), they do not fall within the subject matter of copyright. This theory has support in *Bromhall v. Rorvik*,[55] which upheld the plaintiff's state law claim for misappropriation of the ideas contained in his unpublished doctoral thesis. The court held that since copyright protects only the expression of ideas, and not the ideas themselves, the claims being considered were not entitled to protection under the Act and hence were not preempted.[56] The same analysis was used in *Rand McNally & Co. v. Fleet Management Systems*.[57] Rand McNally argued, among other things, that the defendant had copied the plaintiff's procedures, processes, and systems for calculating mileage data in preparing roadway mileage charts. The court stated that, "[a]s these procedures are expressly excluded from copyright protection, Section 102(b), they fail the subject matter test of Section 301(a) and are not preempted."[58] *Werlin v. Readers Digest Association, Inc.*,[59] goes even further than the above cases by preventing preemption of state law protection of ideas whether or not the ideas are embodied in a copyrightable work. *Werlin* held that the state quasi-contract claim was not preempted and that plaintiff was entitled to compensation for the idea of her article. "Werlin's submission to RDA was both an article and an idea. To the extent it was an article, it enjoyed federal copyright protection; to the extent it was an idea, it enjoyed no federal copyright protection but limited state law protection."[60]

Concurrent state-federal protection is in the best interests of the public . . .

However, other courts have consistently treated facts, research and the like as being unprotectable, either by copyright or common law. "Where, as here, historical facts, themes, and research have been deliberately exempted from the scope of copyright protection to vindicate the overriding goal of encouraging contributions to recorded knowledge, the states are preempted from removing such materials from the public domain."[61] The same analysis could be used to preempt idea protection, as all the items listed in Section 102(b) are arguably designated for the public domain.

(2) Equivalent Rights

The second prong of the test to determine preemption is whether the state right involved is equivalent to any of the exclusive rights provided under Section 106.[62] If the state right is infringed by an act that constitutes copyright infringement, such as unauthorized reproduction, performance, distribution, or display, then the right should be deemed equivalent and subject to preemption if within the subject matter of copyright. Even if ideas are considered within the subject matter of copyright, they could be protected by non-equivalent state rights. The main problem here is defining the term "equivalent."

Two different approaches have developed. The first is a comparison of the elements of proof. If an added element must be established to prove a violation of the state right, then the right is not preempted. The second approach examines the impact and effect of the right and remedy. The right must be *qualitatively* different from that granted by copyright to escape preemption. If the effect of the state right would be to place the defendant under the same restrictions from copying and use as would the copyright laws, then that right should be preempted.

The doctrine of misappropriation is the most problematic source of litigation in this area. While one House Committee report stated that misappropriation was "nothing more than copyright protection under another name,"[63] a later Committee report reached the opposite conclusion: "Misappropriation is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as misappropriation is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by Section 106 nor on a right equivalent thereto . . ."[64] The doctrine of misappropriation is invoked when a person imitates or uses a work developed at the expense of another, thereby converting the other's investment. The doctrine has been used to guard against unauthorized use of public domain materials. First established in *International News*

Service v. Associated Press,[65] the Court allowed state law protection of "hot news" through a claim of unfair competition, even though the news was not copyrightable. The scope of the state law protection authorized was limited, only lasting long enough for I.N.S. to retain the financial incentive to be the first to gather and disseminate the news. The Court carefully balanced the copyright and first amendment issues, and the case stands as an example of the benefits of allowing state protection of matter excluded from copyright protection under Section 102(b).

Misappropriation is generally agreed to have these elements: (1) creation of plaintiff's product through extensive time, labor, skill, and money; (2) defendant's use of that product in competition with the plaintiff, thereby gaining special advantage since the defendant is not burdened with the developmental expenses incurred by the plaintiff; and (3) commercial damage to the plaintiff. To the extent that the misappropriation doctrine merely prevents reproduction and distribution, the rights being protected appear to be equivalent to those protected by Section 106.[66] However, when direct competition exists, misappropriation seemingly only protects "the limited right of a commercial enterprise to be free from unfair competitive practices that deprive it of a fair return on its work and investment."[67]

