

COPYRIGHT LAW REVISION

STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS, FIRST SESSION

PURSUANT TO

S. Res. 53

STUDIES 1-4

1. The History of U.S.A. Copyright Law Revision
From 1901 to 1954
2. Size of the Copyright Industries
3. The Meaning of "Writings" in the Copyright
Clause of the Constitution
4. The Moral Right of the Author



Printed for the use of the Committee on the Judiciary

UNITED STATES
GOVERNMENT PRINTING OFFICE

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¹ The late Hon. William Langer, while a member of this committee, died on Nov. 8, 1959.

FOREWORD

This is the first of a series of committee prints to be published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights presenting studies prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

The present copyright law is essentially the statute enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are the subject matter of copyright; new uses of such works and new industries for their dissemination have grown up; and the organization of the groups and industries that produce or utilize such works has undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting studies of the copyright law and practices. A number of these have been completed and others are in the process of preparation. Four of the completed studies (comprising this first committee print), are general surveys of a background nature. The other studies (to appear in succeeding committee prints) deal with substantive problems which appear to call for consideration in a general revision of the law; they are designed to review the problems objectively and to present the major issues to be resolved, as well as alternatives for their resolution, together with the views submitted to the Copyright Office by various persons on these issues.

The subcommittee believes that these studies will be a valuable contribution to a better understanding of copyright law and practice and will be extremely useful in considering the problems involved in proposals to revise the copyright law.

The present committee print contains four general studies of a background nature: (1) "The History of U.S.A. Copyright Law Revision From 1901 to 1954," by Abe A. Goldman, Chief of Research of the Copyright Office, with a supplementary note on "Revision of Patent and Trademarks Laws"; (2) "Size of the Copyright Industries," by William M. Blaisdell, economist of the Copyright Office; (3) "The Meaning of 'Writings' in the Copyright Clause of the Constitution," prepared by staff members of the New York University Law Review

under the guidance of Prof. Walter J. Derenberg of the New York University School of Law; and (4) "The Moral Right of the Author," by William Strauss, attorney-advisor of the Copyright Office.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are solely those of the authors.

JOSEPH C. O'MAHONEY,

Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate.

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors and not of the Copyright Office.

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STUDY NO. 3
THE MEANING OF "WRITINGS" IN THE COPYRIGHT
CLAUSE OF THE CONSTITUTION

PREPARED BY STAFF MEMBERS OF THE NEW YORK UNIVERSITY LAW
REVIEW UNDER THE GUIDANCE OF PROF. WALTER J. DERENBERG

November 1956

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PREFATORY NOTE

The preparation of a study on this subject was suggested to Prof. Walter J. Derenberg of the New York University School of Law by the U.S. Copyright Office. This study was written, under the guidance of Professor Derenberg, by Stephen Lichtenstein, Lawrence Pollock, Harold Reynolds, Leonard Sacks, and Margaret Taylor, and edited by Donald Fox and Donald Elliott, to assist the program of studies being conducted by the Copyright Office for the general revision of the U.S. copyright law.

This study was published in the New York University Law Review, November 1956 issue, volume 31, No. 7, pages 1263-1312. It is reprinted herein with the courteous permission of the Law Review.

**THE COPYRIGHT OFFICE,
LIBRARY OF CONGRESS.**

THE MEANING OF "WRITINGS" IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION

In 1954 the Supreme Court of the United States decided *Mazer v. Stein*¹ holding that statuettes of Bali dancers, which had been registered with the Copyright Office as "works of art"² but which were actually intended for and used as lamp bases, were entitled to copyright protection. The majority of the Court assumed that constitutionally these statuettes were "writings."³ But Justice Douglas in a short separate opinion questioned this assumption and in so doing fundamentally challenged the present status of Federal copyright law. After enumerating some of the many and varied objects that have been registered with the Copyright Office,⁴ he questioned whether these objects came within the scope of the word "writings" as used in the copyright clause of the Constitution. Desiring that this question be squarely faced, he recommended putting the case down for reargument.⁵

The Constitution provides that—

The Congress shall have Power * * * (8) To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.⁷

A literal reading of this clause⁸ would invalidate part of every copyright law passed since 1790 and prevent any copyright protection for such presently protected matter as advertising,⁹ photographs and motion pictures,¹⁰ paintings,¹¹ maps,¹² cartoons,¹³ and three-dimensional objects.¹⁴

But in spite of this the problem of the constitutionality of the copyright statutes, at least in respect to the subjects of copyright, has lain

¹ 347 U.S. 201 (1954).

² Pursuant to 17 U.S.C. § 5(g) (1952).

³ 347 U.S. at 214. Four similar suits had been brought by Stein for infringement of his copyright under this section.

(a) *Stein v. Expert Lamp Co.*, 96 F. Supp. 97 (N.D. Ill.) (relief denied as lamps were purely utilitarian), *aff'd*, 188 F. 2d 611 (7th Cir.), *cert. denied*, 342 U.S. 829 (1951).

(b) *Stein v. Rosenthal*, 103 F. Supp. 227 (S.D. Cal. 1952) (relief granted as art form was sufficient in spite of its possible utilitarian uses), *aff'd*, 205 F. 2d 633 (9th Cir. 1953).

(c) *Stein v. Benaderet*, 109 F. Supp. 364 (E.D. Mich. 1952) (considered *Rosenthal* case based on mistake and followed *Expert Lamp* case in denying relief), *rev'd per curiam*, 214 F.2d 822 (6th Cir. 1954) (based on the Supreme Court decision in *Mazer v. Stein*).

(d) *Stein v. Mazer*, 111 F. Supp. 359 (D. Md.) (dismissed complaint holding no protection for utilitarian work), *rev'd*, 204 F. 2d 472 (4th Cir. 1953) (agreeing with *Rosenthal* case), *aff'd*, 347 U.S. 201 (1954).

⁴ 347 U.S. at 221 (with Justice Black concurring).

⁵ Statuettes, bookends, clocks, lamps, door knockers, candlesticks, inkstands, chandellers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays.

⁶ *Ibid.*

⁷ Art. I, § 8, cl. 8, reprinted in H.R. Doc. No. 739, 81st Cong., 2d Sess., 46 (1951).

⁸ Webster's New Collegiate Dictionary (1956 ed.) defines writing as: "1. The act of one who writes (in any sense). 2. Something written, as a letter, notice, etc. Specif.: (a) an inscription; (b) any written or printed paper or document, as a deed, contract, etc.; (c) any written composition; book; as, the writings of Addison. . . ."

⁹ See text at notes 208-24 *infra*.

¹⁰ See text at notes 225-31 *infra*.

¹¹ See text at notes 232-34 *infra*.

¹² See text at notes 235-30 *infra*.

¹³ See text at notes 240-46 *infra*.

¹⁴ See text at notes 247-64 *infra*.

dormant for many years. In fact, this is the first instance of a direct questioning by a Supreme Court Justice of the *general* scope of copyright protection since 1884.¹⁵

The importance of the problem raised by Justice Douglas demands a thorough and comprehensive study of the history and application of the copyright clause to see if a definition can be found which both explains what has developed *and* is consistent with the intent of the framers of the Constitution. This note is such a study based upon an examination of all available historical, legislative, and case material.

HISTORICAL DEVELOPMENTS

English Background

The concept of copyright that has existed at common law has prevailed since early Roman times.¹⁶ Under this concept, the owners of literary property possessed exclusive rights to the use of their works until dedication to the public, commonly termed "publication".¹⁷ The subject of these common law rights was not limited to any theory of "writings."¹⁸

The historical origin of statutory copyright protection is commonly traced to the chartering of the Stationer's Company in 1556,¹⁹ the main object of which was the suppression in England of the religious ideas of the Protestant Reformation. The printing of any book for sale was forbidden unless it was registered by a member of the Company. While this effected the desired control over the press and vested the Company with a practical monopoly of the trade, an advantage also accrued to the publisher, for the registration of a book by him excluded all others from printing it. In 1694 the Licensing Act, under which the Company then operated, expired and there ensued, from 1695 until 1709, a period in which no copyright protection existed. Pirating during this period became common and publishers joined with authors in petitioning Parliament for protection. Finally, in 1709, the Statute of Anne²⁰ was passed. The first copyright statute anywhere to be found, its purpose clause explained that books and other writings had been published without the consent of authors or proprietors to their detriment and that of their families. A term of fourteen years of copyright protection was provided for authors,²¹ with a fourteen year renewal term. This statute changed the purpose of statutory copyright from censorship to protection. This protection became necessary with the invention of printing, the first commercially feasible method of mass production of intellectual property.

¹⁵ In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the question was squarely presented to and decided by the Supreme Court.

¹⁶ See Bowker, Copyright, Its History and Its Law 8 (1912).

¹⁷ For a modern discussion of what constitutes publication, see Note, 15 Temp. L.Q. 531 (1941).

¹⁸ See *Prince Albert v. Strange*, 1 Macn. & G. 25, 41 Eng. Rep. 1171 (ch. 1849). This case, which granted protection for unpublished etchings, while subsequent to the first English copyright statute, preceded any statutory copyright protection for paintings, etchings, and like items, and was therefore decided strictly on common-law principles. See also Scrutton, Law of Copyright 152 (3d ed. 1896).

¹⁹ See Birrell, The Law and History of Copyright in Books c. 2 (1899); 6 Holdsworth, History of English Law 360-79 (1927).

²⁰ 8 Anne, c. 19 (1710). In 1735 a statute extending copyright protection to "inventors and engravers" of historical and other prints was passed. 8 Geo. 2, c. 13 (1735). A reading of it shows a close identity with the terms of the Statute of Anne.

²¹ This was the first acknowledgment of a copyright in authors. Birrell, *op. cit. supra* note 19, at 93. Theretofore registration with the Stationers' Company has assured only a publisher's copyright. For an excellent coverage of the copyright problem in England from 1710 to 1780, see Collins, *Authership in the Days of Johnson* (1927).

History of the copyright clause

The English law of copyright was presumably familiar to colonial lawyers. Although the Articles of Confederation did not have a copyright clause, the Continental Congress, alive to the problems of authors,²² recommended that the states provide copyright protection.²³ Twelve states passed copyright laws prior to the Constitutional Convention.²⁴ Eight of these states protected writings in the literal sense.²⁵ In four of these, the subjects of copyright were books and pamphlets.²⁶ Other modes of enumerating subjects were: "books,"²⁷ "books, treatises, and other literary works,"²⁸ and "book or books, writing or writings."²⁹ Three states provided protection for maps and charts as well as books.³⁰ Two of these statutes did not use the word "writings," hence an extension to maps and charts could not have been implied.³¹ Connecticut, however, used the term "writings" in apposition to "author" in the preamble, and thereafter used author in apposition to book, pamphlet, map, or chart and would thus imply that maps and charts were writings, a slight expansion of the definition.³² These statutes, however, were limited in operation to the territorial jurisdiction of the particular states. There was no national uniform copyright protection. The resulting lack of complete coverage produced a receptive atmosphere at the time of the Constitutional Convention for the creation of authority enabling the establishment of federal copyright protection.

²² Noah Webster seemed to have been particularly active at this time in urging copyright legislation upon the states. See Webster, *Collection of Papers on Political, Literary and Moral Subjects* 173-75 (1843).

²³ 24 Journals, Continental Congress 326 (1783).

²⁴ Conn. Acts & Laws 1784-90, p. 133 (1784); Mass. Acts & Laws 1782, c. 58; Digest of Laws of Ga., p. 323 (1876); 1 Md. Laws 1692-1784, c. 34 (Kilty 1783) (law contingent upon every state passing a copyright law); 4 N.H. Laws 1783, c. 1; N.J. Acts 1776-83, p. 325 (1783); N.Y. Laws 1786, c. 54; N.C. Laws 1785, c. 26, republished in 24 N.C. State Records 747 (1905); 11 Pa. Stat. at Large, c. 1079 (1782); R.I. Acts & Resolves, p. 6 (1783); 4 S.C. Stat. at Large, No. 122 (1784); 12 Va. Stat. at Large, c. 6 (Hening 1785). The only exception in the original thirteen colonies was Delaware which didn't pass any law.

²⁵ Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, and Virginia. See note 24 supra.

²⁶ Virginia, New York, New Jersey, and Pennsylvania protected books and pamphlets. South Carolina: books. North Carolina: books, maps, and charts. Georgia and Connecticut: books, pamphlets, maps, and charts. Massachusetts, New Hampshire, Rhode Island; books, treatises, and other literary works. Ibid.

The term "author" was used in apposition to all of the above subjects in each of the eleven statutes, while it appears in apposition to the term "writings" in the Connecticut (in the preamble) and Maryland statutes. Ibid.

"Securing" appears in the titles of the statutes of Virginia, North Carolina, Massachusetts, New Hampshire, and Rhode Island. Ibid.

"For a limited time" appears only in the Virginia statute which was submitted by Madison at the instance of Noah Webster. 2 Brant, James Madison 371 (1948). While Brant attributes the copyright clause to Madison, Curtis attributes it to Pinckney. 1 Curtis, *Constitutional History* 531 (2d ed. 1889). There seems to be no evidence conclusively proving that either was solely responsible for its suggestion or specific phraseology. Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 Geo. L.J. 109 (1929).

"Exclusive right" appears in the titles of the Massachusetts, New Hampshire, and Rhode Island statutes. It is interesting to note that these statutes did not contain restrictive provisions concerning the sale of printed matter at reasonable prices or the maintenance of a sufficient supply for the public. See note 24 supra. It has been suggested that the use of the phrase "exclusive right" in the Constitution indicates an intent that no restriction encumber the copyright. Fenning, *Copyright Before the Constitution*, 17 J. Pat. Off. Soc'y 379, 384 (1935).

An excellent discussion of the state copyright statutes appears in 1 Crosskey, *Politics and the Constitution* 482-85 (1953).

²⁷ South Carolina. See note 24 supra.

²⁸ Massachusetts, New Hampshire, Rhode Island. Ibid.

²⁹ Maryland. Ibid. The disjunctive here suggests that the word "writings" extends beyond "books." This extension may be indicative of an expansion definition of writings or it may merely signify other writings within the literal definition, such as newspapers, pamphlets, and periodicals.

³⁰ North Carolina, Georgia, and Connecticut. Ibid.

³¹ North Carolina and Georgia. Ibid.

³² Connecticut. Ibid.

The committee proceedings of the convention were secretly conducted, and the final form of the copyright clause was approved without debate.³³ In the available records of the proceedings, there is no direct evidence which conclusively establishes the intended scope of the copyright clause, and, accordingly, there is no direct evidence concerning the meaning of the word "writings"—whether it was intended to be construed literally or as a word of art encompassing many objects outside of its literal meaning. Some material, however, is available from which several inferences of possible intent can be drawn.

Four clauses differing from the one finally adopted were suggested to the Constitutional Convention. None used the word writings. The clauses read: "To secure to literary authors their copyrights for a limited time";³⁴ "To secure to authors exclusive rights for a certain time";³⁵ "To secure to authors the exclusive right to their performances and discoveries";³⁶ and "To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries."³⁷ The fact that the clause contained the word "writings," while the original proposals did not, permits opposing conjectures: (1) the word was used as a limitation upon the broad scope of all the proposals; or (2) since the word was included by the committee on style and there was no consideration by the convention, it can be inferred that the change was not substantive but merely formal.

The Federalist sheds more interpretive light upon the probable scope of the clause. It should be remembered, however, that Madison's purpose in *The Federalist* was to present his analysis in a light which he felt would be most acceptable to the nation. Referring to the clause as it appears in the Constitution, Madison stated:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.³⁸

It may very well be argued, from the above quotation, that the intent of the clause was to establish harmony between federal copyright protection and the development of common-law protection. The statement places no limitation, either direct or implied, upon the scope of the clause but rather intimates that the types of objects protected will expand when the common law sees fit to expand them. Following this reasoning, the clause was not intended to deal specifically with the subjects of copyright but merely to assure uniform protection through nationwide laws.³⁹ Since the legislature has the authority to change

³³ Madison, *Debates in the Federal Convention of 1787*, at 512-13 (Hunt & Scott ed. 1920); *Journal, Acts and Proceedings, of the Convention* 328-29 (1819).

³⁴ 5 Elliot, *Debates on the Federal Constitution* 440 (1845). The first drafts of the Constitution, submitted by Edmund Randolph and Charles Pickney, did not contain copyright provisions. *Journal, Acts and Proceedings, of the Convention* 67, 71 (1819).

³⁵ *Ibid.* See also 2 Madison, *Journal of the Constitutional Convention* 550 (1894).

³⁶ Madison, *Debates in the Federal Convention of 1787*, at 420 (Hunt & Scott ed. 1920); *Journal, Acts and Proceedings, of the Convention* 259-61 (1819).

³⁷ 2 Madison, *Journal of the Constitutional Convention* 550 (1894).

³⁸ *The Federalist*, No. 43, at 278 (Modern Library ed. 1937). Madison, a member of the committee which framed the copyright clause, was referring in this paragraph to the case of *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769) (holding that a perpetual copyright existed at common law), which concerned literary property; to the state copyright statutes, which concerned printed matter; and to the resolution of the Continental Congress, supra note 23, which concerned only books.

³⁹ Curtis, *A Treatise on the Law of Copyright* 81 (1847). See 3 Story, *Commentaries on the Constitution of the United States* c. 19 (1833).

the common law by statute, there would appear to be no objection to Congress' enumerating and expanding by statute the objects to be covered by copyright.

