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## How Perris v. Hexamer Was Lost in the Shadow of Baker v. Selden

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HOW *PERRIS v. HEXAMER* WAS LOST IN THE SHADOW OF *BAKER v. SELDEN*

Zvi S. Rosen\*

INTRODUCTION

As part of this symposium on forgotten cases in intellectual property law, *Perris v. Hexamer* stands out as a case that is equal parts important and forgotten. It is obviously important—it is one of a preciously small number of United States Supreme Court decisions on the idea/expression dichotomy,<sup>1</sup> but it is mostly forgotten in favor of the Court’s decision the following year in *Baker v. Selden*.<sup>2</sup> It is equally obscure—Westlaw counts 2,787 citations of *Baker v. Selden*, and 82 of *Perris v. Hexamer*.<sup>3</sup> Yet the subject matter of both decisions is surprisingly similar, and these cases tell us far more about the boundaries of copyright law when considered in tandem than when either one is considered on its own. This piece will seek to tell the story of *Perris v. Hexamer*—in terms of both the background of the controversy and the procedural track of the lawsuit, as well as discussing the decision itself. Following this, two questions will be addressed—firstly, why *Perris* was largely forgotten as a decision about the idea/expression dichotomy, and secondly, why the vote among the Justices was different in

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<sup>1</sup> Dale P. Olson, *The Uneasy Legacy of Baker v. Selden*, 43 S.D. L. REV. 604, 606 (1998).

<sup>2</sup> See, e.g., Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 464 (1989).

<sup>3</sup> Citing references to *Baker v. Selden*, WESTLAW, <https://1.next.westlaw.com/RelatedInformation/I1dab47e7b65511d9bdd1cfdd544ca3a4/kcCitingReferences.html> (enter “*Baker v. Selden*” in search field; select “*Baker v. Selden*”; follow “citing references” hyperlink); Citing references to *Perris v. Hexamer*, WESTLAW, <https://1.next.westlaw.com/RelatedInformation/I3eb9bfa1b5bc11d993e6d35cc61aab4a/kcCitingReferences.html> (enter “*Perris v. Hexamer*” in search field; select “*Perris v. Hexamer*”; follow “citing references” hyperlink).

*Perris* than in *Baker*. Finally, this piece will argue that *Perris v. Hexamer* offers insight into the scope of copyright protection that continues to be relevant with the major cases of today.

## I. THE CASE

A series of urban fires in the first half of the nineteenth century spurred insurers to realize that mere listings of properties that held fire insurance policies that they had underwritten were insufficient tools to adequately assess and manage their risk exposure.<sup>4</sup> To this end, in 1850 William Perris, an English engineer, collaborated with the Jefferson Insurance Co. to produce and market a fire map of New York City which would graphically illustrate the fire hazards of properties and their adjoining lots.<sup>5</sup> George T. Hope, secretary of the Jefferson Insurance Co., led a committee of insurance men who devised the standards for color-coding and symbols to be used to identify risk factors of particular properties and areas.<sup>6</sup> Perris published his work in 1852, under the title *Maps of the City of New York Surveyed Under the Direction of Insurance Companies of the Said City*.<sup>7</sup> This work was successful, and Perris and his partners would successfully publish revised editions of this work until his death in 1863.<sup>8</sup> Upon his passing, his son William G. Perris succeeded his father in the business of producing and selling insurance maps, in partnership with his brother-in-law Henry H. Browne.<sup>9</sup>

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<sup>4</sup> DIANE L. OSWALD, FIRE INSURANCE MAPS: THEIR HISTORY AND APPLICATIONS 14 (Alma Maxwell and Linda Barclay eds., 1997).

<sup>5</sup> *Id.* at 15; WALTER W. RISTOW, AMERICAN MAPS AND MAPMAKERS 258 (1985).

<sup>6</sup> OSWALD, *supra* note 4, at 16.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 16–17.

<sup>9</sup> Transcript of Record at 13, *Perris v. Hexamer*, 99 U.S. 674 (1879) (No. 357).