The grant of limited rights against the unfair acts of a competitor, not against the public at large, would not appear to conflict with federal policy. According to the House Report, however, misappropriation seems to be preserved only to the extent it protects against a pattern of unfair use by a competitor.[68] They reason that the element of competition is almost always present in infringement situations, and really adds nothing further to the rights contained in Section 106, whereas a *pattern* of unfair use by a competitor would be non-equivalent. Judicial interpretations vary. The Court in *Warner Bros. v. American Broadcasting Companies*[69] stated that the New York unfair competition law was preempted to the extent that the claim relied on the misappropriation branch of the law, citing *Durham Industries, Inc. v. Tomy Corp.*,[70] but to the extent that the claim relied on "passing off," it was not asserting rights equivalent to those protected by copyright and therefore would not be preempted. "Passing off" generally requires a showing of consumer deception and appropriation of good will. As long as a strong showing of deception is made, the element of "passing off" actually does protect a right different in kind from the Section 106 rights. However, if the claim was based mainly on a good will dilution theory, it arguably should not survive preemption.[71] *Roy Export Co. v. Columbia Broadcasting System*,[72] upheld a state unfair competition claim on the basis of the extra element of commercial immorality. "The fact that the basis for the finding of unfair competition may have partly overlapped the basis for the finding of statutory copyright infringement is insufficient to find the unfair competition claim preempted where, as here, the law of unfair competition serves to compliment, rather than conflict with, federal law."[73]

Conclusion

Nothing definitive about the present status of state idea protection can be said in light of the discrepant results reached in the application of Section 301. However, a proper analysis of the preemption problem cannot be reached using Section 301 principles alone. It is hard, if not impossible, to evaluate the proper scope of preemption under Section 301 without determining the purposes and policy behind the copyright clause and the current Copyright Act. The two inquiries suggested in *Goldstein* should be required to determine if the subject matter is covered by the Copyright Act, and if not, whether it had been left unattended or deliberately excluded from protection by Congress. Limitations on state law protection should also be defined to keep the states extending monopolies beyond the public's interest, as well as some durational limitations.[74] However, upon review, state protection of ideas and the excluded subject matter of Section 102(b) under the current Act has never been offensive to the policy of promoting progress and expanding the contributions to recorded knowledge; rather, state protection operates to relieve injustices that would be permitted if such protection were preempted. Concurrent state-federal protection is in the best interests of the public, and should not be dismissed without a thorough analysis of the policies of the copyright clause and the effects of denying such protection in a capitalistic, reward-motivated society.

Notes

[1] 17 U.S.C. § 102(b) (1982). *See Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Baker v. Selden*, 101 U.S. 99, 102-103 (1879).

[2] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (Codified at 17 U.S.C. §§ 101-810 (1982)). The law became effective on January 1, 1978. 17 U.S.C. § 302(a) (1982).

[3] 17 U.S.C. § 102(b) (1982).

[4] 376 U.S. 225 (1964).

[5] 376 U.S. 234 (1964).

[6] 412 U.S. 546 (1973).

[7] 416 U.S. 470 (1974).

[8] *Goldstein*, 412 U.S. at 559.

[9] *Supra* note 2, at § 301 (1982).

[10] 17 U.S.C. § 301 (1982) reads in full:

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to–

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any state shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any cause of action arising from undertakings commenced on or after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

[11] H.R. Rep. No. 1476, 94th Cong., 2nd Sess. 129 (1976).

[12] *Id.* at 130.

[13] U.S. CONST. art. I, § 8.

[14] *Id.*

[15] *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). *See also* Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 Sup. Ct. Rev. 509, 510 (1984).

[16] U.S. CONST. art. I, § 8.

[17] *Goldstein*, 412 U.S. at 561. Note that the 1976 Copyright Act uses the word "works" in § 102 rather than the constitutional term "Writings" to make it clear that the categories listed in § 102 are not exhaustive of the constitutional scope of the copyright-patent clause.

[18] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1973); *Berlin v. E.C. Publications, Inc.* 329 F.2d 541, 543-44 (2nd Cir.), *cert. denied*, 379 U.S. 822 (1964).

[19] ___ U.S. ___, 105 S.Ct. 2218 (1985).

[20] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

[21] 17 U.S.C. § 102(b) (1982).

[22] *Nation*, 105 S.Ct. at 2242 (Brennan, J., dissenting).

[23] *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

[24] *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 664-68 (2nd Cir. 1955) (Hand, J., dissenting).

[25] The supremacy clause provides, "This Constitution and the laws of the United States . . . shall be the Supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl.2. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state law obstructing Congress' purpose is preempted).