Professor Crosskey attributes an even more limited intent to the particular wording of the clause.⁴⁰ His argument is that it was intended only as a limitation on the perpetual copyright granted at common law—as established in 1769 by *Millar v. Taylor*.⁴¹

In opposition to the above argument, it can be said that the use of the word "author" in apposition to "writing" persuasively indicates that the protection was to be limited to printed matter, unless we ascribe to the originators of the clause the harboring of a definition of "writing" which was not extant at that time⁴² and which is still opposed to the literal or common sense meaning of the term. However, in view of the paucity of evidence bearing directly on the intent of the clause, further analysis of the clause must be made in respect to its legislative and judicial development.

LEGISLATION

Although an important factor in the search for a definition of "writings," the legislative history of the copyright acts does not provide an express answer. To the contrary, congressional discussions of the various bills and the resulting enactments reveal a tacit assumption that there is no problem at all—that Congress may constitutionally include in a copyright statute whatever it wishes. This, of course, cannot properly be accepted as the final word. The question, therefore, becomes this: What rationale can be gleaned from the reports and the acts that will explain the present development of congressional copyright protection?

The first theory to itself is that the copyright clause was intended to protect literal "writings," meaning such objects as books and periodicals—words written in a form intelligible to all who can read. This is the most obvious and the most easily disposed of limitation on the scope of copyright insofar as legislative history is concerned. Not only is there no recognition of this construction in the congressional reports, but, as will be shown later, from the first enactment in 1790⁴³ to the most recent codification in 1947,⁴⁴ the acts themselves exceed this narrow definition.

Two other theories, however, are more probable and do find support in the legislative history. It can fairly be maintained that the copyright clause reflects a desire to protect the commercial value of the productive effort of the individual's mind. From this evolves the

⁴⁰ 1 Crosskey, *Politics and the Constitution* 486 (1953): "Reading the power, then, in the light of the Statute of Anne and the then recent decisions of the English courts, it is clear that this power of Congress was enumerated in the Constitution, for the purpose of expressing its limitations. And those limitations were expressed . . . because it did desire, by restricting Congress to the creation of limited rights, to extinguish, by plain implication of the 'supreme law of the land,' the perpetual rights which authors had, or were supposed by some to have, under the Common Law."

⁴¹ 4 Burr, 2303, 98 Eng. Rep. 201 (K.B. 1769).

⁴² See Johnson, *A Dictionary of the English Language* (1755):

"Author" is given four meanings: (1) The first beginner or mover of any thing. (2) The efficient; he that effects or produces any thing. (3) The first writer of any thing; distinct from the translator or compiler. (4) A writer in general.

"Writing" is given three definitions: (1) A legal instrument. (2) A composure; a book. (3) A written paper of any kind.

But cf. *Bach v. Longman*, 2 Cowp. 623, 98 Eng. Rep. 1274 (K.B. 1777), in which Lord Mansfield held that a musical composition was a writing under the Statute of Anne.

⁴³ Act of May 31, 1790, c. 15, 1 Stat. 124.

⁴⁴ 17 U.S.C. (1952).

plausible conclusion that the clause was intended to protect all intellectual property capable of extensive reproduction, and that whenever new methods of reproduction made possible the "pirating" of unprotected works resulting from intellectual effort, the clause could be expanded to include these objects.⁴⁵

A third conclusion as to the scope of the clause involves the proposition that the first part of the clause—"To promote the Progress of Science and useful Arts"—defines and colors the entire clause, and that whatever may be construed as promoting science and the useful arts falls within the definition of "writings."

The later two theories achieve the same result—a broad scope of coverage. The evidence to support either of them, although more implied than express, is convincing. As will be seen by an examination of all the pertinent copyright acts, either of these theories or a combination of them, could be the proper meaning of the copyright clause so far as copyright legislation and proposed legislation is concerned.

The Copyright Laws

*Act of 1790.*⁴⁶—This was the first federal copyright law, specifying maps, charts, and books as objects of protection. Passed only one year after the adoption of the Constitution by a Congress whose membership included many of those present at the Constitutional Convention, the act's constitutionality, it would seem, can hardly be placed in doubt. There was no report accompanying this bill nor any congressional discussion of the copyrightability of the objects enumerated. It should be noted that there is no definition of books in the statute. Books, as used, could include pamphlets, leaflets, folders, a single page, even a single verse or brief statement separately published⁴⁷—in short, everything that a literal interpretation of "writings" includes. But if the clause is literally construed maps and charts could not have been protected. Thus from the beginning of the legislative history it became necessary to give the clause a construction other than literal.

*Act of 1802.*⁴⁸—Copyright protection was extended to those "who shall invent and design, engrave, etch or work . . . any historical or other print or prints." No report accompanied the act, nor is there any other evidence indicating doubt as to its constitutionality, at least in the minds of Congress. And the same statement concerning the membership of Congress can be made in regard to this act as to the first. It may be surmised that the extension of protection to prints emphasized the need for protection from the pirating of these objects.

*Act of 1831.*⁴⁹—This was the first general revision of the copyright laws, but the subjects of copyright were still specifically enumerated. Musical compositions and cuts were added to the list. For the first time a report accompanied a copyright act,⁵⁰ but there was no question

⁴⁵ In line with this reasoning, it might be argued that the founders, in using the word "writings," used it as the one word that would encompass all the items that needed protection, and intended that it would expand along with technical progress. If the Constitution is a living instrument, it is logical to presume that its component parts must also "live."

⁴⁶ Act of May 31, 1790, c. 15, 1 Stat. 124.

⁴⁷ Howell, *The Copyright Law* 17 (3d ed. 1952). See also *Holmes v. Hurst*, 174 U.S. 82 (1899).

⁴⁸ Act of Apr. 29, 1802, c. 36, 2 Stat. 171.

⁴⁹ Act of Feb. 3, 1831, c. 16, 4 Stat. 436. Congress rejected S. 77, 18th Cong., 1st Sess. (1824), which would have extended copyright to paintings or drawings.

⁵⁰ Report by Mr. Ellsworth of the Committee on the Judiciary to Amend the Copyright Law, H.R. Rept. No. 3, 21st Cong., 2d Sess. (1831). A copy of this report can be found in 2 *Copyright Laws of the United States, Petitions and Memorials on International Copyright Laws 1783-1941*, at 9-10 (Edwin P. Kilroe Collection in the Columbia University Library).

of constitutionality raised in the report. The committee merely proposed the addition of musical compositions, stating: "It has furthermore been claimed, and, it seems to your committee, with propriety, that the law of copyright ought to extend to musical compositions, as does the English law."⁵¹ It might be profitable to consider the significance of the word "ought" in the report, particularly as indicating a consideration of the increasing *need* for protection of musical compositions without further question as to whether such protection was possible.

*Act of 1856.*⁵²—Dramatic compositions had thus far been given protection only by implication. Although previous acts did not specifically enumerate dramatic compositions as protected objects, the 1856 act granted the right of public performance in dramatic compositions already subject to copyright.⁵³ Apparently, Congress thought that such compositions were intended to come within the scope of "books."⁵⁴ There was no published report with this bill.

*Act of 1865.*⁵⁵—Photographs and negatives were expressly added to the list of protected works. Again, without any report or hearing discussing the problem, we find the implied assumption of constitutionality by Congress. In searching for a justification of the protection of photographs and negatives, it is noteworthy that this was the period of emergence of the commercial value of photography, through the famous civil war pictures taken by Mathew Brady.⁵⁶

This statute also defined "book" for the first time as meaning every volume and part of a volume, including maps, prints, or other engravings contained within the volume.⁵⁷

*Act of 1870.*⁵⁸—With the passage of this act, it became more apparent than ever before that Congress did not consider the constitutionality of its copyright enactments to be a problem, but assumed that the scope of protection was as broad as it wished to make it. Paintings, drawings, chromos, statuettes, statuary, and models or designs intended as works of fine art were added to the enumerated list. The statute also, for the first time, expressly listed dramatic compositions as protected.⁵⁹

*Act of 1909.*⁶⁰—Completely revising, collating, and reorganizing the federal copyright laws, this act became and still is the basic copyright

⁵¹ 2 Copyright Laws of the United States, supra note 50 at 9.

⁵² Act of Aug. 18, 1856, c. 169, 11 Stat. 138.

⁵³ Protection was given by this statute only to the "grand performing" or dramatic rights and extended to the music only if it was a part of a dramatic work. *Id.* at 139.

⁵⁴ Previously, no action was taken on S. 227, 26th Cong., 2d Sess. (1839), which would have secured specific protection to authors of dramatic works.

⁵⁵ Act of Mar. 3, 1865, c. 123, 13 Stat. 540.

⁵⁶ See Meredith, Mr. Lincoln's Cameraman: Mathew B. Brady (1946). Prior to this act, it was held that a photograph was not a print, cut, or engraving. *Wood v. Abbott*, 30 Fed. Cas. 424, No. 17938 (C.C.S.D.N.Y. 1866).

⁵⁷ Act of Mar. 3, 1865, c. 123, § 4, 13 Stat. 540.

⁵⁸ Act of July 8, 1870, c. 230, 16 Stat. 198. Trade-marks were also protected by this act. *Id.* at 210. But the Supreme Court subsequently held that trade-marks could not be given copyright—essentially because of a purported lack of originality. *Trade-Mark Cases*, 100 U.S. 82 (1879).

⁵⁹ Act of July 8, 1870, c. 230, § 86, 16 Stat. 212.

⁶⁰ Act of March 4, 1909, c. 320, 35 Stat. 1075. Between 1870 and 1909 there were three copyright acts of interest but they did not extend the scope of protection:

(a) Act of June 18, 1874, c. 301, 18 Stat. 79, limited engravings, cuts, and prints to "pictorial illustrations or works connected with the fine arts." Prints or labels designed for any other articles of manufacture were to be registered in the Patent Office. These limitations were repealed by Act of July 31, 1939, c. 396, 53 Stat. 1142.

(b) Act of Aug. 1, 1882, c. 366, 22 Stat. 181, provided for the placing of the copyright mark on molded decorative articles, tiles, plaques, and articles of pottery or metal already "subject to copyright." Presumably, these objects were covered in the 1870 act (Act of July 8, 1870, c. 230, 16 Stat. 198) under "models or designs intended as works of fine art."

law of the nation. It is also the first act accompanied by congressional reports and hearings which discuss the scope of the copyright clause of the Constitution. The subjects of copyright were covered in sections 4 and 5, the former being the general all-inclusive section⁶¹ and the latter designating specific classes to which the work is ascribed.⁶² The broader language used indicated a legislative desire to escape from rigorous adherence to the objects specifically enumerated in the statute.⁶³

This was the first copyright law that provided, in addition to enumerated objects, a "catch-all" clause. It can be argued that by section 4 Congress intended to expand the scope of copyright protection to its full constitutional limits.⁶⁴ This argument is re-enforced by the proviso at the end of section 5 expressly stating that it is not to limit section 4. In the report accompanying the final draft of the bill as passed, it was stated that—

Section 4 is declaratory of existing law. It was suggested that the word "works" should be substituted for the word "writings", in view of the broad construction given by the courts to the word "writings", but it was thought better to use the word "writings", which is the word found in the Constitution. It is not intended by the use of this word to change in any way the construction which the courts have given to it.⁶⁵

The report notes that "Congress and the courts have always given a liberal construction to the word 'writings'."⁶⁶

Section 5, in addition to continuing protection for the works enumerated in prior statutes, expanded the list of protected subjects. Certain objects such as compilations and periodicals, which previously might have been included under books, were spelled out. Lectures, sermons, and addresses prepared for oral delivery were added. A most significant change for the future extension of copyright was the

(c) Act of Jan. 6, 1897, c. 4, 29 Stat. 481, prevents "any person publicly performing any dramatic or musical work for which a copyright has been obtained." See also, H.R. Rep. No. 2290, 59th Cong., 2d Sess. (1896).

⁶¹ Section 4: "That the works for which copyright may be secured under this act shall include all the writings of an author."

⁶² Section 5: "That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations;

(b) Periodicals, including newspapers;

(c) Lectures, sermons, addresses, prepared for oral delivery;

(d) Dramatic or dramatico-musical compositions;

(e) Musical compositions;

(f) Maps;

(g) Works of art; models or designs for works of art;

(h) Reproductions of a work of art;

(i) Drawings or plastic works of a scientific or technical character;

(j) Photographs;

(k) Prints and pictorial illustrations;

Provided, nevertheless, That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act."

⁶³ Section 4 has not been given an all inclusive effect by the courts or by the Copyright Office. See *Capital Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657, 661, 665 (2d Cir. 1955); Regulations of the Copyright Office, 21 Fed. Reg. 6021 (1956) (the Copyright Office has fitted all its registrations into the specific classes enumerated in section 5).

⁶⁴ See 2 Ladas, *The International Protection of Literary and Artistic Property* § 329 (1938); Meagher, *Copyright Problems Presented by a New Art*, 30 N.Y.U.L. Rev. 1081, 1085 (1955).

⁶⁵ H.R. Rep. No. 2222, 60th Cong., 2d Sess. 10 (1909). The meaning of "author" was not discussed in the reports on the bill. Herbert Putnam, then Librarian of Congress, in speaking of the general terms in the proposed bill, said "the courts have followed Congress in construing it [author] to include the originator in the broadest sense, just as they have held in 'writings,' as used in the Constitution, to include not merely literary but artistic productions." Arguments before the Committees on Patents of the Senate and House of Representatives, Conjointly, on the bills S. 6330 and H.R. 19853, 59th Cong., 1st Sess. 11 (1906).

⁶⁶ *Id.* at 2.

use, in subsection (g), of "works of art" rather than "works of fine art" as used in the 1870 law. As indicated by its language and the proviso at the end, section 5 was intended only as a guide in the classification of subjects of copyright. Its practical effect, however, has been the same as the specific enumerations of prior statutes.⁶⁷ The Copyright Office refuses to register phonograph records under section 5, and it seems that anything outside the classifications of this section has little chance for registration.⁶⁸ This refusal is an administrative limitation of the meaning of "writings" to those subjects in section 5, intimating that Congress did not intend to expend its entire constitutional grant by section 4.⁶⁹ Professor Chafee advances several arguments to support this view: (1) that the protection seems to extend only to subjects within the machinery of the act⁷⁰—thus, records, not easily administered under the present act, are not covered; (2) that the word "writings" is to be given a narrower definition in the statute than its constitutional definition.⁷¹ It can be argued also that the proviso at the end of section 5 is modified by the rule of *ejusdem generis*, and an object like records does not fit, since all of the subjects enumerated convey intellectual conceptions visually.

Although, as mentioned above, the extent of "writings" was considered, in neither the preliminary⁷² nor the final report⁷³ accompanying this law was there any discussion of the constitutionality of particular objects finally covered. As in all the previous laws, this lack of discussion shows by implication that Congress felt the enumerated objects fell within the acknowledged broad definition of "writings."

The process of thought in granting protection to new objects is seen in the arguments for protecting composers against the unauthorized mechanical reproduction of music. In the minority view of the preliminary report (later adopted in the final report), it is stated:

If it is proper to extend copyright protection to these mechanical forms of reproducing music, an express provision should be inserted in the law. *That was the course adopted when the improvement of photography made a change in the law necessary. Photographs and the negatives thereof were expressly added to the list of subjects of copyright.*⁷⁴ [Emphasis added.]

Clearly, the thought was not whether the particular object could be constitutionally protected but whether it needed protection because of the progress of its commercial development. In the President's message to Congress in 1905, when speaking of the need to revise the copyright laws, part of his description was "they omit provision for many articles which, *under modern reproductive processes, are entitled to protection.*"⁷⁵

⁶⁷ See note 63 *supra*.

⁶⁸ See Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 734 (1945).

⁶⁹ Bowker argues that the effect of the phrase in § 4 is to construe writings as falling within the § 5 classifications. Bowker, *Copyright, Its History and Its Law* 64 (1912). He thought this gave the constitutional provision its broadest effect. *Id.* at 66-67.

⁷⁰ See Chafee, *supra* note 68, at 734-35.

⁷¹ *Id.* at 735. Judge Learned Hand accepts Professor Chafee's reasoning in spite of the language of § 4. *Capital Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657, 665 (2d Cir. 1955) (*dissenting on other grounds*).

⁷² H.R. Rep. No. 7083, 59th Cong., 2d Sess. (1907).

⁷³ H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

⁷⁴ H.R. Rep. No. 7083, 59th Cong., 2d Sess., pt. 2, at 4 (1907).

⁷⁵ *Id.* at 30 (Emphasis added). It should be pointed out that the reports rarely, if at all, distinguish between the objects protected and the scope of the protection. The same considerations are used for both—need for protection and the promotion of science and the useful arts.

The committee's language, in the final report on the act, lends some credence to the proposition that the phrase "To promote the Progress of Science and useful Arts" colors the entire clause:

It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.⁷⁶

*Act of 1912.*⁷⁷—The addition of motion pictures by this amendment to section 5 of the 1909 act was the last congressional extension of copyright. Motion pictures already were protected under the photograph classification.⁷⁸ The fact that Congress felt it necessary to amend section 5 by specifically adding motion pictures is more evidence of the inefficacy of section 4 in extending copyright to objects not listed in section 5. Although the addition may have been made merely to make classification easier for the Copyright Office, it seems to negate any intent Congress may have to expand protection through section 4 to the limit of the copyright clause.

In the report on this bill,⁷⁹ once again, there was no discussion as to constitutionality. Protection was recommended because the motion picture industry "has become a business of vast proportions. The money invested therein is so great and the property rights so valuable that . . . the . . . law ought . . . to give them distinct and definite recognition and protection."⁸⁰ In other words, a new process, produced by intellectual effort and having commercial value, had emerged. It needed and received protection.