The success of the Perris map created a “virtual cartographic gold rush” for engineers across the country.<sup>10</sup> One of the “most prolific” was Ernest Hexamer, a German immigrant and civil engineer who had fled the aftermath of the revolution of 1848<sup>11</sup> and worked for Perris from 1852 to 1855.<sup>12</sup> Having learned his craft there, in 1857 Hexamer relocated to Philadelphia where, along with his partner William Lochner, he commenced production of a series of insurance atlases entitled *Maps of the City of Philadelphia*.<sup>13</sup> Under their partnership Lochner is believed to have done most of the surveying, while Hexamer (along with his wife) colored, printed, and bound the volumes.<sup>14</sup> According to Hexamer he remained friendly with the elder Perris until Perris’s death in 1863, and in 1862 the elder Perris had even acted as Hexamer’s sales agent in New York City.<sup>15</sup> Hexamer admitted that these maps used the same symbols, legend, and colors to identify risk as used by Perris,<sup>16</sup> and asserted that the elder Perris had encouraged him to do so.<sup>17</sup> As shown in the Appendix, though, the early editions of Hexamer’s maps use a key or

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<sup>10</sup> OSWALD, *supra* note 4, at 19.

<sup>11</sup> *Id.*; RISTOW, *supra* note 5, at 260.

<sup>12</sup> OSWALD, *supra* note 4, at 19.

<sup>13</sup> *Id.* at 20. *But see* Transcript of Record, *supra* note 9, at 6 (A third partner, Joseph Dietrich, is also mentioned in Hexamer’s answer).

<sup>14</sup> OSWALD, *supra* note 4, at 21.

<sup>15</sup> Transcript of Record, *supra* note 9, at 8.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 19. His exact words were that

[b]efore making this map I called on my friend, William Perris, and told him I intended to make an insurance map of Philadelphia. He was very much pleased at hearing it, and suggested to me to use the same key as he used, for the convenience of the insurance companies who would use my maps. I accepted his offer, and did so.

*Id.*

legend that is a literal copy of the legend for early editions of the Perris maps.<sup>18</sup> Lochner would leave the enterprise in 1860, and when Hexamer released his *Insurance Maps of the City of Philadelphia* in 1872, a revised and expanded version of his earlier work, he was one of the most successful regional fire map publishers.<sup>19</sup> This revised version substituted a new legend and symbols, and although it retained the same colors, assigned different meanings to them.<sup>20</sup>

The immediate chain of events that led the younger Perris et al. to sue Hexamer for use of the colors and symbols used by his father are not entirely clear. Hexamer's answer stated that until the summer of 1874, his right to use these colors and symbols had never been questioned, but that in "July or August" of 1874 he had received a letter from the younger Perris asserting that he was engaging in copyright infringement.<sup>21</sup> In December of 1874, the younger Perris, along with his brother-in-law and business partner, sister, and mother, sued Hexamer in the U.S. Circuit Court for the Eastern District of Pennsylvania in Philadelphia.<sup>22</sup> The complaint was drawn in broad terms, accusing Hexamer of infringement of Perris's work, without making clear that the maps were of different cities.<sup>23</sup> However, the facts of the case were never truly at issue—Hexamer filed an initial answer and then an amended answer, explaining that his maps were of Philadelphia while the Perris maps were of New York city, and asserted that the only copied

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<sup>18</sup> See *infra* Part VI and note 167; see also Transcript of Record, *supra* note 9, at 19.

<sup>19</sup> OSWALD, *supra* note 4, at 21, 23.

<sup>20</sup> Transcript of Record, *supra* note 9, at 9.

<sup>21</sup> *Id.* at 9, 21. A brief news clipping from July 29, 1874 indicates that a William Perris had been seriously injured jumping from a window in New York City to avoid a fire the previous day. *A Fire*, ATLANTA CONST., July 29, 1874, at 2. One can speculate that the younger Perris may have been unable to work and needed money, but it is not provable that this is the same individual.

<sup>22</sup> Transcript of Record, *supra* note 9, at 1–2.