[26] Goldstein, *Preempted State Doctrines, Involuntary Transfers, and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. Rev. 1107, 1108 (1977).
[27] *Id.* at 1108, n. 5.
[28] *Goldstein*, 412 U.S. 546; *Kewanee Co. v. Bricron Oil Corp.*, 416 U.S. 470 (1974); *see generally*, Goldstein, *The Competitive Mandate: From Sears to Lear*, 59 Cal. L. Rev. 873 (1971).
[29] *See* Abrams, *supra* note 15, at 519; *Sears, Roebuck & Co.*, 376 U.S. at 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).
[30] Goldstein, *supra* note 26, at 1109.
[31] 376 U.S. 225 (1964).
[32] 376 U.S. 234 (1964).
[33] *Id.* at 237.
[34] Abrams, *supra* note 15, at 524.
[35] *See, e.g., Capitol Records, Inc. v. Spies*, 130 Ill. App.2d 429, 264 N.E.2d 874 (1970).
[36] 412 U.S. 546 (1973).
[37] 416 U.S. 470 (1974).
[38] 312 U.S. 52, 67 (1941), cited in *Goldstein*, 412 U.S. 561.
[39] *Kewanee Oil Co.*, 416 U.S. at 560, 570.
[40] *Id.* at 559.
[41] Abrams, *supra* note 15.
[42] Goldstein, *supra* note 26, at 1123.
[43] *Kewanee Oil Co.*, 416 U.S. 470.
[44] *Id.* at 479.
[45] *Morseburg v. Balyon*, 621 F.2d 972, 978 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980).
[46] 17 U.S.C. § 301 (1982). For full text, *see supra* note 8.
[47] H.R. Rep. No. 1476, 9th Cong., 2nd Sess. 131 (1976).
[48] The deleted provision of § 301(b) read:

> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:
> (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or
> (2) . . .
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including rights against misappropriation not equivalent to any of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation; . . .

[49] 122 CONG. REC. 31, 977, 32, 015 (1976). For a full analysis of the legislative history surrounding this deletion and section 301 in general, *see* Abrams, *supra* note 15, at 537-50; 1 Nimmer on Copyright 1.01[B] at 1-14-16.
[50] *Supra* note 2, § 301(a).
[51] 1 Nimmer on Copyrights 1.01[B] at 1-22.
[52] Abrams, *supra* note 15, at 561.
[53] Abrams, *supra* note 15, at 561-65; 3 Nimmer on Copyright 16.04[C]. Nimmer also suggests that even were ideas to escape preemption under § 301, state or federal protection of ideas would constitute a violation of the first amendment guarantee of freedom of speech. § 1.01[B] at 1-25, 26.
[54] *Goldstein, supra* note 26.
[55] 478 F. Supp. 361 (E.D. Pa. 1979).
[56] *Id.* at 367.
[57] 591 F. Supp. 726 (1983).
[58] *Id.* at 739.
[59] 528 F. Supp. 451 (S.D.N.Y. 1981).
[60] 528 F. Supp. at 467; *Cf. Harper & Row Publishers, Inc. v. Nation Enterprises*, 105 S.Ct. 2218, 2224 (1985) (The law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression).
[61] *Suid v. Newsweek Magazine*, 503 F. Supp. 146, 149 (D.D.C. 1980); *See also, Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2nd Cir.), *cert. denied*, 449 U.S. 841 (1980); *Rosemont Enterprises, Inc., v. Random House, Inc.*, 366 F.2d 303 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). *But see Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950) (Fruits of original research and facts are copyrightable).
[62] U.S.C. § 106 (1982) provides:

> § 106. Exclusive rights in copyrighted works
> [T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
> (4) . . . to perform the copyrighted work publicly; and
> (5) . . . to display the copyrighted work publicly.

[63] H.R. Rep. No. 2237, 89th Cong. 2d Sess. 129 (1966).
[64] H.R. Rep. No. 1476, 94th Cong. 2d Sess. 132 (1976).
[65] 248 U.S. 215 (1918).
[66] *See, e.g., Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 918-19 (2nd Cir. 1980); *Suid v. Newsweek Magazine*, 503 F. Supp. 146 (D.D.C. 1980).
[67] Shipley, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C.L. Rev. 125 at 161 (1984).
[68] H.R. Rep., *supra* note 43, at 132.
[69] 720 F.2d 231 (2nd Cir. 1983).
[70] 630 F.2d 905 (2nd Cir. 1980).
[71] Goldstein, *supra* note 26, at 1116.
[72] 503 F. Supp. 1137 (1980).
[73] *Id.* at 1152.
[74] Abrams, *supra* note 15, at 576-77.

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