*Act of 1947.*⁸¹—This act codified title 17 of the United States Code into positive law. Neither the Senate⁸² nor House⁸³ reports are pertinent to our purpose.

Proposed Bills

Many bills which have been introduced in Congress would expand copyright protection and bring it into closer harmony with modern advances in communicative media. Although these bills have all failed of passage, this can be attributed more to fear of incurring the displeasure of various interest groups, or fear of the impracticability or undesirability of a particular extension of the law, than to fear of constitutional barriers. A sampling of some of these bills demonstrates the wide range that copyright protection might encompass, if the constitutional inhibitions were narrowly construed.

*H.R. 6990.*⁸⁴—In 1930 a bill was introduced in Congress⁸⁵ which provided, in section 1, that—

copyright is secured and granted . . . to authors . . . in all their writing . . . in any medium or form or by any method through which the thought of the author may be expressed.

⁷⁶ H. R. Rep. No. 2222, 60th Cong., 2d Sess. 6-7 (1909).

⁷⁷ Act of Aug. 24, 1912, c. 356, 37 Stat. 488. It specifically added: "(1) Motion-picture photoplays; (m) Motion pictures other than photoplays."

⁷⁸ *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 Fed. 262 (C.C.D.N.J. 1905); *Edison v. Lubin*, 122 Fed. 240 (3d Cir. 1903).

⁷⁹ H. R. Rep. No. 756, 62d Cong., 2d Sess. (1912).

⁸⁰ *Id.* at 1.

⁸¹ Act of July 30, 1947, c. 391, 61 Stat. 652. A 1952 law, Act of July 17, 1952, c. 923, 66 Stat. 752, preserved to authors the right of public performance in books and non-dramatic literary work. There were no reports, pertinent to our quest, accompanying this bill.

⁸² S. Rep. No. 663, 80th Cong., 1st Sess. (1947).

⁸³ H. R. Rep. No. 254, 80th Cong., 1st Sess. (1947).

⁸⁴ 71st Cong., 1st Sess. (1929).

⁸⁵ Introduced by Vestal and referred to Committee on Patents, 72 Cong. Rec. 338 (1929).

Section 37 of this bill enumerates many subjects of copyright and then provides a separate classification, section 37(r), for "works not specifically hereinafter enumerated." Doubtless, this section was intended to remove the block to copyrightability imposed by failure of a possible subject of copyright to fit into the specifically listed classifications.⁸⁶ Section 37 also provides for express recognition of the subjects listed, but "the following specifications shall not be held to limit the subject matter of copyright." Section 1, by its grant of copyright to authors—

in all their writings . . . in any medium or form . . . through which the thought of the author may be expressed,

appears to attack the constitutional problem by declaring that "writings" can be in any medium or form; thus, there is a congressional broadening of the concept by a wider general definition, implicit in the wording of this phrase. The wide sweep of this language indicates the draftsman's desire to expend the constitutional grant in this bill; thus, the language of section 1 leaves the extent of the grant to judicial decision. Possibly it is also a hint to the courts of a definition of the constitutional phrase that is both feasible and very broad. Certainly, the phrase indicates that the bill did not fetter the word "writings" with a requirement that it must be embodied in a particular form. Rather, it suggests that the important requirement for a writing is intellectual conception, which if present, makes form immaterial. Although the language of the bill would still seem to require embodiment in some concrete form, the words "or by any method" would appear to abolish the necessity for concrete form altogether. For example, oral delivery would be a "method" of expressing the thought of the author.⁸⁷ A possible constitutional definition of "writings" is thus suggested: any intellectual conception of an author expressed in a way that communicates it to others.

From the approach followed by Congress in proposed bills it is tenuous and narrow to insist that the framers of the Constitution were concerned with the form the copyrighted object took. But even if the form is immaterial, it does not follow that the copyrighted conception need not be in some physical form;⁸⁸ reasons of policy and convenience might demand concreteness of form without circumscribing the manner in which this form is cast.

After listing (in section 37) classes (a)-(m), which are almost the same⁸⁹ as the similarly lettered classes in the present Act,⁹⁰ H.R. 6990 also expanded the specifically enumerated subjects of copyright to include scenarios for movies,⁹¹ works of architecture and models or designs for architectural works,⁹² choreographic works and pantomimes, the scenic arrangement or acting form of which is fixed in

⁸⁶ See Chafee, *supra* note 68.

⁸⁷ Bowker suggests that "in the wider sense . . . a writing is the record or expression of thought or idea." Bowker, *Copyright, Its History and Its Law* 66 (1912). In other countries protection has been extended to oral deliveries. *Id.* at 67. See also *Donoghue v. Allied Newspapers, Ltd.*, [1938] 1 Ch. 106, to the effect that writing is not limited to the physical act of putting something on paper.

⁸⁸ See 2 Ladas, *The International Protection of Literary and Artistic Property* § 329 (1938); Well, *American Copyright Law* 30 (1917); Chafee, *supra* note 68, at 504.

⁸⁹ Classes (a), (d), (g), and (k) have minor changes of wording. Section (h) provides for "reproductions of a work of art, including engravings, lithographs, photoengravings, photogravures, casts, plastic works, or copies by any other methods of reproduction." The last phrase shows an intent to cover future advances, and to give protection as broad as the Constitution will permit.

⁹⁰ 17 U.S.C. § 5 (1952).

⁹¹ § 37(n).

⁹² § 37(o).

writing or otherwise,⁹³ phonograph records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced,⁹⁴ and the above-mentioned general classification section.⁹⁵

*H.R. 12549.*⁹⁶—In 1931 Congress considered⁹⁷ H.R. 12549. Section 1 of this bill is substantially the same as section 1 of H.R. 6990. However, the classification section⁹⁸ differs from section 37 of H.R. 6990 in that the catchall subsection in the first bill is absent from this bill, as is the section protecting records. The declaration that “the following specifications shall not be held to limit the subject matter of copyright”⁹⁹ is present in H.R. 12549, but the omission of records from this bill made this phrase ambiguous. If it covered unforeseeable subjects, or subjects now in existence that Congress had overlooked, the failure to protect records could be explained only as inadvertence or as an indication that Congress did not think records were constitutionally protectable.

The omission of records might reflect the Patents Committee’s attitude that neither records nor performers’ renditions are writings.¹⁰⁰ The protection of records is basically aimed at protecting either the performer’s rendition or arrangement, or the record company’s interpretation, or both, and not the music itself. The Committee might have thought this was not a literary creation within the scope of copyright as it did not reflect authorship and denied record protection on that ground.¹⁰¹ This view would allow for broader protection and greater possibility of protection outside the enumerated categories.

However, the view that the omission of records was not indicative of congressional opinion that records were not constitutionally copyrightable,¹⁰² either because of lack of literary creation or because they are not writings, is the more probable one since Congress has rarely troubled itself with the constitutional problems involved in extending copyright protection. If this view is followed, however, it would

⁹³ § 37(p).

⁹⁴ § 37(q).

⁹⁵ § 37(r).

⁹⁶ 71st Cong., 3d Sess. (1931).

⁹⁷ Introduced by Vestal and referred to Committee on Patents, 72 Cong. Rec. 9404 (1930). Reported with amendment, id. at 9771. Minority views presented, id. at 9998. Recommended to Committee on Patents, id. at 10595. Reported with amendment, id. at 10680, 10690. Recommended to Committee on Patents, id. at 11549. Reported with amendment, id. at 11642. Made special order, id. at 11994. Debated, id. at 11996-12018, 12474. Debated, 74 Cong. Rec. 2006, 2037, 2080 (1931). Passed House and title amended, id. at 2081. Referred to Senate Committee on Patents, id. at 2721. Reported with amendment, id. at 5720. Debated, id. at 6102, 6234, 6244, 6449, 6458, 6463, 6470, 6474, 6480, 6486, 6640, 6654, 6712, 6717, 6722.

⁹⁸ § 35.

⁹⁹ *Ibid.*

¹⁰⁰ A good argument can be made that records are writings in the literal sense of the word. The earliest writing is the Assyrian wedge-shaped inscription made by pressing the end of a squared stick into a soft clay cylinder. The phonograph point inscribes its record in the same manner upon the disk, for the mechanism only revolves the roll, and the point is actuated by the sound vibrations. The word phonograph literally means sound writing, the Greek “graph” meaning the same as the Saxon “write.” Bowker, *op. cit. supra* note 87, at 215.

¹⁰¹ This was the view presented to the Section on Patents, Trade-Marks and Copyrights of the American Bar Association. ABA, Patent, Trade-Mark & Copyright Law Section, Committee Reports to be Presented at Annual Meeting 77-78 (1935). But see ABA, Patent, Trade-Mark & Copyright Law Section, Committee Reports to be Presented at Annual Meeting 16 (1930). See also statement of Louis Frohlich, spokesman for ASCAP, in Hearings Authorizing a Composer’s Royalty in Revenues from Coin-operated Machines and to Establish a Right of Copyright in Artistic Interpretations Before the Subcommittee on Patents, Trade-Marks, and Copyrights of the House Committee on the Judiciary, 80th Cong., 1st Sess. 26 (1947); statement of Louis C. Smith, representing the Copyright Office, id. at 264.

¹⁰² That they are constitutionally copyrightable, see Diamond and Adler, Proposed Copyright Revision and Phonograph Records, 11 *Air L. Rev.* 29, 46 (1940). Cf. Notes, 5 *Stan. L. Rev.* 433, 458 (1953), 49 *Yale L.J.* 559, 566 (1940). That they are not, see Statement of Louis Frohlich, Hearings, *supra* note 101, at 24.

seem to mean that despite the broad catchall clause and the similarly broad language of section 1, H.R. 12549 returns to the accepted interpretation of the present act, so that if a subject does not fit into an enumerated classification, it is unlikely to be protected. Although this interpretation creates an ambiguity, in mundane terms it is logical. The interests opposed to copyrighting records pressured the Patents Committee into withdrawing protection for them, and the Committee did so, without paying heed to the resultant paradox—the prospect that the unamended broad language might either force an undesired protection of records or force the putative subjects of copyright protection into adherence to the enumerated classifications.

*H.R.s 11948, 10976, 10364, and 10740.*¹⁰³—The 72d Congress in 1932, held hearings on four proposals,¹⁰⁴ all general revision bills, attempting, among other things, to expand the subjects of copyright.

H.R. 11948 provided, in section 1, that “authors are secured copyright in all their writings.” Section 3, entitled “copyrightable works,” lists the writings of an author, with subsections (a) to (l) giving specific classifications. Subsection (m) is an attempt to provide a general classification, and reads as follows: “[the writings of an author include] miscellaneous writings including works mentioned in section 4 not enumerated above. The foregoing specifications shall not be held to limit the subject matter of copyright as defined in section 1 of this Act.” Section 4 is entitled “other works” and provides that—

translations, and compilations, abridgements, adaptations, and arrangements, including sound disk records, sound film records, electrical transcriptions records, and perforated rolls, and arrangements and compilations for radio broadcasting and television or other versions of works, shall be regarded as new works and, to the extent that they are original copyright shall subsist therein. . . .

Section 3(m), read in conjunction with section 4, seems to add the enumerated modes of communication in section 4 to the subject of copyright, and is primarily aimed at performers' rights and other rights in the performance of the record. Section 3(m) is also a catch-all category which might seem to imply that Congress was intending to expend all its constitutional power, deferring the decision on whether any unenumerated works are writings to the courts. The phrase “miscellaneous writings including works mentioned in section 4” implies that works other than section 4 works are also protectable. Section 5(c), which specifically denies copyright to “designs or patterns,” reinforces this conclusion since the necessity of spelling out exceptions demonstrates that Congress thought protection was being extended beyond the enumerated works. Again, however, caution is advisable in following the maxim *expressio unius*, for the bill might contain this exception merely to soothe an agitated interest group, and this express exception might not necessarily mean that the draftsmen intended to include all else.

H.R. 10976 is, insofar as pertinent, the same as H.R. 11948.¹⁰⁵ H.R. 10364 modifies the word “writings” by providing in section 1 that

¹⁰³ 72d Cong., 2d Sess. (1932).

¹⁰⁴ H.R. 11948: Introduced by Sirovich and referred to Committee on Patents, 75 Cong. Rec. 9803 (1932). H.R. 10976: Introduced by Sirovich and referred to Committee on Patents, 75 Cong. Rec. 7159 (1932). Reported back, id. at 7519. H.R. 10364: Introduced by Sirovich and referred to Committee on Patents, 75 Cong. Rec. 5722 (1932). H.R. 10740: Introduced by Sirovich and referred to Committee on Patents, 75 Cong. Rec. 6692 (1932).

¹⁰⁵ Section 5(c) here is also identical with § 5(c) of H.R. 11948.

"authors who create literary, artistic or scientific writings are granted copyright therein." This modification might imply that the congressional framers considered the word "writings" to include subjects other than those of literature, art, or science, such as parts of machinery and other objects they did not desire to copyright. An intent to protect all writings within the fields of literature, art, or science may be inferred since section 3 provides that—

the literary, artistic, and scientific writings of an author include . . . (o) composite works mentioned in section 4 and not enumerated above; and (p) miscellaneous works embodying literary, artistic or scientific creations of authors.

Section 4 is the same substantially as section 4 in H.R. 11948. Thus, H.R. 10364 seems to go slightly further in expressing desire to copyright works not specifically listed than does H.R.s 10976 or 11948, since section 3(p) is a new and separate general classification, in addition to the classification in section 3(o). However, section 3(m) in H.R.s 11948 and 10976 indicates that section 4 works are not the only works registrable in that category, since it says "miscellaneous writings including works mentioned in section 4," whereas the equivalent section 3(o) in H.R. 10364 indicates that the section 4 works are the sole works registrable under section 3(o). Hence, in the latter bill, a separate category is needed for works not listed in either section 3 or section 4. That is, section 3(m) in H.R.s 11948 and 10976 includes the same subjects as are included in sections 3(o) and 3(p) of H.R. 10364. Thus, the desire to expend the entire constitutional grant is not expressed much more strongly in H.R. 10364. However, congressional awareness of the uncertainty regarding the extent of coverage under sections 4 and 5 of the present act¹⁰⁶ is reflected in the strength of the language in all three bills.¹⁰⁷

H.R. 10740 is similar to H.R. 10364, except that miscellaneous works embodying literary, artistic, or scientific creations are combined in one classification with section 4 works.

*S. 3047.*¹⁰⁸—This bill would have amended section 4 of the 1909 act¹⁰⁹ to read:

that the works for which copyright may be secured under this Act shall include all the writings of an author, whatever the mode or form of their expression.

This language, although similar to that of H.R. 6990,¹¹⁰ is not as sweeping. Also, the amendments to section 5 of the 1909 act,¹¹¹ which add "choreographic works and pantomimes, the scenic arrangement of acting form of which is fixed in writing or otherwise,"¹¹² "works of architecture, or models or designs for architectural works,"¹¹³ and "works prepared expressly for radio broadcasting, or for recording by means of electrical or mechanical transcription, including programs

¹⁰⁶ See text of §§ 4, 5 in notes 61, 62 supra. In § 5 see particularly the final clause.

¹⁰⁷ Section 5(c) in H.R. 10364 is also identical with § 5(c) in H.R.s 10976 and 11948. This is additional evidence that the Committee thought it was copyrighting everything that could be copyrighted, since it felt it necessary to specifically exempt what it did not wish to cover.

¹⁰⁸ 74th Cong., 1st Sess. (1935). Introduced by McDuffy and referred to Committee on Patents, 79 Cong. Rec. 9257 (1935). Reported back, id. at 9414. Debated, id. at 10059, 12054, 12181, 12249, 12257, 12475, 12559, 12611. Amended and passed in Senate, id. at 12615. Referred to House Committee on Patents, id. at 12904. Debated, 80 Cong. Rec. 1942 (1936).

¹⁰⁹ See note 61 supra.

¹¹⁰ See quote in text following note 86 supra.

¹¹¹ See note 62 supra.

¹¹² § 4(m).

¹¹³ § 4(n).

and continuities insofar as they embody original work of authorship,"¹¹⁴ indicate a lack of intent to copyright everything copyrightable under the Constitution. Although the phrase at the end of section 5 in the 1909 act¹¹⁵ is presumably left intact and section 4 contains sweeping language, the difficulty in determining whether the statute would copyright anything not enumerated within it, which was experienced under the 1909 act, is present here.

*H.R. 11420.*¹¹⁶—In 1936, during the 2d session of the 74th Congress, H.R. 11420 was introduced into committee.¹¹⁷ Section 4 of this bill is the same as in S. 3047 above, and section 5 is also substantially similar, except for subsection (o), which provides for registration of "miscellaneous writings, including works mentioned in section 6 not enumerated above." Section 6 reads, "copyright shall subsist in compilations, abridgments, translations, dramatizations, adaptations, picturizations, novelizations, and arrangements." Section 7 specifically denies copyright to "designs, or textiles, or patterns for wearing apparel, or pictorial representations of such designs or patterns"¹¹⁸ or to—

renditions, interpretations, mechanical and electrical recordings and transcriptions, in respect of any work the author of which shall not have consented in writing to the securing of copyright in such . . . recordings. . . .¹¹⁹

The latter clause by implication protects these interpretations of records when the author has consented. Since there is no specific classification section for records, this protection indicates that the specific classifications of section 5 are not exclusive and reinforces the view that section 5(o) meant to spend the entire constitutional grant. Although section 5(n) classifies for registration "works prepared expressly for radio broadcasting or for recording by means of electrical or mechanical transcription," these are not the same subjects as in section 7(d). The section 5(n) grant is unconditional whereas the section 7 grant forbids copyright without consent of the author. The only way to resolve this ambiguity is to interpret "works prepared . . . for recording" as not including "interpretations . . . in such recordings." A further indication that these subjects are not the same is the fact that in H.R. 10632, mentioned below, both are included in section 5¹²⁰ and are thus established as separate categories.