<sup>23</sup> See *id.* at 3.

material was the colors and symbols used in both maps.<sup>24</sup> This was a slight exaggeration, as indicated—in early editions of his maps the legend was a virtually photographic copy from Perris’s maps.<sup>25</sup>

Some discovery was conducted in the case, and the depositions were preserved in the record.<sup>26</sup> The younger Perris and Henry H. Browne were both deposed, for the purpose of establishing their title to the work of the elder Perris and to introduce documents to the record.<sup>27</sup> Hexamer’s deposition, referenced above, discussed the circumstances of how he came to use the legend created by Perris, and his use of different symbols and colors in more recent versions of his insurance maps.<sup>28</sup> A number of Philadelphia insurance men were also deposed, and asked about the meaning and importance of certain symbols used by both atlases.<sup>29</sup>

The case did not present any real questions of disputed fact—at least regarding his original fire maps of Philadelphia, Hexamer admitted that he had used the symbols and colors used by Perris, and asserted that he had done so with his encouragement.<sup>30</sup> There was no dispute that Hexamer’s map was not a complete copy of the Perris maps, since a map of Philadelphia cannot be a copy of a map of New York.<sup>31</sup> However, the legend in the Hexamer map was copied

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<sup>24</sup> *Id.* at 6, 8.

<sup>25</sup> *See id.* at 19.

<sup>26</sup> *See id.* at 14–49.

<sup>27</sup> *See* Transcript of Record, *supra* note 9, at 9–11.

<sup>28</sup> *See id.* at 19–24.

<sup>29</sup> *See id.* at 24–25, 28–29.

<sup>30</sup> *Id.* at 19.

<sup>31</sup> *See* Perris v. Hexamer, 99 U.S. 674, 676 (1879).

essentially verbatim from the Perris map, creating at least some issue of literal copying as well.<sup>32</sup>

In October of 1875 the matter was heard by the trial court, whose brief opinion was not published, but is reproduced in the Transcript of Record submitted to the United States Supreme Court on appeal.<sup>33</sup> The court's opinion was that

[t]he complainants are the representatives of the author of a map of the city of New York, in which he embodied certain useful improvements, of which he is alleged to have been the inventor. The defendants had made and published a map of the city of Philadelphia, in which like improvements are alleged by the complainants to be embodied as to the latter city.

The author under whom the complainants derive their title never obtained a patent for the alleged invention, but obtained a copyright for the map only. Under the patent conferring this copyright in the map, they alleged that the defendant's map is an infringement of their exclusive right.

The court is of opinion that the bill cannot be sustained.  
It is dismissed with costs.<sup>34</sup>

Put another way, the court held that Perris had produced a map, and embodied in that map his system for marking and indicating fire risks. However, the suit was only brought on the grounds of the copyright in the map Perris created, and that was not a viable ground for the lawsuit.<sup>35</sup> Copyright in a work does not include the system or idea embodied therein, it only protects the expression of that idea.<sup>36</sup> The fact that Hexamer had copied the legend verbatim from the title page of the Perris map was still insufficient to lead to a finding of infringement.<sup>37</sup>

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<sup>32</sup> See Transcript of Record, *supra* note 9, at 19.

<sup>33</sup> *Id.* at 29.

<sup>34</sup> *Id.* at 30.

<sup>35</sup> *See id.* at 3.

<sup>36</sup> 17 U.S.C. § 102(a)–(b) (2012).

<sup>37</sup> *See Perris v. Hexamer*, 99 U.S. 674, 676 (1879).

Perris et al. timely appealed to the United States Supreme Court in early 1876.<sup>38</sup> However, it would be almost four years until the case was decided.<sup>39</sup> This was not particularly unusual—a number of factors led to the four year docket backlog in the court, including the rigors of the Justices riding circuit much of the time,<sup>40</sup> and the lack of a certiorari system that meant the Supreme Court had no ability to control its docket.<sup>41</sup> Counsel for Perris asked each term following when the case would be heard, but it would not be heard until the October Term of 1878.<sup>42</sup> However, it is worth noting that not all cases took this long—for instance the three cases that would become the *Trade-Mark Cases* were filed with the Supreme Court in January and February of 1879; the cases were consolidated in April of 1879 and argument was heard in October of the same year.<sup>43</sup> *Perris* (and indeed *Baker v. Selden*) did not receive the same priority.