*H.R. 10632.*¹²¹—This bill, introduced¹²² at the same session as H.R. 11420, would have amended section 4 of the present act by providing—

That the works for which copyright may be secured . . . shall include all the writings of an author, whatever the mode or form of their expression, and all renditions and interpretations of a performer and/or interpreter of any musical, literary, dramatic work, or other compositions, whatever the mode or form of such renditions, performances, or interpretations.

This broad language suggests the correctness of Professor Chafee's theory that the word "writings" in the statute is more narrowly defined than it is in the Constitution.¹²³ Here, section 4 gives copyright to "all the writings of an author . . . and all renditions and interpretations

¹¹⁴ § 4(o).

¹¹⁵ See note 62 supra.

¹¹⁶ 74th Cong., 2d Sess. (1936).

¹¹⁷ Introduced by Sirovich and referred to Committee on Patents, 80 Cong. Rec. 2725 (1936).

¹¹⁸ § 7(c).

¹¹⁹ § 7(d).

¹²⁰ §§ 5(o), (n).

¹²¹ 74th Cong., 2d Sess. (1936).

¹²² Introduced by Daly and referred to Committee on Patents, 80 Cong. Rec. 1086 (1936).

¹²³ See Chafee, supra note 68, at 504.

of a performer. . . ." Since this grant shows that renditions are something more than writings, and since Congress cannot constitutionally protect anything but a writing, it seems that the draftsmen were following Professor Chafee's idea and saying that constitutional concept of authors and writings includes at least those renditions and performers covered by the statute. But the poor draftsmanship of many of the copyright bills forbids implying too much from this language which may have been inadvertent.

Section 5 of the 1909 act¹²⁴ is amended to include, among other things, "works prepared expressly for radio broadcasting, or for recording by means of electrical or mechanical transcription."¹²⁵ Subsection (n)¹²⁶ provides for registration of—

the interpretations, renditions, readings, and performances of any work when mechanically reproduced by phonograph record, disks, sound-track tapes, or any and all other substances and means, containing thereon or conveying a reproduction of such interpretations, renditions, readings, and performances.

It is puzzling to determine the borderline between section 5(o) and 5(n), a distinction not so obviously drawn as in H.R. 11420.¹²⁷

*H.R. 1270.*¹²⁸—This bill¹²⁹ provided for amending section 5(m)¹³⁰ of the present act by substituting "recordings which embody and preserve any acoustic work in a fixed permanent form . . . on any . . . (substance) . . . by means of which it may be acoustically communicated or reproduced." This seems to have been primarily aimed at protecting performers' rights by extending the concept of writings to include communications through the sense of hearing, if such communications are embodied in some concrete object.¹³¹

Conclusions.—The most apparent fact which can be drawn is that the constitutional definition of "writings" has not been the controlling factor in Congress' decisions on the extension of copyright protection.¹³² Since 1790 Congress has shown a readiness to protect property

¹²⁴ See note 62 supra.

¹²⁵ § 5(o).

¹²⁶ This is probably a misprint for subsection (p), since it succeeds subsection (o). It is printed this way in Hearings, supra note 101, at 8-10. For statements urging passage of a similar bill, see *ibid.* For statements urging defeat, see statements of Gene Buck, *id.* at 18, and Louis Frohlich, *id.* at 24.

¹²⁷ See text at notes 119-20 supra.

¹²⁸ 80th Cong., 1st Sess. (1947).

¹²⁹ Introduced by Scott and referred to Committee on the Judiciary, 93 Cong. Rec. 552 (1947).

¹³⁰ See note 77 supra.

¹³¹ The subcommittee of the American Bar Association Section of Patents, Trade-Marks and Copyright Law disapproved this section of the bill. ABA, Patent, Trade-Mark & Copyright Law Section, Committee Reports to be Presented at Annual Meeting 1953 (1948). Arguments by witnesses on the unconstitutionality of proposed copyright bills has not prevented Congress from passing dubious sections in the past. Opponents of § 1, which gave rights of mechanical reproduction to copyright owners, and thus overrode *White-Smith Music Publishing Co. v. Apollo Co.*, 208 U.S. 1 (1908), contended this section was unconstitutional. The view was that the Constitution states that authors shall be protected in their writings, and thus they could not be protected against means other than writings. Statement of Horace Pettit, in Hearings Before the Committees on Patents of the Senate and House of Representatives, on Pending Bills to Amend and Consolidate The Acts Respecting Copyright 273 (1908). The rejection of this argument and the many sub silentio decisions upholding the constitutionality of this part of the 1909 act indicate either that the authors' rights to prohibit use by anyone is not restricted to use through writings, contrary to Mr. Pettit's contention, or that all of the § 1 rights, which deal with the exclusive rights of copyright owners, are "writings." If that latter view is followed, the definition of "writings" would be expanded so far that it would even include oral works under § 1(c). The first view is probably the correct one.

It was also contended that the provision in § 1(c), granting a compulsory license to all record manufacturers as soon as one recorded the song, was unconstitutional as violative of the constitutional phrase "exclusive right." See, e.g., Statement of Nathan Burkan, Counsel, Music Publishers Ass'n, *id.* at 233, 234; Statement of Robert Underwood Johnson, Secretary, Copyright League, *id.* at 361. Nevertheless, the section was passed. See Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 Geo. L.J. 109 (1929); Note, 22 *Chi. L. Rev.* 920 (1955).

¹³² Nowhere in the reports or hearings can an instance be found when it has controlled the decision.

having commercial value, although the bills have often been ambiguous and poorly drawn.¹³³

CASE LAW

Largely unnoticed and unquestioned, the courts have interpreted the copyright provision of the Constitution¹³⁴ far beyond its literal wording. Very few courts have decided the question of copyrightability on the basis of whether particular objects were literally "writings" produced by "authors" or whether the framers intended the objects in question to be protected. As a matter of fact, very few courts even deal with the Constitution in their decisions delineating the proper subject matter of copyright.

Even when the courts discuss the words in the Constitution, the analysis rarely includes any discussion of the literal or plain meaning of "writings" and "authors" or what the framers of the Constitution meant and why they used such explicit and limiting words. These words and their applicability to copyright subject matter are discussed on an entirely different level of meaning.

These courts feel that section 8 (exclusive of "inventors" and "discoveries") gives Congress the basic power to regulate copyrights; the clause "to promote the Progress of Science and useful Arts" embodies the various objectives and purposes of copyrights; the phrase "by securing for limited Times . . . the exclusive Right" sets forth the method by which these objectives are to be accomplished; and "writings" and "authors" require that subjects must conform to certain principles, such as originality, creativity, and intellectual thought, before they are entitled to protection. In no instance is the particular form in which the object may exist the controlling consideration.

In only two cases has the constitutionality of copyright legislation been passed upon by the United States Supreme Court. In the *Trade-Mark Cases*¹³⁵ the power of Congress to include objects used as trademarks, such as engravings, etchings, and prints, was questioned. Their copyrightability was rejected, not on the ground that they were not literary productions, but rather because they lacked originality and creativity. In the second case, *Burrow-Giles Lithographic Co. v. Sarony*,¹³⁶ the question of whether photographs were writings, *i.e.*, literary productions, was thoroughly discussed. The Court rejected a literal interpretation of writings and held the photographs were copyrightable.

Most courts have followed *Burrow-Giles* and assumed that the framers of the Constitution "by writings . . . meant the literary productions of . . . authors."¹³⁷ Likewise, in a frequently cited decision of the Seventh Circuit Court of Appeals denying copyright protection to ticker tape reports of current events, the court said that unquestionably the framers of the Constitution had authorship of literary productions in mind in vesting Congress with power under article I, section 8, and if "the intention of the framers . . . [were] to give boundary to the constitutional grant, many writings, to which copyright has since been extended, would have been excluded."¹³⁸

¹³³ It is not to be presumed that this is the only area in copyright law where congressional confusion is evident.

¹³⁴ U.S. Const., art. I, § 8, cl. 8.

¹³⁵ 100 U.S. 82 (1879).

¹³⁶ 111 U.S. 53 (1884).

¹³⁷ *Id.* at 58.

¹³⁸ *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 204, 297 (7th Cir. 1902).

Despite this restricted interpretation of the original meaning intended by the framers, the courts do not seem to consider the literal definition of "writings" binding in deciding the issue of copyrightability. Occasionally, a court will refuse to extend protection to a particular object on the ground that it does not wish to expand the concept of "writings," but there seems to be no doubt these courts thought Congress could so expand it.¹³⁹

Whether they are granting or withholding copyright protection, the courts agree that the words "writing" and "authors" should be liberally construed.¹⁴⁰ Various phrases have been used to express this idea: "the words have received a broad interpretation by the courts";¹⁴¹ "both these words are susceptible of a more enlarged definition";¹⁴² "here as elsewhere, the constitution under judicial construction, has expanded to new conditions as they arose";¹⁴³ and "the history of the copyright law does not justify so narrow a construction of the word 'writings'."¹⁴⁴ It is clear that even though they express the belief that the Constitution was intended only to give power to Congress to protect literary productions, they consider neither themselves nor Congress limited to protecting this form of subject matter. Apparently *Mazer v. Stein* states the currently accepted view that, at least since the decision of *Burrow-Giles* in 1884, the question is settled and it has been "made clear that 'writings' was not limited to chirography and typography."¹⁴⁵

Definitions of "Writings" and "Authors" by the Courts

Writings.—The courts do not define writings as the from a particular subject matter but rather they determine if the subject matter meets certain standards or principles to which all objects, whatever their form, must conform if they are to be entitled to copyright protection. *Writings, thus, are defined not in terms of concrete, tangible forms, but in terms of principles and standards.*

In the first definitive statement of the meaning of writings, the Supreme Court in the *Trade-Mark Cases* held that Congress had no power to protect trade-marks under article I, section 8, not because trade-marks were not in the form of "writings" as it might have declared by literally interpreting the word, but because writings of authors require originality. The Court went on to say that—

while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are the *fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like.¹⁴⁶

¹³⁹ See *Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) (player piano rolls); *Atlas Mfg. Co. v. Street & Smith*, 204 Fed. 398 (8th Cir.), *appeal dismissed*, 231 U.S. 348, *cert. denied*, 231 U.S. 755 (1913), *cert. denied*, 232 U.S. 724 (1914) (title of literary work); *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657 (2d Cir. 1955); *J. L. Mott Iron Works v. Clow*, 82 Fed. 316 (7th Cir. 1897) (catalogue of pictures); *Jack Adelman Inc. v. Sonners & Gordon, Inc.*, 112 F. Supp. 187 (S.D.N.Y. 1934) (dress).

¹⁴⁰ *Trade-Mark Cases*, 100 U.S. 82 (1879); *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 Fed. 993 (6th Cir. 1900), *rev'd sub nom. Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (the Supreme Court reversed the circuit court on the ground that it had interpreted this section of the Constitution too narrowly); *J. L. Mott Iron Works v. Clow*, supra note 139; *Metro-Goldwyn-Mayer Distributing Corp v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933); *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F. 2d 583 (E.D.N.Y. 1929).

¹⁴¹ *Id.* at 584.

¹⁴² *Burrow-Giles Lithograph Co. v. Sarony*, 111 U.S. 53, 57 (1884).

¹⁴³ *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 297 (7th Cir. 1902).

¹⁴⁴ *Harper & Bros. v. Kalem Co.*, 169 Fed. 61, 64 (2d Cir. 1909), *aff'd*, 222 U.S. 55 (1911).

¹⁴⁵ 347 U.S. at 210 n. 15.

¹⁴⁶ *Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

Since trade-marks were the result of use or accident and not of "fancy," "imagination," "genius," or "laborious thought,"¹⁴⁷ they were not entitled to copyright protection.

In similar words, the Supreme Court in 1884 held that Congress had the power to protect photographs, not because they were a form of literary production, but because writings included all forms "by which the ideas in the mind of the author are given visible expression."¹⁴⁸ Since the author of the photographs proved the—

facts of originality, of intellectual production, of thought, and conception . . . [they were in the] class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell. . . .¹⁴⁹

On the basis of these two cases, other courts have similarly defined these words in terms of principles and standards, such as: "the expression of an idea, or thought, or conception"¹⁵⁰ of the one who takes the photograph; subjects which "convey or are capable of conveying the thought of an author";¹⁵¹ "creative, intellectual or aesthetic labor in the production of a concrete, tangible form"¹⁵² resulting in an artistic creation; results and "fruits of intellectual labor";¹⁵³ and "labor of the brain in these useful departments of life."¹⁵⁴

Courts have expressly held the following objects to be "writings": an interest and discount time teller consisting of a diagram in contrasting colors with words, markings, and numerals;¹⁵⁵ pictorial illustrations of women's dresses;¹⁵⁶ code words for cable correspondence;¹⁵⁷ a motion picture photoplay film;¹⁵⁸ and a chart for analyzing handwriting.¹⁵⁹ Even in these cases which declare a specific subject to be a writing instead of saying a writing is the idea or expression of the thought or conception of the author, the courts say these objects are writings because they are original intellectual and creative conceptions.

It is interesting to note that in the cases involving the motion picture photoplay film and the handwriting chart, the courts discussed section 4 of the Copyright Act¹⁶⁰ which grants copyright protection to "all the writings of an author." Section 5 classifies the works for copyright registration but states that these specifications "shall not be held to limit the subject matter of copyright as defined in section 4."¹⁶¹ Both courts held that if the objects in issue could not be properly classified within the subjects mentioned in section 5, they were meant to be included as "writings" under section 4.¹⁶² Section 5 certainly specifies all forms of literary production so, to these courts at

¹⁴⁷ *Ibid.*

¹⁴⁸ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

¹⁴⁹ *Id.* at 60.

¹⁵⁰ *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 Fed. 262, 265 (C.C.D.N.J. 1905).

¹⁵¹ *Brown Instrument Co. v. Warner*, 161 F. 2d 910, 911 (D.C. Cir.), *cert. denied*, 332 U.S. 801 (1947).

¹⁵² *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F. 2d 583 (E.D.N.Y. 1929).

¹⁵³ *J. L. Mott Iron Works v. Clow*, 82 Fed. 316, 318 (7th Cir. 1897).

¹⁵⁴ *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 297 (7th Cir. 1902).

¹⁵⁵ *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F. 2d 35 (7th Cir. 1926).

¹⁵⁶ *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215 (C.C.M.D. Pa. 1911).

¹⁵⁷ *Reiss v. National Quotation Bureau, Inc.*, 276 Fed. 717 (S.D.N.Y. 1921).

¹⁵⁸ *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933).

¹⁵⁹ *Deutsch v. Arnold*, 98 F. 2d 686 (2d Cir. 1938).

¹⁶⁰ 17 U.S.C. § 4 (1952). See wording in note 61 *supra*.

¹⁶¹ 17 U.S.C. § 5 (1952). See note 62 *supra*.

¹⁶² *Deutsch v. Arnold*, 98 F. 2d 686, 688 (2d Cir. 1938); *Metro-Goldwyn Mayer Distributing Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66, 72 (D. Mass. 1933).

least, "writings" does not relate to the form of the object but to certain principles and standards generally consistent with those set forth in the *Trade-Mark Cases* and *Burrow-Giles*.

The fact that courts do not consider "writings" a limitation on form does not mean that any form or subject is entitled to copyright protection. "Writings" is defined as the expression or form by which the original ideas of the author are given expression. Writings according to the courts are the results, fruits, or conceptions of original or creative intellectual thought or labor, with the primary emphasis on originality and intellection.

Authors.—Probably the most frequently quoted definition of the nature of authorship is that of Lord Justice Cotten in *Nottage v. Jackson*,¹⁶³ in 1883, stating that authorship involved "originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph."¹⁶⁴

Similarly, a circuit court has stated that if the product would not have found existence in the form presented but for the distinctive individuality of mind from which it sprang, and if in makeup there is evinced some peculiar mental endowment, there is authorship.¹⁶⁵ Another case defined authors as "all who exercise creative, intellectual, or aesthetic labor in the production of a concrete, tangible form."¹⁶⁶ Interestingly, one court stated that a "man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street numbers, acquires material of which he is the author"¹⁶⁷ and is entitled to copyright protection.

From these definitions of "authors," it is apparent that an author is not defined as a type of writer, but is analyzed on the same conceptual level as "writing."

Some courts rely heavily on a broad definition of authorship to support their conclusions as to the copyrightability of a particular object.¹⁶⁸ It is an expanding rather than limiting word.

Reasons Given by the Courts for their Broad Interpretation of "Writings" and "Authors"

Such a broad definition and subtle interpretation of the rather precise and explicit words in section 8 would seem to require a great deal of explanation and rationalization on the part of the courts. Such, however, is not the case. Most courts probably feel *Burrow-Giles* settled the issue and therefore do not discuss the reason for their interpretations. However, the Supreme Court in *Burrow-Giles* and a number of other courts have given reasons for their decisions.

It should be made clear at the beginning of this discussion that the reasons given are usually mere dicta. However, these analyses, whether relevant or not to the particular holding in the case, are important because these are the basic assumptions and foundations upon

¹⁶³ 11 Q.B.D. 627 (1883).

¹⁶⁴ *Id.* at 635.

¹⁶⁵ *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 298 (7th Cir. 1902).

¹⁶⁶ *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F. 2d 583, 584 (E.D.N.Y. 1929) (author of shoebox wrappings).

¹⁶⁷ *Jewelers Circular Publishing Co. v. Keystone Publishing Co.*, 281 Fed. 83, 88 (2d Cir. 1922).

¹⁶⁸ See, e.g., *Rushion v. Vitalc*, 218 F. 2d 434 (2d Cir. 1955); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99 (2d Cir. 1951); *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, 134 F. Supp. 551 (S.D.N.Y. 1955); *Falk v. Donaldson*, 57 Fed. 32 (C.C.S.D.N.Y. 1893). But see *International News Serv. v. The Associated Press*, 248 U.S. 215, 234 (1918), where the concept of author was used to find the report of news not a "writing."

which the courts have built the entire body of copyright law. Without these basic assumptions or rationalizations, whether expressly stated or not, the only conclusion one can reach is that for approximately 150 years Congress and the courts have been operating outside and in violation of an express power delegated to Congress.

1. *Reliance on Congressional Interpretation.*—Some courts will justify their decisions on the ground that Congress for over 100 years has included objects in copyright statutes which are clearly not writings in the narrow literal sense of that word.¹⁶⁹ This attitude was expressed by the Supreme Court in the *Burrow-Giles* case when it stated:

The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive. . . . These statutes certainly answer the objection that books only, or writing in the limited sense of a book and its author, are within the constitutional provision.¹⁷⁰

In a subsequent case affirmed by the Supreme Court, the Court of Appeals for the Second Circuit expressed a similar view. The "history of the Copyright law does not justify . . . narrow construction of the word 'writings'."¹⁷¹ The court went on to say in substance that since Congress has construed "writings" to cover various forms of expression including maps, charts, engravings, prints, paintings, and statuettes, and this action has been acquiesced in over fifty years, writings should not be strictly or narrowly interpreted by the courts.¹⁷²

These cases are significant not only because they uphold the power of Congress to protect subject matter beyond the common sense definition of "writings," but also for their frank reliance on congressional enactments as legitimate interpretations of the constitutional extent of the term. While it is well settled that the judiciary considers congressional interpretation strongly persuasive, the courts cannot rely on it as conclusive. Their constitutional duty under the principle of judicial review would prevent allowing Congress to determine finally the extent of its delegated powers. Thus, some courts have found it necessary to explain their actions on grounds independent of congressional actions in the copyright field.

2. *Dominance of the Phrase "to Promote the Progress of Science and Useful Arts."*—Under this approach the courts have interpreted section 8 so as to emphasize the basic power of Congress to promote the progress of science and the useful arts. Congress under this general power need not be closely restricted by the additional but secondary qualifications in section 8. It can be argued, therefore, that the courts should not interpret "writings" and "authors" literally and by so doing hinder progress.

For example, motion pictures were held to be photographs under the 1865 statute because to say that motion pictures were unknown

¹⁶⁹ See, e.g., *Harper & Bros. v. Kalem Co.*, 169 Fed. 61, 64-65 (2d Cir. 1909), *aff'd*, 222 U.S. 55 (1911); *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933); *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215, 217-18 (C.C.M.D. Pa. 1911). See also *Taylor Instrument Companies v. Fawcley-Brost Co.*, 139 F. 2d 98, 99-100 (7th Cir.), *cert. denied*, 321 U.S. 785 (1943); *J. L. Mott Iron Works v. Clow*, 82 Fed. 316, 317-318 (7th Cir. 1897).

¹⁷⁰ 111 U.S. at 57.

¹⁷¹ *Harper & Bros. v. Kalem Co.*, 169 Fed. 61, 64 (2d Cir. 1909), *aff'd*, 222 U.S. 55 (1911).

¹⁷² *Id.* at 64-65.

when the act covering photographs was passed in 1865 seemed to beg the question. "Such construction is at variance with the object of the act, which was passed to further the constitutional grant of power 'to promote the Progress of Science and useful Arts.'" ¹⁷³ Likewise, another court held that the act of Congress including illustrations was passed in execution of the power which had as its object the promotion of science and the useful arts. Since a liberal construction of the clause would give effect to "its tenor and true intent," pictorial illustrations used to advertise dress fashions were considered the "writings of an author" under the Constitution. ¹⁷⁴ Original recipes on a label were protected because they possessed some value as intellectual compositions and also because they served some purpose in promoting the progress of useful art, *i.e.*, the progress of culinary arts. ¹⁷⁵

In a leading case on the copyright protection of three-dimensional objects, *Pellegrini v. Allegrini*, ¹⁷⁶ the question of whether a statuette which constituted a candleholder was a "writing of an author" was not mentioned. Instead the court stated that the—

motive underlying design patents and copyrights of works of art is one which is readily appreciated. The beautiful and the development of a love of the beautiful and of the artistic sense and taste is as much necessary to a well-rounded life as are the useful things. A like comment applies to our national life. It is well, therefore, to encourage the production of works of art. This policy is in line with, and in one sense an extension of, the policy avowed in our Constitution "To promote the Progress of Science and useful Arts." ¹⁷⁷

It is interesting to note that some courts will consider this phrase in section 8 as a limitation on subjects which may be copyrighted. However, even considered as an additional limitation to the standards set forth in the *Trade-Mark Cases* ¹⁷⁸ and *Burrow-Giles*, ¹⁷⁹ it is still analyzed as the basic power giving Congress the right to expand rather than restrict copyright protection.

In *J. L. Mott Iron Works v. Clow*, ¹⁸⁰ a case often cited for its reasoning but probably overruled by the Supreme Court in *Bleistein v. Donaldson Lithographing Co.*, ¹⁸¹ illustrations in a price catalogue of bathtubs, slop sinks, and washbowls were considered not copyrightable, the court saying:

Large discretion is lodged in the Congress with respect to the subjects which could properly be included within the constitutional provision; but that discretion is not unlimited. . . . [It] is restricted to the promotion of the progress of science and the useful arts. ¹⁸²

This court approved the definition of writings set forth in the *Trade-Mark Cases* and *Burrow-Giles* but implied that even if these illustrations met the standards of these cases, which it doubted, the most important part of the section was the promotion of science and art.

Although all of these courts consider the principles of originality, creativity, and intellectual thought set forth in the *Trade-Mark Cases*

¹⁷³ *Edison v. Lubin*, 122 Fed. 240, 242 (3d Cir. 1903).

¹⁷⁴ *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215, 217-218 (C.C.M.D. Pa. 1911).

¹⁷⁵ *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 Fed. 823 (8th Cir. 1924).

¹⁷⁶ 2 F. 2d 610 (E.D. Pa. 1924).

¹⁷⁷ *Id.* at 610-611.

¹⁷⁸ 100 U.S. 82 (1879).

¹⁷⁹ 111 U.S. 53 (1884).

¹⁸⁰ 82 Fed. 816 (7th Cir. 1897).

¹⁸¹ 188 U.S. 239 (1903).

¹⁸² 82 Fed. at 318-20. See discussion in *Eichel v. Martin*, 241 Fed. 404, 408-09 (S.D.N.Y. 1918), in which the court denied copyright protection to the fundamental plot of a play on the ground that since the object of copyright was to promote science and useful arts, one would not withdraw ideas and conceptions from the stock of materials to be used by other authors.

and *Burrow-Giles* binding on them, their analyses center primarily on the question of whether the object for which protection is sought promotes the progress of science and the useful arts. The form of the object in each of these cases is not the controlling factor. If the protection of the particular subject in question through copyright will fulfill what they consider the overriding purpose of section 8, it is entitled to such protection whether or not it is literally a writing. Thus, if "authors" and "writings" were given a narrow construction it would hinder rather than foster this progress. Writings must mean more than mere form alone or the whole purpose of the constitutional grant of this power to Congress would be frustrated.

3. *Article I, Section 8, Clause 8 of the Constitution Embodies the Basic Ideas and Principles of the Copyright Concept.*—This interpretation is based on the assumption that the Constitution gives Congress power to regulate copyright and, therefore, it should be expanded or restricted in accord with the purposes and objects of the concept of copyright. In other words, the courts look at the reasons for the existence of copyright protection, both statutory and common law, and grant or withhold such protection on the basis of these reasons. This approach quite naturally leads to an interpretation of "writings" and "authors" in terms of copyright principles. Undoubtedly, the courts are basing this analysis on the grant to Congress of the power "To promote the Progress of Science and the useful Arts." However, the courts in this interpretation of the clause do not analyze it strictly in terms of promoting progress, but rather taking clause 8 as a whole, they consider it an embodiment of copyright. Therefore, in order to determine what subjects are proper for copyright protection one must look at the reasons for the existence of copyright and if protection of the particular form in question is in line with these basic reasons, then it is entitled to protection under the Constitution.

The courts apparently divide the basic reasons for the existence of copyright protection into roughly three categories: (1) the inherent right of an author to his own works; (2) the right of an author to the rewards and fruits of his labor to encourage further production of such subjects; and (3) the benefit the public will derive from such encouragement to authors resulting in creation of objects of beauty and works which will increase the public's knowledge of the arts and sciences.

With respect to the inherent right of an author to his own works the Supreme Court in *Burrow-Giles* stated that it is not—

to be supposed that the framers of the Constitution did not understand the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own genius or intellect, existed in England at that time. . . .¹⁸³

Although this reasoning seems to contradict the earlier statement in this case that "writings" means "literary productions,"¹⁸⁴ the Court felt that this was a logical interpretation since the whole question of the exclusive right to literary and intellectual productions had been freely discussed in the contest in England over the Statute of Anne,¹⁸⁵ prior to the adoption of the Constitution.¹⁸⁶

¹⁸³ 111 U.S. at 58.

¹⁸⁴ *Ibid.*

¹⁸⁵ 8 Anne, c. 19 (1710).

¹⁸⁶ See *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

In 1907 the Supreme Court again used this same approach to the Constitution in protecting a painting from being copied, stating that the foundation of copyright was the "natural dominion which every-one has over his own ideas . . . embodied in visible forms or characters."¹⁸⁷ In the same year an Illinois circuit court of appeals held that a copyrighted piece of sculpture was entitled to protection because protection was in—

accord with the reason and spirit of the law [T]he copyright acts "secure to the author the original and natural rights, and it was said that the various provisions of the law in relation to copyrights should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work."¹⁸⁸

However, this inherent right is not so much control over the "physical thing created, but the right of printing, publishing, and copying."¹⁸⁹ Thus, since section 8 embodies the rights of copyright, Congress has the power thereunder to protect the inherent right of the author to the publication and reproduction of his works of art or literature, and any statute which does so is valid.

Overlapping this idea of the "inherent right" is the idea that a person is entitled to the rewards and fruits of his own labor which, in essence, means the right to publish, copy, and sell such works. As the Supreme Court said in *Mazer v. Stein*, "sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."¹⁹⁰ Previously, the Supreme Court had on two other occasions expressed this same philosophy.¹⁹¹ Similarly, a federal district court stated that "men of ability who employed their time for the service of the community, may not be deprived of their just merits and the reward of their ingenuity and labor."¹⁹²

The third basic category of the concept of copyright is securing benefit for the public through granting temporary monopolies. This interpretation was succinctly stated by the Supreme Court in *Mazer v. Stein* when it stated that the copyright law was—

"intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world' The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. . . ."¹⁹³

In an interesting case the Supreme Court held states could tax copyrighted motion pictures in spite of the argument that copyrighted objects were immune because protected by federal law. The Court held that—

the mere fact that a copyright is property derived from a grant by the United States is insufficient to support the claim of exemption. Nor [does] the fact, that the grant is made in furtherance of a governmental policy of the United States, and because of the benefits which are deemed to accrue to the public in the execution of that policy, furnish ground for immunity [from state taxation].¹⁹⁴

¹⁸⁷ *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 290-291 (1907).

¹⁸⁸ *Bracken v. Rosenthal*, 151 Fed. 136, 137 (C.C.N.D. Ill. 1907).

¹⁸⁹ *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 298 (1907).

¹⁹⁰ 347 U.S. at 219.

¹⁹¹ See *Bubbe-Merrill Co. v. Straus*, 210 U.S. 339, 347 (1908); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299 (1907).

¹⁹² *Eichel v. Marcin*, 241 Fed. 404, 410 (S.D.N.Y. 1913).

¹⁹³ 347 U.S. at 219.

¹⁹⁴ *Fox Film Corp. v. Doyal*, 286 U.S. 123, 128 (1932).

The Court in its discussion of the nature of copyright under the Constitution said that—

the sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is "at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects."¹⁹⁶

The creator of a cartoon character of a horse was granted protection against reproductions of the horse in the form of toys, on the ground that it is "the commercial value of his property that . . . is protected," and this is done "to encourage the arts by securing to him the monopoly in the sale of the objection of the attraction."¹⁹⁶

This interpretation has been used as one of the grounds to deny copyright protection to certain subjects. In these cases, the courts state that because protection of the particular subject matter would not benefit the public it is not entitled to protection. In the case involving illustrations of bath tubs and slop sinks one of the grounds on which they were declared unprotected was the fact that the object of the constitutional provision—

was to promote the dissemination of learning, by inducing intellectual labor in works which would promote the general knowledge in science and useful arts. It sought to stimulate original investigation, whether in literature, science or art for the betterment of the people, that they might be instructed and improved with respect to those subjects.¹⁹⁷

In very similar words a New York district court refused to grant protection to a fundamental plot which had been common property before the author wrote his play. "Copyright protection is extended to authors, mainly with a view to inducing them to give their ideas to the public so that they may be added to the intellectual store, accessible to the people, and that they may be used for the intellectual advancement of mankind."¹⁹⁸ According to the analysis of the court, if this particular author were allowed to withdraw this idea for a plot from the stock of materials to be used by other authors this would deprive the world of improvements and retard the progress of the arts.¹⁹⁹

This interpretation has probably been largely responsible for the actual definitions given to "writings" and "authors."

4. *The Constitution Is a Flexible Document, Interpreted in Light of New Arts and Methods of Reproduction.*—Under this theory of judicial interpretation the courts have evolved the idea that the Constitution was not meant to be a static document but should be interpreted to take into consideration changes in society brought about through the developments in science and the arts. As new arts and methods of reproduction are developed, Congress has the power to enact new copyright laws to extend protection to these new subjects. Courts operating under this theory have granted protection to certain objects prior to their specific inclusion under the specifications set forth in the statute.

¹⁹⁶ Id. at 127.

¹⁹⁶ *King Features Syndicate v. Fleischer*, 299 Fed. 533, 536 (2d Cir. 1924).

¹⁹⁷ *J. L. Mott Iron Works v. Clow*, 82 Fed. 316, 319 (7th Cir. 1897).

¹⁹⁸ *Eichel v. Marcin*, 241 Fed. 404, 410 (S.D.N.Y. 1913).

¹⁹⁹ Id. at 408.

The Supreme Court in the *Burrow-Giles* case stated that—

the only reason why photographs were not included in the extended list in the act of 1802 is probably that they did not exist, as photography as an art was then unknown, and the scientific principle on which it rests, and the chemicals and machinery by which it is operated, have all been discovered long since that Statute was enacted.²⁰⁰

Pictorial illustrations have been properly included in the copyright statutes because "in keeping pace with the growth of the subject of this constitutional provision, many statutes have been enacted, extending and enlarging its protection."²⁰¹

The two leading cases granting copyright protection to motion pictures on the ground that they were photographs supported their expansion of both the statute (which did not expressly protect motion pictures or motion picture photoplay films when these cases were decided) and the Constitution on this theory of a flexible constitution.²⁰² In 1903 motion pictures were held to be photographs within the meaning of the 1865 statute because it was in accord with the purpose of the constitutional grant of power.

When Congress amended the copyright act in 1865 to include photographs, it is not to be presumed it thought such art could not progress and no protection afforded such progress. It recognized there would be change and advance as in other subjects of copyright protection.²⁰³

A motion picture photoplay film not based on a novel or dramatic production was protected on the ground, among others, that it could be considered a "writing" under section 4 or a photograph under the 1865 statute. In either case, the court said this decision was supportable because—

they were copyrightable and copyrighted under prior acts passed before they were invented. . . . While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.²⁰⁴

The court also referred to President Roosevelt's message to Congress in 1905 in which he said:

Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection. . . .²⁰⁵

Similarly, the Court of Appeals for the Seventh Circuit expressed the view that the courts have extended protection to the literature of commerce which the old guild of authors would have disdained, such as catalogues, mathematical tables, statistics, and guide books, because "here as elsewhere, the constitution, under judicial construction, has been expanded to meet new conditions as they arose."²⁰⁶

If one accepts the philosophy that the words of the Constitution are susceptible of expanded meaning to handle unanticipated situations,

²⁰⁰ 111 U.S. at 58.

²⁰¹ *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215, 218 (C.C.M.D. Pa. 1911).

²⁰² *Edison v. Lubin*, 122 Fed. 240 (3d Cir. 1903); *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933).

²⁰³ *Edison v. Lubin*, supra note 202, at 242.

²⁰⁴ *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66, 72 (D. Mass. 1933).

²⁰⁵ *Id.* at 71.

²⁰⁶ *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 297 (7th Cir. 1902) (dictum).

this is a very credible approach. It is possible to say that at the time the Constitution was written the need for statutory copyright extended only to literary productions. Statutory copyright was needed to expand common-law copyright as the methods of reproduction made copying of literary works economically feasible.

All new additions to copyright law since common-law copyright, including our own statutes, have been induced by the developments in the arts and the methods of reproduction. Therefore, within the spirit of section 8 it is possible to give a broad interpretation to "writings" and "authors" to include objects not within the literal definition of these words because the need to protect them was not known to the framers.

This approach to the Constitution was probably best stated by Judge Learned Hand in a case upholding the copyrightability of cable code words. He said it is not true that the Constitution—

embalms inflexibly the habits of 1789 [I]ts grants of power to Congress comprise, not only what was then known, but what the ingenuity of men should devise thereafter. . . . [T]he new subject-matter must have some relation to the grant; but we interpret it by the general practices of civilized peoples in similar fields, for it is not a strait-jacket, but a charter for a living people.²⁰⁷

Subjects Granted Copyright Protection Other Than Literary Productions

The courts have shown considerable leniency in applying the standards they have developed to construe section 8. As a matter of fact in most of the cases discussed below, the question of the Constitution and its relation to copyright is not discussed. However, since most of them cite cases in which the Constitution is discussed as authority for their decisions, presumably these courts are relying on the reasoning in the cited interpretations.

1. *Advertising*.—It was the "circus poster case," *Bleistein v. Donaldson Lithographing Co.*,²⁰⁸ that substantially modified the standards for copyrightability set forth in the *Trade-Mark* and *Burrow-Giles* cases, thus allowing the courts to grant copyright protection to a number of things which would not have been permitted under earlier standards. It must be noted again, however, that these are standards of copyright and have nothing to do with the form of the subject matter. In other words, the definitions of "writings" and "authors" set forth previously, though still valid and controlling must themselves be interpreted broadly on the basis of the *Bleistein* case.

Prior to this "circus poster case," some courts had held that materials designed for no other purpose than mere advertising were not copyrightable, regardless of their form. In an early Supreme Court case, decided in 1891, a label for an ink bottle was denied protection because the object did not serve some purpose "other than as a mere advertisement or designation of the subject to which it is attached."²⁰⁹ Subsequently, other courts, ignoring the fact that the only thing sought to be protected in that case was the statement on the label "water-proof drawing ink," held that illustrations in price catalogues of bathtubs and slop sinks²¹⁰ and in circus poster advertisements were not copy-

²⁰⁷ *Reiss v. National Quotation Bureau, Inc.*, 276 Fed. 717, 719 (S.D.N.Y. 1921).

²⁰⁸ 188 U.S. 239 (1903).

²⁰⁹ *Higgins v. Keuffel*, 140 U.S. 428, 431 (1891). See also *Cross v. Onida Paper Products Co.*, 117 F. Supp. 191 (D.N.J. 1954).

²¹⁰ *J. L. Mott Iron Works v. Olow*, 82 Fed. 316 (7th Cir. 1897).

rightable.²¹¹ It was held that to be protected pictures must have some other use, intrinsic merit, or value aside from just advertising.²¹²

However, since the Supreme Court upheld the copyrightability of circus posters, advertisements have been almost uniformly protected, whether they were pictures or merely a general lay-out. Justice Holmes stated in *Bleistein v. Donaldson*:

The Constitution does not limit the useful to that which satisfies immediate bodily needs. . . . A very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act. . . . A picture is none the less a picture and none the less a subject of copyright [despite the fact] that it is used for an advertisement.²¹³

As a result of the *Bleistein* philosophy, photographs or illustrations used to advertise such things as dress fashions,²¹⁴ "B.V.D.'s,"²¹⁵ and piston rings,²¹⁶ have been held proper subjects of copyright. Pictures of vegetables were held to be copyrightable even though they had little artistic merit. The court felt it was enough if in details, designs, and combination of lines and colors a picture originated with the plaintiff and was in fact a picture, illustration, or work of art connected with the fine arts.²¹⁷ Likewise, an advertising lay-out containing pictures of cosmetics and toilet articles was granted copyright protection with little emphasis on originality. The court seemed to think that any work involving labor or brain skill should be protected because courts should seek to "increase rather than to restrict, the subject matter of copyright."²¹⁸ Recently, a case extended copyright protection even to an advertisement composed primarily of a dot-counting contest.²¹⁹

Illustrations in catalogues used exclusively to sell the plaintiff's products have almost always been granted protection since the "circus poster case," including those with illustrations of electrical conductors,²²⁰ religious statuary,²²¹ and brass goods.²²² The grant of copyright protection to pictures of extension shoes in a sales catalogue was upheld because the pictures were "originally designed and prepared by persons of skill and artistic capacity." Although the pictures contained little that was original, they were "quasi-artistic" and this was enough.²²³

In none of these advertisements is a writing, in the literal sense, involved. But the only issue considered was whether they were the result of original or creative intellectual thought or labor as modified by the "modest grade of art" principle of the *Bleistein* case²²⁴ and

²¹¹ *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 Fed. 993 (6th Cir. 1900), *rev'd sub. nom. Bleistein v. Donaldson*, 188 U.S. 239 (1903).

²¹² See also *Lamb v. Grand Rapids School Furniture Co.*, 39 Fed. 474 (C.C.W.D. Mich. 1889) (protection denied to illustrations of furniture in price catalogue because court said they had no value independent of their use as advertisements).

²¹³ 188 U.S. at 249-51. A rigorous dissent supported the view that the clause in the Constitution did not embrace mere advertisements and that if the object had no connection with the fine art, or with intrinsic value other than advertising, it was without the obvious meaning of the Constitution. *Id.* at 252-53.

²¹⁴ *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215 (C.C.M.D. Pa. 1911). Cf.

L. A. Westerman Co. v. Dispatch Printing Co., 249 U.S. 100 (1919).

²¹⁵ *Golden Rule, Inc. v. B.V.D. Co.*, 242 Fed. 929 (8th Cir. 1917).

²¹⁶ *No-Leak-O Piston Ring Co. v. Norris*, 277 Fed. 951 (4th Cir. 1921).

²¹⁷ *Stecher Lithographic Co. v. Durston Lithograph Co.*, 233 Fed. 601 (W.D.N.Y. 1916).

²¹⁸ *Anaehl v. Puritan Pharmaceutical Co.*, 61 F. 2d 131, 136 (8th Cir. 1932), quoting *Weil, American Copyright Law* 277 (1917).

²¹⁹ *Gordon v. Weir*, 111 F. Supp. 117 (E.D. Mich. 1953).

²²⁰ *Burdny Engineering Co. v. Penn Union Elec. Corp.*, 25 F. Supp. 507 (W.D. Pa. 1938).

²²¹ *Da Prato Statuary Co. v. Giuliani Statuary Co.*, 189 Fed. 90 (C.C.D. Minn. 1911).

²²² *J. H. White Mfg. Co. v. Shapiro*, 227 Fed. 957 (S.D.N.Y. 1915).

²²³ *Campbell v. Wireback*, 269 Fed. 372 (4th Cir. 1920).

²²⁴ 188 U.S. at 239.

fulfilled the basic objectives of copyright. It is apparent from these advertising decisions that copyright standards, and thus the definition of "writings," have been considerably modified to meet new conditions, particularly the rise of extensive advertising. However, the approach to article I, section 8 of the Constitution and its meaning has not been changed. The standards merely have been, and probably will continue to be, made more flexible.

2. *Photographs and Motion Pictures.*—Photographs and motion pictures need little discussion since the grounds on which they have been held copyrightable have been considered previously. Suffice it to say that on the basis of the ideas expressed in the *Burrow-Giles* case and to a certain extent those in the *Bleistein* case, many photographs have been held proper subjects of copyright including those of the following subject matter: Colorado scenery,²²⁵ water falls,²²⁶ a scene on Fifth Avenue,²²⁷ and various persons.²²⁸

With similar reasoning, primarily because they were first held copyrightable as photographs, motion pictures depicting a ship launching²²⁹ and telling a connected story,²³⁰ and simply a motion picture photo play²³¹ have been held protectable under the Constitution. Generally, the courts will say that since the production of these works requires the arranging, selecting, and utilizing of light, shadows, general surroundings, and vantage point to secure the entire effect, they have the character of works of art.

3. *Paintings.*—Although some of the copyright cases involving paintings were decided prior to the *Burrow-Giles* and *Bleistein* cases, the courts have generally used the same reasoning to uphold protection.²³²

In an engaging case it was held that a painting was entitled to copyright protection even though its theme had been taken from another picture. The court stated that "works of art, to be copyrightable, do not . . . need to disclose the originality of invention."²³³ A distinguishable variation of the same theme is sufficient. Similarly, a defendant in a later case claimed that mezzotint engravings of paintings of old masters were not proper subjects of copyright because they were copies themselves, but the court said that it was sufficient if "the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own'."²³⁴ The court seemed to imply in this decision that a copy of a painting by hand would always involve some variation entitling the subsequent picture to copyright.

²²⁵ *Cleland v. Thayer*, 121 Fed. 71 (8th Cir. 1903).

²²⁶ *Journal Publishing Co. v. Drake*, 199 Fed. 572 (9th Cir. 1912).

²²⁷ *Pagano v. Chas. Beseler Co.*, 234 Fed. 963 (S.D.N.Y. 1916).

²²⁸ E.g., *Gross v. Seligman*, 212 Fed. 930 (2d Cir. 1914) (nude girl); *Falk v. Donaldson*, 57 Fed. 32 (S.D.N.Y. 1893) (Miss Marlowe); *Falk v. T. P. Howell & Co.*, 37 Fed. 202 (S.D.N.Y. 1888) (girl portrayed as "Yum-Yum" in "the Mikado").

²²⁹ *Edison v. Lubin*, 122 Fed. 240 (3d Cir. 1903) (motion picture held to be "photograph" to come within the statute).

²³⁰ *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 Fed. 262 (C.C.D.N.J. 1905).

²³¹ *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933) (motion picture copyrightable although not founded on copyrighted novel or dramatic composition).

²³² *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907). The primary issues were technical ones of publication and notice, the court assuming the copyrightability of paintings. See also *Schumacher v. Schwencke*, 30 Fed. 690 (C.C.S.D.N.Y. 1887); *Schumacher v. Schwencke*, 25 Fed. 466 (C.C.S.D.N.Y. 1885). Cf. *De Jonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33 (1914) (painting clearly copyrightable but technical requirements not fulfilled).

²³³ *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F. 2d 150, 161 (2d Cir. 1927).

²³⁴ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99, 103 (2d Cir. 1951).

Given a literal interpretation of "writings," the latter two cases lead directly into the question of why the framers seemed to exclude paintings and also sculpture from protection under the Constitution. An argument can be made that since paintings were recognized works of art at the time the Constitution was written, the framers intended by the term "writings" to include only literary productions.

If this argument is valid, it is difficult to justify the actions of Congress and the courts in deliberately ignoring the explicit intention of the framers. Are the courts justified in interpreting this clause of the Constitution in accord with what they conceive to be the general spirit of section 8 in the light of such a specific intent? Why did the framers not use broad words such as works or works of art if they were cognizant of the existence of other arts in addition to literary works?

There seems to be no logical reason for the framers to have excluded paintings unless extensive copying of paintings was not possible at that time and they thought that common-law copyright offered sufficient protection. It can be assumed that at the time the Constitution was written the only, or at least the most common, method of reproducing a painting was by the hand of another painter. This method of copying, besides being laborious and expensive, would in very few instances result in an exact copy. As the latter two cases involving paintings implied, such copies probably involve enough variation to entitle them to common-law copyright protection also. Thus, common-law copyright was probably sufficient in 1789 to protect painters from other painters. However, with the development of new methods of reproduction such as photography, exact copies of paintings could be made easily and cheaply for sale. The need then developed for statutory copyright protection.

Paintings and sculpture are certainly works which Congress and the courts deem worthy of copyright protection, and one could reasonably infer that the framers would have also protected them if the need for statutory protection had existed at that time. Assuming that efficient methods of reproducing paintings were not in existence in 1789, the fact that paintings were not included in the Constitution adds considerable validity to the various theories, discussed previously, justifying a broad interpretation of "writings" and "authors." Accept the historical argument or not, no court has held a painting unprotectable because it was not a writing or a painter not an author. Like all other cases, the analysis, whether the Constitution is discussed or not, has been devoted exclusively to determining whether the prerequisites of originality and creativity were met.

4. *Maps*.—Maps have been protected since the first copyright statute. The standards most often applied were expressed in a case involving the infringement of automobile maps. The court said that "the elements of the copyright consist in the selection, arrangement, and presentation of the component parts."²³⁵ If the maps show originality in preparation and represent skill, labor, and expense²³⁶ or a modicum of creative work,²³⁷ this is sufficient.

²³⁵ *General Drafting Co. v. Andrews*, 37 F. 2d 54, 55 (2d Cir. 1930).

²³⁶ *Ibid.*

²³⁷ *Andrews v. Guenther Publishing Co.*, 60 F. 2d 555, 557 (S.D.N.Y. 1932) (protection denied because largely copied from government publication). Many types of maps have been held copyrightable, including one showing the paths of electric railroads, *Globe Newspaper Co. v. Walker*, 210 U.S. 356 (1908), and another the fire risks in a city, *Sanborn Map & Publishing Co. v. Dakin Publishing Co.*, 39 Fed. 266 (C.C.N.D. Cal. 1889).

However, a recent case held that collecting information from various sources, all in the public domain, and spending "considerable time and effort to assemble and prepare this information for publication," was not sufficient to entitle the map to copyright protection.²³⁸ The court said:

the presentation of information available to everybody, such as is found on maps, is protected only when the publisher of the map in question obtains originally some of that information by the sweat of his own brow.²³⁹

Inclusion of maps in the copyright act of 1790, even prior in order to books, has given the courts one of their basic arguments for a broad interpretation of "writings."

5. *Cartoons.*—Cartoons have been protected by copyright at least since 1903 when a Massachusetts circuit court held that copyrighted cartoons were infringed by a dramatic production which included characters copied from plaintiff's cartoons.²⁴⁰ In a similar case a New York district court held that plaintiff's copyrighted cartoons of "Mutt and Jeff" were infringed by a dramatic performance.²⁴¹

A leading case on the question of the elements which make cartoons proper subjects of copyright is *King Features Syndicate v. Fleisher*.²⁴² Copyrighted cartoons of "Barney Google" and "Spark Plug" were held infringed by defendant's toy reproduction of "Sparky," the cartoon horse. The court stated that—

plaintiff had the original conception of the idea of the concept of humor embodied in the original cartoons. . . .

The Copyright Act protects the conception of humor which a cartoonist may produce, as well as the conception of genius which an artist or sculptor may use. . . . The form of the horse, embodying the aspect of humor, was the essence of the cartoon; its end, within the artist's purpose, and its object, the production of amusement in contemplation. We think copyright law was intended to give protection to the creation of that form, protection to its value in that form. . . .²⁴³

The court went on to say that if the defendant were allowed to copy the form of the horse by producing a toy reproduction, he would be taking the "fruits of the cartoonist's genius which consisted in his capacity to entertain and amuse."²⁴⁴ The same court ten years later held that a cartoon of "Betty Boop" was also a proper subject of copyright and was infringed by a doll copy.²⁴⁵

The language employed in *King Features Syndicate v. Fleischer* seems to imply that the defendant was not copying a particular cartoon but rather the concept of humor embodied in the form of the horse which was protected.

However, it may be possible to reconcile these cartoon cases with others by reasoning that although the concept of humor is the thing protected, its only existence is in the form of the horse either as a toy or drawing. Form and the concept of humor are so interwoven in cartoon cases that reproduction of the concrete form in any medium will constitute a copying of plaintiff's artistic or creative production.

In no way could these cartoons be protected under the Constitution if "writings" was literally interpreted, for the subject in each case was

²³⁸ *Amsterdam v. Triangle Publications, Inc.*, 189 F. 2d 104, 105 (3d Cir. 1951).

²³⁹ *Id.* at 106.

²⁴⁰ *Empire City Amusement Co. v. Wilton*, 134 Fed. 132 (C.C.D. Mass. 1903).

²⁴¹ *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (S.D.N.Y. 1914).

²⁴² 289 Fed. 533 (2d Cir. 1924).

²⁴³ *Id.* 535-37.

²⁴⁴ *Id.* at 538.

²⁴⁵ *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. 2d 276 (2d Cir. 1934).

copyrighted cartoons with no words or connected story. Form is important in cartoon cases, as well as in cases involving three-dimensional works, but it is not placed in juxtaposition with "writings" in the Constitution. Instead, the form is considered a writing if it is the result of original or creative thought or labor. It is then entitled to copyright protection unless a court should hold, which is unlikely, that the particular cartoon does not "promote the Progress of Science and useful Arts" or that its protection would not under the basic copyright principles inure to the benefit of the public. Certainly art includes within its scope objects of humor, and it is reasonable to assume that the public will benefit from the encouragement of an artist with a "capacity to entertain and amuse."²⁴⁶

In addition, these cases raise another question involving form. It is difficult to determine whether these courts were merely granting to the author all rights to reproduce the cartoon character in any medium, or whether a three-dimensional figure of this character is separately copyrightable. In these cases it did not make too much practical difference which was the proper theory, because if the cartoonist produced a three-dimensional figure of his cartoon character, no one could copy it.

6. Three-Dimensional Subjects.—It is probably clearer in the three-dimensional objects cases than in any other involving nonliterary objects (with the possible exception of phonograph records) that if any protection is to be granted, it can only be done constitutionally if a copyright-principles analysis rather than a form analysis of "writings" and "authors" is used. In all the following cases the courts have decided to grant or withhold copyright protection to three-dimensional materials on the basis of the same copyright standards and the reasons therefor which courts have applied in order to protect other non-literary objects.

In none of these cases is the obvious fact mentioned that a three-dimensional form is not a writing in the familiar sense of the word. As a matter of fact, none of the courts discuss whether it is constitutionally possible to consider a three-dimensional subject a "writing."²⁴⁷

One of the earliest cases held that a copyrighted piece of sculpture was infringed by a photograph thereof. Since, according to the court, this photograph contained the artistic ideas and conceptions expressed in the statuary, the defendant infringed the rights secured to the author by the copyright acts.²⁴⁸

Subsequently, in three cases decided in 1921 and 1922 the Court of Appeals for the Second Circuit expressed doubt as to the copyrightability of Kewpie dolls²⁴⁹ and of dolls' heads manufactured for sale.²⁵⁰ In one of the cases involving dolls' heads the decision was against the plaintiff on other grounds, but in dicta the court expressed the opinion that it would be difficult to assume the dolls' heads were

²⁴⁶ *King Features Syndicate v. Fleischer*, 299 Fed. 533, 538 (2d Cir. 1924).

²⁴⁷ In a footnote in *Mazer v. Stein* the Court in a general way noticed the constitutional question but since it was not raised, did not decide it. 347 U.S. at 206, n.5.

²⁴⁸ *Bracken v. Rosenthal*, 151 Fed. 136 (C.C.N.D. Ill. 1907).

²⁴⁹ *Wilson v. Haber Bros.*, 275 Fed. 346 (2d Cir. 1921).

²⁵⁰ *E. I. Horsman & Aetna Doll Co. v. Kaufman*, 286 Fed. 372 (2d Cir. 1922), cert. denied, 261 U.S. 615 (1923); *E. I. Horsman & Aetna Doll Co. v. Squires*, 286 Fed. 372 (2d Cir. 1922), cert. denied, 261 U.S. 615 (1923).

works of art within the copyright law or that as dolls' heads they were capable of copyright at all.²⁵¹ In the Kewpie doll case the same court stated it would "express no opinion as to the propriety of copyrighting this doll."²⁵² It held for the plaintiff on infringement because in a previous consent decree the defendant had conceded that the copyright of the doll was good and valid in law.

In none of these three cases did the court even consider the idea of resolving their doubt on the question of copyrightability by holding simply that since these three-dimensional objects were not literally "writings," they were not constitutionally entitled to copyright protection.

Shortly thereafter, in the leading case of *Pellegrini v. Allegrini*²⁵³ it was decided that a candleholder containing the figures of two saints standing on either side of a crucifix was copyrightable. The court stated that—

the question of artistic merit or value does not touch the right of property protected by a copyright. . . . The French phrase . . . more nearly expresses the thought. It is not necessarily a "work of art," something displaying artistic merit, but it is "objet d'art"—something upon which the labors of an artist as such have been employed. . . . It is something which appeals to the artistic sense; something which gives rise to a perception of artistic merit in the object.²⁵⁴

On the basis of this case another statuette was held a proper subject of copyright in 1943.²⁵⁵

A court of appeals decided in 1951 that a sculptured model of a cocker spaniel was copyrightable since it contained that something "irreducible" which was the artist's alone. This "something" was the proportion, form, contour, configuration, and conformation embodying the intellectual or artistic conception of a dog of the breed involved in a show attitude.²⁵⁶

Unfortunately, the majority in *Mazer v. Stein* did not expressly decide in their opinion the constitutional point of whether the statutory of Bali dancers was entitled to copyright protection under the Constitution, because it had not been raised in the lower court. However, they assumed the statuette to be copyrightable as did the petitioners.²⁵⁷ There was a long discussion in the footnotes of the case on this question of constitutionality and the Court concluded, particularly in the light of the *Burrow-Giles* decision, that it was clear that "writings" was not limited to chirography and typography.²⁵⁸

Other courts thereafter seemed to feel that *Mazer v. Stein* was sufficient authority under the Constitution to uphold the copyrightability of three-dimensional materials of various kinds.

²⁵¹ *E. I. Horsman & Aetna Doll Co. v. Kaufman*, 286 Fed. 372, 373 (2d Cir. 1922), cert. denied, 261 U.S. 615 (1923). In the companion case, *E. I. Horsman & Aetna Doll Co. v. Squires*, 286 Fed. 372, 374 (2d Cir. 1922), cert. denied, 261 U.S. 615 (1923), the court felt the copyrightability of the dolls' heads was "very debatable" because it thought the plaintiff was attempting to use the copyright laws as a cover for the business of making dolls' heads. This problem of granting copyright protection to "applied art" would seem now to be settled by *Mazer v. Stein*.

²⁵² *Wilson v. Haber Bros.*, 275 Fed. 346, 347 (2d Cir. 1921).

²⁵³ 2 F. 2d 610 (E.D. Pa. 1924).

²⁵⁴ Id. at 611-12.

²⁵⁵ *United States v. Backer*, 134 F. 2d 533 (2d Cir. 1943).

²⁵⁶ *F. W. Woolworth Co. v. Contemporary Arts*, 193 F. 2d 162 (1st Cir. 1951), aff'd, 344 U.S. 228 (1952).

²⁵⁷ 347 U.S. at 206.

²⁵⁸ Id. at 210.

For example, costume jewelry was granted protection because though the creation may not be strikingly new, it expresses the artistic conception of its author no less than a painting or statue.

So long as the material for which copyright is sought exhibits some degree of individuality so that the court is convinced that the author has created an original, tangible expression of an idea rather than a merely pleasing form dictated solely by functional considerations, copyright registration is available.²⁵⁰

All that is needed to entitle an author to copyright protection is that his artistic expression reflect a distinguishable variation from what had gone before and that he has contributed something substantial of his own to the prior art.

Another court said there was little doubt as to the validity of a copyright on a doll in the form of a chimpanzee named "Zippy," a character on the "Howdy Doody" television program.

Copyright protection extends to any production of some originality and novelty regardless of its commercial exploitation or lack of artistic merit.²⁵⁰

With remarkable frankness, the court went on to say that "originality . . . means little more than a prohibition of actual copying."²⁵¹ It did not matter how poor artistically the author's addition may have been. It was enough if it was his own. Reminiscent of the Holmes' approach in the *Bleistein* case—that art is what is appreciated by the general public—the court felt one could not say that the doll lacked artistry when the "Howdy Doody" audiences adored "Zippy."

There can be no more serious constitutional objection to extending copyright protection to three-dimensional subjects than to the protection almost uniformly granted to such things as photographs, motion pictures, paintings, and cartoons. Although solid forms appear to contradict the literal meaning of "writings" more than these works, the difference is only a matter of degree. The difference does not justify the denial of copyright protection to three-dimensional works, particularly when such a decision could only be reached by abandoning accepted copyright standards and replacing them with a narrow analysis of "writings."

If three-dimensional works are excluded from copyright protection on constitutional grounds rather than on the basis of general copyright principles, there is no justification for the protection of any other non-literary subject matter. All of the nonliterary subjects, including three-dimensional forms, can and should be interpreted as "writings" within the Constitution if courts adhere to the idea that this term means the result of creative or original intellectual labor or thought.

The courts in recent years, particularly since *Mazer v. Stein*, are beginning to realize the validity of the copyright approach and are gradually overcoming their hesitation to hold, expressly or impliedly, that a three-dimensional object is a "writing." Perhaps the Copyright Office anticipated this development by changing its regulation with regard to the definition of the term "work of art." Prior to 1949 three-dimensional objects, intended primarily for commercial use, were not ordinarily granted registration. On the contrary, applicants were advised that "protection of productions of the industrial arts, utilitarian in purpose and character, even if artistically made or ornamented, de-

²⁵⁰ *Trifari, Krussman & Fishel, Inc. v. Oharel Co.*, 184 F. Supp. 551, 553 (S.D.N.Y. 1955).

²⁵¹ *Rushion v. Vitale*, 218 F. 2d 434 (2d Cir. 1955).

²⁵² *Id.* at 435.

pends upon action under the patent law.”²⁶² However, in 1949 section 202.8²⁶³ of the Regulations was changed so as to make registrable the artistic features of jewelry, enamel, glassware, tapestries, and other similar materials. Such registration was to cover only the artistic aspects, as distinguished from “the mechanical or utilitarian” aspects. When the validity of this regulation was challenged in *Mazer v. Stein*, the Register of Copyrights, as amicus curiae, took the position that the new regulation actually reflected the previous practice of the Office. The brief said in this regard—

that the Copyright Office has consistently since 1909—and even before then—registered works like the one in this case following the clearly stated mandate of Congress.²⁶⁴

In August 1956, the Copyright Office issued regulations which, in greater detail than ever before, explicitly describe what can be registered.²⁶⁵ These regulations do not talk in terms of “writings” but do require that any object offered for registration meet at least minimal standards of originality and creativity, as well as fall within one of the classes enumerated in section 5 of the copyright statute.

Subjects Denied Copyright Protection

In this section some of the objects to which the court have denied copyright protection will be considered with particular reference to those cases in which the courts discuss the Constitution. With certain exceptions, it will be apparent that in most instances denial of copyright protection has been based on various copyright principles. This is, of course, consistent with the approach that the courts use to grant copyright protection.

1. *Phonograph Records*.—Musical compositions have been protected under copyright law since 1831.²⁶⁶ Since the object registered with the copyright offices is a paper written notations thereon, it is possible without too much distortion of the word to consider a musical composition a type of writing. Sheet music certainly does not seem as alien to “writing” as do photographs, motion pictures, and statutes. In form, at least, it does consist of notations on a piece of paper.

As a matter of fact, musical compositions present a reverse situation from that discussed in the previous sections. Here is an art which if considered strictly in relation to form could probably be called a writing. To include musical compositions within the protection of section 8, writings could be interpreted to mean any written notation on a piece of paper. This use of the form approach would not involve as much distortion of “writings” as when applied to other nonliterary subjects.

²⁶² Circular Letter No. 82 (July 1940) (Designs). For a reproduction of this letter and an excellent discussion of the background and development, until 1953, see Derenberg, “Copyright No-Man’s Land: Fringe Rights in Literary and Artistic Property,” in 1953 Copyright Problems Analyzed 215, 227–249 (1953).

²⁶³ 37 C.F.R. § 202.8 (1949).

²⁶⁴ Brief for Register of Copyrights as Amicus Curiae, p. 24, *Mazer v. Stein*, 347 U.S. 201 (1954).

²⁶⁵ 21 Fed. Reg. 6021 (1956).

²⁶⁶ Act of Feb. 3, 1831, c. 16, § 1, 4 Stat. 436. See also, e.g., *Anstein v. Porter*, 154 F. 2d 464 (2d Cir. 1948); *Littleton v. Oliver Ditson Co.*, 62 Fed. 597 (C.C.D. Mass. 1894); *Fred Fisher, Inc. v. Dillingham*, 298 Fed. 145 (S.D.N.Y. 1924); *Henderson v. Tompkins*, 60 Fed. 758 (C.C.D. Mass. 1894). But see *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950) (court held bass too simple to be copyrighted); *Cooper v. James*, 213 Fed. 871 (N.D. Ga. 1914) (alto parts to well-known hymns not copyrightable because not sufficiently new or original).

However, it is difficult to say that the notations on paper are really the essence of musical compositions as such notations probably are with respect to literary productions. Thus, in a leading decision in 1946 Judge Frank stated, on the issue of appropriation of a musical composition, that the criterion is not comparison of musical compositions as they appear on paper or in the judgment of trained musicians, but the question "is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience."²⁶⁷

It would seem from an analysis of the musical copyright infringement cases that the subject matter actually protected is the sound and not the "writings" on the paper. The courts will hold a particular musical composition to be copyrightable if the sounds are the result or fruits of original or creative intellectual thought or labor.

Despite the use by the courts of the same type of analysis in music cases as is applied to other subjects of copyright, they have refused to extend protection to phonograph records. The reason for this is the Supreme Court's decision in *White-Smith Music Publishing Co. v. Apollo Co.*²⁶⁸

Although it is doubtful that a court would declare a statute passed by Congress granting protection to records unconstitutional on the basis of the reasoning in the *Apollo* case,²⁶⁹ this decision is important because it, along with the *Burrow-Giles* case, has actually prevented the courts from granting protection to records under section 4 of the copyright statute until Congress clearly indicates otherwise.²⁷⁰

The Supreme Court held in the *Apollo* case that player piano rolls did not infringe plaintiff's musical compositions saying:

Congress has dealt with the concrete and not with an abstract right of property in ideas or mental conceptions. . . .

[A] copy of a musical composition [is] . . . "a written or printed record of it in intelligible notation." . . . [M]usical tones are not a copy which appeals to the eye. . . . It is not susceptible of being copied until it has been put in a form which others can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be. . . . [Player-piano rolls] are not intended to be read as an ordinary piece of sheet music. . . .

As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases.²⁷¹

Immediately after the *Apollo* decision, however, Congress passed a law giving the composer of a musical composition the right, (subject to compulsory license after the first exercise of that right), to repro-

²⁶⁷ *Arnstein v. Porter*, supra note 266, at 473.

²⁶⁸ 209 U.S. 1 (1908). See Regulations of the Copyright Office, § 202.8(b), 21 Fed. Reg. 6024 (1956). See also *Corcoran v. Montgomery Ward & Co.*, 121 F. 2d 572 (9th Cir. 1941) (owner of copyright on poem not protected from sale of phonograph records embodying the poem as set to music); *Kennedy v. McTanmany*, 33 Fed. 584 (C.C.D. Mass. 1888), is a similar holding in which the court dismissed plaintiff's bill for an injunction to restrain the defendant from manufacturing and selling perforated rolls for organettes of plaintiff's copyrighted sheet music. The court stated: "Perforated strips were not made to be addressed to the eye as sheet music but form part of a machine." *Ibid.*

²⁶⁹ In fact, in a recent case in the Second Circuit the court, both in the majority and dissenting opinion, recognized that phonograph records are not now covered by the copyright act, but stated that Congress has the power to include them. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657, 660, 664 (2d Cir. 1955).

²⁷⁰ See *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657 (2d Cir. 1955); *R.C.A. Mfg. Co. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940); *Miller v. Goody*, 139 F. Supp. 176 (S.D.N.Y. 1956); *Aolian Co. v. Royal Music Roll Co.*, 196 Fed. 926 (W.D.N.Y. 1912). But see *Fontofia Ltd. v. Bradley*, 171 Fed. 951, 963 (C.C.E.D.N.Y. 1909), in which the court thought that such a statute had already been passed.

²⁷¹ 209 U.S. at 16-18.

duce his composition on phonograph records or to license others so to reproduce it.²⁷²

Two things are apparent from the *Apollo* case and the subsequent statute of Congress. In the first place, the Supreme Court was clearly discussing and interpreting only a congressional statute and not the Constitution. The Court implied that Congress could enact a statute to remedy the situation.²⁷³ Secondly, although Congress did not declare records to be "copies" or "publications," the Court felt it would not be beyond the Constitution to grant protection to a composer of a musical composition from a mechanical reproduction thereof even if it could not and was "not intended to be read as an ordinary piece of sheet music."²⁷⁴ If the decision in the *Apollo* case were considered as an interpretation of section 8 of the Constitution, as some courts subsequently seem to have suggested, it is difficult to understand how this particular provision in the 1909 statute could be constitutional.

2. *Ideas*.—One of the leading cases to declare ideas, in and of themselves, not copyrightable is *Baker v. Selden*.²⁷⁵ The Supreme Court held that accounting blanks in plaintiff's copyrighted book were not protected against unauthorized use. The object of the Constitution, said the Court, was the promotion of science and the encouragement of learning. It distinguished illustrations by saying that in illustrations form is the essence, that they are the product of genius, and that their production is for the pleasure of their observers.²⁷⁶

On the basis of *Baker v. Selden* it has been held that systems of speedwriting²⁷⁷ and shorthand²⁷⁸ are not copyrightable. According to the court in the *Brief English Systems* case, the author of a shorthand writing system has no property right in it, and the only copyrightable material, if any, is in the explanation of how to do it.²⁷⁹

In like vein it was held that a system of indexes for filing letters was not copyrightable because copyright protects only those things printed and published for information and not for use in themselves.²⁸⁰ Two relatively recent cases held that charts used in connection with machines for recording temperature and pressure were not proper subjects of copyright. In the *Taylor Instrument* case the court said that although the 1909 statute included plastic works it did not enlarge copyright and the field was still confined to the "writings of an

²⁷² 35 Stat. 1075 (1909), 17 U.S.C. § 1(e) (1952).

²⁷³ 209 U.S. at 14.

²⁷⁴ *Id.* at 18.

²⁷⁵ 101 U.S. 99 (1879). See also Regulations of the Copyright Office § 202.1(b), 21 Fed. Reg. 6022 (1956).

²⁷⁶ But see *Brightley v. Littleton*, 37 Fed. 103 (C.C.E.D. Pa. 1888), in which the court granted copyright protection to blank forms used for liquor license applications.

²⁷⁷ *Brief English Systems, Inc. v. Owen*, 48 F. 2d 555 (2d Cir.), *cert. denied*, 283 U.S. 858 (1931).

²⁷⁸ *Griggs v. Perrin*, 49 Fed. 15 (C.C.N.D.N.Y. 1892).

²⁷⁹ *Brief English Systems, Inc. v. Owen*, 48 F. 2d 555, 556 (2d Cir.), *cert. denied*, 283 U.S. 858 (1931). It is difficult to reconcile cases denying copyright protection to shorthand and speedwriting systems with those which grant such protection to codes. See *American Code Co. v. Reusinger*, 282 Fed. 829 (2d Cir. 1922), and *Reiss v. National Quotation Bureau, Inc.*, 276 Fed. 717 (S.D.N.Y. 1921). In the *Reiss* case Judge Learned Hand said: "Not all words communicate ideas; some are mere spontaneous ejaculations. Some are used for their sound alone, like nursery rhymes, or the rhymes of children in their play. . . . There has of late been prose written, avowedly senseless, but designed by its sound alone to produce an emotion. . . . Music is not normally a representative art, yet it is a 'writing,' . . . Works of plastic art need not be pictorial. They may be merely patterns, or designs, and yet they are within the statute. A pattern or an ornamental design depicts nothing; it merely pleases the eye. If such models or paintings are 'writings,' I can see no reason why words should not be such because they communicate nothing. They may have their uses for all that, aesthetic or practical, and they may be the productions of high ingenuity, or even genius. . . ." *Id.* at 718.

²⁸⁰ *Amberg Filis & Index Co. v. Shea Smith & Co.*, 82 Fed. 314 (7th Cir. 1897).

author.”²⁸¹ It held the test was whether it was an object of explanation or of use, and if it did not teach or convey information, it was not copyrightable. In like vein the court held in *Brown Instrument Co. v. Warner*²⁸² that a similar chart was not a “writing of an author” within the meaning of the Constitution since it did not convey the thought of the author, was not intended to communicate facts or ideas, and was solely for use in making records of facts.

In accord with the reasoning in the shorthand cases it was held that the system of “Bank Night” in theatres “being in no sense a writing, could not be . . . [copyrighted] although plaintiff has expended time and money in originating and developing . . . [it].”²⁸³ Likewise, it has been held that a system for conducting races on roller skates was not a proper subject of copyright.²⁸⁴

Related to the question of the copyrightability of a system is a series of cases involving the rules of card games. In *Whist Club v. Foster*²⁸⁵ the court stated that “in the conventional laws or rules of a game, as distinguished from the forms or modes of expression in which they may be stated, there can be no literary property susceptible of copyright.” The game or rules of “Acy-Ducy” were not copyrightable because the Copyright Act—

would be void if it went beyond granting monopolies (or exclusive franchises) to authors whose works “promote the progress of science and the useful arts.” Obviously the Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality. . . .

Plaintiff therefore must lose unless he has shown that his work contains some substantial, not merely trivial, originality . . . [I]t is the form of expression and not the idea that is copyrightable²⁸⁶

In *Russell v. Northeastern Publishing Co.*²⁸⁷ the court held that a person can acquire no exclusive right “in the particular distribution of the fifty-two cards, in the problems of play, or the principles of contract bridge applicable to its solution.”²⁸⁸

3. *Names and Titles.*—The leading case holding that a name or title is not the proper subject of copyright is *Atlas Mfg. Co. v. Street & Smith*²⁸⁹ decided in 1913. This involved the name of a literary work, “Nick Carter.” The court stated:

We are unwillingly, indirectly, to extend to writings a protection beyond that conferred by statute. . . . It is for Congress to say whether these limitations should be relaxed. . . . [This] involves an attempt to make a monopoly of ideas, instead of confining the application of the law “to a particular cognate and well-known form of production.”²⁹⁰

Subsequently, a number of courts have held that titles cannot be copyrighted, including not only titles to literary works and plays,²⁹¹ but to “Bank Night”²⁹² and the name of a cartoon character.²⁹³ The empha-

²⁸¹ *Taylor Instrument Cos. v. Fowley-Brost Co.*, 139 F. 2d 93, 100 (7th Cir.), cert. denied, 321 U.S. 785 (1943).

²⁸² 161 F. 2d 910 (D.C. Cir. 1947).

²⁸³ *Alliated Enterprises, Inc. v. Gruber*, 86 F. 2d 958, 961 (1st Cir. 1936).

²⁸⁴ *Eltzer v. Sunbrock*, 22 F. Supp. 621 (S.D. Cal. 1938).

²⁸⁵ *Whist Club v. Foster*, 42 F. 2d 782 (S.D.N.Y. 1929).

²⁸⁶ *Chamberlain v. Uris Sales Corp.*, 150 F. 2d 512, 512-13 (2d Cir. 1945).

²⁸⁷ 7 F. Supp. 571 (D. Mass. 1934).

²⁸⁸ Id. at 572.

²⁸⁹ 204 Fed. 398 (8th Cir.), appeal dismissed, 231 U.S. 348, cert. denied, 231 U.S. 755 (1913), cert. denied, 232 U.S. 724 (1914).

²⁹⁰ Id. at 406.

²⁹¹ *Becker v. Loew's Inc.*, 133 F. 2d 889 (7th Cir. 1943). See also, *Glaser v. St. Elmo Co.*, 175 Fed. 276, 278 (C.C.S.D.N.Y. 1909); *Corbett v. Purdy*, 80 Fed. 901 (C.C.S.D.N.Y. 1897).

²⁹² *Alliated Enterprises, Inc. v. Rock-Ola Mfg. Corp.*, 23 F. Supp. 3 (N.D. Ill. 1937).

²⁹³ *Wilson v. Hecht*, 44 App. D.C. 33 (D.C. Cir. 1915).

sis in these cases is that copyright does not extend to the protection of an idea, which they conceive a title to be. However, as can be seen from the *Atlas* case, the courts do not seem to feel that Congress could not extend the word "writings" to cover titles.

4. *Reports of Current Events.*—Another category of subjects excluded from protection is reports of current events. As the Supreme Court stated in *International News Serv. v. The Associated Press*:²⁹⁴

the information respecting current events contained in the literary production—is not the creation of the writer, but, is a report of matters that ordinarily are *publici juris* [T]he framers of the Constitution [did not intend to] confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

In a well-reasoned case decided by the Seventh Circuit in 1902, *National Tel. News Co. v. Western Union Tel. Co.*,²⁹⁵ the court said that under the Constitution there is a "point where authorship proper ends, and mere annals begin. . . . [Writings which are mere notations] cannot bear the impress of individuality, and fail, therefore, to rise to the plane of authorship." In both of these cases the court concludes that news reports are unprotected, not because they are not "writings," which they clearly are in the familiar sense of the word, but because they lack distinctive creativity, labor of the brain, and particularly originality. Their emphasis is entirely on the fact that reports of current events lack the authorship required by the Constitution. Again it should be noted that the court is interpreting the words in the Constitution according to certain copyright principles rather than applying its literal meaning.

5. *Dress Designs and Fabrics.*—Before discussing the cases involving dress and fabric designs, it is necessary to consider another series of cases involving the problem of infringement by a different medium. It will be remembered that in the cartoon cases of *King Features Syndicate v. Fleischer*²⁹⁶ and *Fleischer v. Freundlich*²⁹⁷ the question involved was the infringement of the cartoon characters by dolls produced by the defendant. The court in the former case held that the essence of the cartoon was the concept of humor embodied in the cartoon and that the copyright law was intended to give protection to the creation of the form of a horse embodying the aspect of humor. Citing this case as authority the court held in *Jones Bros. Co. v. Underkoffler*²⁹⁸ that a cemetery memorial produced by the defendant was an infringement of a design for the same memorial by the plaintiff who was engaged in the manufacturing and selling of cemetery memorials. In this latter case the court held, on the ground of the *Pellegrini* case, that the memorial was clearly an object of art upon which the labors of an artist were employed. It said the statute "has been held to afford protection to the copyrighted idea against infringement by manufacture in other media."²⁹⁹

It would certainly seem that on the basis of the protection given the cartoons and the memorial, and the words used by the courts in stating that it was the conception of beauty, humor, and genius that

²⁹⁴ 248 U.S. 215, 234 (1918).

²⁹⁵ 119 Fed. 294, 297-298 (7th Cir. 1902).

²⁹⁶ 299 Fed. 533 (2d Cir. 1924).

²⁹⁷ 73 F. 2d 276 (2d Cir. 1934), cert. denied, 294 U.S. 717 (1935).

²⁹⁸ 16 F. Supp. 729 (M.D. Pa. 1936).

²⁹⁹ Id. at 731. See also *Bracken v. Rosenthal*, 151 Fed. 136 (C.C.N.D. Ill. 1907) (copyrighted sculpture infringed by photograph thereof); *Falk v. T. P. Howell & Co.*, 37 Fed. 202 (C.C.S.D.N.Y. 1889) (copyrighted photograph protected from infringement by stamping an imitation on chair bottoms and backs).

is protected, both dolls of cartoon characters and cemetery memorials are proper subjects of copyright. Whether as a practical matter they should be entitled to such protection is another issue; but certainly in the constitutional sense there would seem to be no prohibition.

It is in this area of infringement in another medium, however, that a great deal of confusion has arisen. In *Muller v. Triborough Bridge Authority*³⁰⁰ it was held, on the basis of *Baker v. Selden*, that a drawing showing a novel way to unsnarl traffic congestion was not infringed by the use of the system. The court analogized plaintiff's drawing to the shorthand cases³⁰¹ and said that the copyrightable material was found in the explanation of how to do it and not in the system itself. In a similar case, also relying on *Baker v. Selden*, the United States Court of Claims held that plaintiff's design showing a camouflaged parachute was not infringed by the United States when it copied this idea.³⁰² The court held that the only monopoly which the copyright gave the author was the exclusive right to reproduce the design as an artistic figure. This latter case may be rationalized since it is not clear from the case whether the United States copied the plaintiff's designs or merely copied the idea of camouflaging parachutes. If it was the latter, the idea, as such, was not copyrightable.³⁰³ In the *Muller* case, however, it is difficult to understand, assuming the Bridge Authority copied plaintiff's actual design for traffic separation, why the plaintiff's design was not protected from copying in the media of concrete. The court made no mention of the word "writings," so it would seem that on the basis of the three-dimensional, the cartoon, and the *Jones* cases, this design for traffic separation, as well as other architectural designs, should be proper subjects of copyright in a constitutional sense. They certainly meet the standards of intellectual conception, artistic genius, skill, labor, judgment, and originality set up by the courts for holding other nonliterary things copyrightable.

In similar fashion to the *Muller* and *Fulmer* cases the courts have held that wearing apparel is not copyrightable. In two cases decided in 1911 the courts stated that although pictorial illustrations in plaintiff's catalogues of ladies' attire were clearly copyrightable (even though only a modest grade of art and made solely for advertising purposes), plaintiff had no monopoly in the manufacture and sale of the apparel depicted in the pictures.³⁰⁴ In a leading case on the subject, *Jack Adelman, Inc. v. Sonners & Gordon, Inc.*,³⁰⁵ the court held that plaintiff's copyright of a drawing of a dress was not infringed by defendant's making and selling a dress copied from plaintiff's drawing. The decision of the court would seem indefensible today, particularly in light of the previous discussion concerning three-dimensional objects and the minimum required standards of originality and artistic creativity.

In the *Adelman* case the court said that the dress itself could hardly be classed as a work of art and filed in the Copyright Office. The drawing, not the dress, was the work of art and plaintiff had only

³⁰⁰ 43 F. Supp. 298 (S.D.N.Y. 1942).

³⁰¹ *Brief English Systems, Inc. v. Owen*, 48 F. 2d 555 (2d Cir.), cert. denied, 283 U.S. 858 (1931); *Griggs v. Perrin*, 49 Fed. 15 (C.C.N.D.N.Y. 1892).

³⁰² *Fulmer v. United States*, 103 F. Supp. 1021 (Cl. Cl. 1952).

³⁰³ See text at notes 275-88 supra.

³⁰⁴ *National Cloak & Suit Co. v. Standard Mail Order Co.*, 191 Fed. 528 (C.C.S.D.N.Y. 1911).

³⁰⁵ 112 F. Supp. 187 (S.D.N.Y. 1934). See also *Cheney Bros. v. Doris Silk Co.*, 35 F. 2d 279 (2d Cir. 1929), cert. denied, 281 U.S. 728 (1930).

the exclusive right to copy and reprint the drawings. It then distinguished *King Features Syndicate v. Fleischer* on the ground that in that case form was the essence of the cartoon. However, the court did suggest that possibly Congress might enact a law to protect persons such as the plaintiff, as it did in response to the *Apollo* case. Apparently the court felt that since the *National Cloak* cases were decided in 1911 and Congress had still not acted to protect wearing apparel, it was not within the court's province to protect them.³⁰⁶ It seems clear from the absence of discussion and the assumption that Congress has the power to enact a law to protect such subjects, that the court saw no constitutional problem. Considering the three-dimensional cases, the cartoon cases, *Jones Bros. Co. v. Underkoffler*, and sections 4 and 5 of the Copyright Act, there would seem to be no objection to holding that wearing apparel are "writings." If a statutory can be considered a "writings," a dress certainly should be entitled to the same consideration. It is difficult to see the distinction between the *Adelman* case and *King Features Syndicate v. Fleischer*. If a two-dimensional cartoon can be infringed by a three-dimensional toy, would not a two-dimensional drawing of a dress be infringed by a three-dimensional dress.³⁰⁷

A court held that a dress pattern made to be stamped on dress goods or paper was not a work of art and therefore not copyrightable.³⁰⁸ This case was based on *Rosenbach v. Dreyfus*,³⁰⁹ where the court held cut-outs of balloons and baskets were not copyrightable because they were not pictorial illustrations or works connected with the fine arts, nor models or designs intended to be perfected as works of art. In neither of these cases was the Constitution mentioned; the courts simply interpreted the statutory provisions covering works of art.

A design used on fabrics and dresses was held to be copyrightable but still the creator of the design had no monopoly of the fabrics or dresses on which this design was printed.³¹⁰ The court seemed to imply that if the copyright notice had been contained in each design on the fabric, the plaintiff might have been protected. This requirement of notice, however, effectually destroys protection for fabrics. This case is dependent upon and in accord with *DeJonge & Co. v. Breuker & Kessler Co.*,³¹¹ involving a painting intended to be used as a design for fancy paper for Christmas boxes. The Supreme Court held that the design alone was entitled to copyright protection because it was artistic in thought and execution and was a work of imagination containing artistic qualities. However, when the design was printed repeatedly on wrapping paper, the paper was not protected because each design did not contain the copyright notice. The Constitution was not discussed and reasons other than the fact that these designs were not "writings" were given for denying copyright protection. The dress design cases are not consistent doctrinally with other de-

³⁰⁶ But see *Deutsch v. Arnold*, 98 F. 2d 686 (2d Cir. 1938); *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 Fed. 262 (C.C.D.N.J. 1905); *Edison v. Lubin*, 122 Fed. 240 (3d Cir. 1903); *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933). In all these cases the courts indicated it is possible to grant copyright protection to objects as "writings" and were not limited to the express words of the statute.

³⁰⁷ Likewise, if a design for the Rushmore cemetery monument in *Jones Bros., Inc. v. Underkoffler*, can be infringed by a model of the memorial itself, the same reasoning should apply to dresses.

³⁰⁸ *Keap & Beatley, Inc. v. Hirsch*, 34 F. 2d 291 (E.D.N.Y. 1929).

³⁰⁹ 2 Fed. 217 (S.D.N.Y. 1880).

³¹⁰ *Verney Corp. v. Rose Fabric Converters Corp.*, 87 F. Supp. 802 (S.D.N.Y. 1949).

³¹¹ 235 U.S. 33 (1914).

cisions, but apparently the reason for this inconsistency is the court's hesitation to grant copyright protection prior to a congressional enactment; they are unwilling to include them under section 4. But it is clear that if Congress did pass a statute including dress designs the courts would not declare the statute unconstitutional on the ground that these objects were not "writings."

CONCLUSION

From a review of the actions of the colonial legislatures, the Constitutional Convention, Congress, and the courts, it seems clear that the words "writings" and "authors" will no longer limit the subject matter which can be copyrighted, at least in so far as the "form" of the object is concerned. Only by a broad interpretation of the words "writings" and "authors" in terms of standards, such as originality and creativity, and in terms of purpose, such as promoting the progress of the arts and sciences, can the action of both the courts and Congress be justified or rationalized in terms of the words contained in section 8.

It seems reasonable to assume that no copyright statute passed by Congress allowing copyright protection to new forms of expression will be declared unconstitutional. This is so, despite the discussion in some cases that certain objects are not "writings" within the meaning of the Constitution. Congress seems to be free to include in a copyright statute any object, conforming to the requirements of originality and creativity, without fear of judicial interference.

The confusion created by the broad language of section 4 in the present act should be corrected. The courts should no longer be put in the position of denying protection to objects because of the practical and policy considerations involved while having to speak in quasi-constitutional terms because the plain language of the statute expands the constitutional grant. Congress should specifically enumerate the subjects it desires to cover and not attempt to project itself too far into the future. The hardship of temporary nakedness to new modes of communicating intellectual properties is overbalanced by the semantic difficulties in such projected attempts. Attempts to project coverage present two dangers at opposite poles—protection may be extended to subjects Congress did not specifically exempt and yet did not wish protected, or on the other extreme, the courts may flatly declare a nonenumerated subject "unconstitutional" and thus establish a serious precedent. The history of copyright law has seen both the courts and Congress grant copyright protection as new forms of art or methods of reproduction were developed, with little concern for the limitations that a literal interpretation of "writings" would impose.

It is suggested that the courts conform their words to their actions, thus eliminating any confusion about the power of Congress to grant copyright protection to objects which it determines should be covered, so long as they are in accord with basic copyright principles. This is the only approach which is consistent with the history of copyright protection and will insure wise action in the future. Practical considerations present the real problems as they have in the past and not the illusory consideration whether a particular object is literally a "writing" created by an "author."