In their brief, counsel for Perris et al. argued that the legend of colors and symbols was an integral and inseparable part of the copyrighted map, and that it was also copyrightable in and of itself.<sup>44</sup> Having made this argument, they then contended that although the legend used by

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<sup>38</sup> Transcript of Record, *supra* note 9, at 30.

<sup>39</sup> *See Perris*, 99 U.S. at 674.

<sup>40</sup> *See* FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 78 (1928) (“The Supreme Court’s business would doubtless have kept the Justices in Washington and the practice of circuit attendance, as subsequent experience shows, would have become atrophied.”).

<sup>41</sup> *Id.* at 77 (“[M]ovement for a comprehensive reorganization of the judicial system made no headway in Congress . . . congestion of the dockets became more and more ominous.”); *see also* Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 364 (2001) (“For most of the Court’s history, the justices were obliged to hear many disputes . . . the Court’s docket skyrocketed.”).

<sup>42</sup> Letter from Joshua Pusey, to Clerk, U.S. Sup. Ct. (Sept. 25, 1876) (on file with author); Letter from Joshua Pusey, to Clerk, U.S. Sup. Ct. (Dec. 3, 1877) (on file with author).

<sup>43</sup> Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, ST. JOHN’S L. REV. 827, 857–60, 866 (2009).

<sup>44</sup> Brief for Appellants at 3–7, *Perris v. Hexamer*, 99 U.S. 674 (1879) (No. 357).



Hexamer was not a literal copy of the legend used by Perris, it was substantially and admittedly based on the legend from the Perris map, and this was sufficient to be infringement.<sup>45</sup> Finally, counsel for the appellants did not dispute Hexamer’s testimony, but rather asserted that it did not prove a license, and that in any case that license had been terminated.<sup>46</sup>

In response, counsel for Hexamer focused on the argument that the use of common colors and symbols could not be copyright infringement.<sup>47</sup> The brief for Hexamer opens with a nod to what would come to be referred to as fair use, arguing that the Hexamer map did not compete with or affect sales for the Perris map.<sup>48</sup> Following that, Hexamer’s counsel focused on his strongest argument—that Perris was attempting to protect a system or idea with copyright, instead of attempting to receive a patent for that system.<sup>49</sup> In addition to these arguments, Hexamer’s counsel noted that Hexamer’s revised 1872 maps used a different legend, that any infringement was de minimis, and that the doctrine of laches precluded the suit, as Hexamer had been using the Perris system of colors and symbols since 1857.<sup>50</sup>

## II. THE DECISION

Argument in the case was held Tuesday, December 17, 1878, and was concluded the following day.<sup>51</sup> On February 3, 1879, the Supreme Court issued its decision, and decisively

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<sup>45</sup> *Id.* at 12.

<sup>46</sup> *Id.* at 14–15.

<sup>47</sup> *See* Brief for Appellee at 5, *Perris*, 99 U.S. 674 (No. 357).

<sup>48</sup> *See id.* at 3–4.

<sup>49</sup> *See id.* at 3–5.

<sup>50</sup> *Id.* at 6–9, 11.

<sup>51</sup> *United States Supreme Court Proceedings of 1878*, CHI. L. NEWS, Dec. 21, 1878, at 112.

sided with Hexamer.<sup>52</sup> The opinion was originally assigned to Justice Clifford, but was transferred to Chief Justice Waite.<sup>53</sup> The Court’s opinion was fairly short, even for the time, measuring about two pages of the United States Reports—less if you remove prefatory matter.<sup>54</sup> After a brief recitation of the facts, the Court addressed the two issues before it—the allegations of literal copying of the key, and the allegations of nonliteral copying for use of the colors and symbols—in two paragraphs totaling under three hundred words and not a single citation.<sup>55</sup> Although the opinion does not strictly distinguish the legal issues, the first paragraph is addressed to the former question, and the second paragraph is generally addressed to the latter issue.<sup>56</sup>

*A. The First Holding: Actionable & De Minimis Copying*

The Court first turned to the question of whether there had been what we now call “actionable copying” or “unlawful appropriation” depending on the Circuit—in this case, whether the copying of the key was a sufficient copying to constitute infringement.<sup>57</sup> In response to this question the Court held that “to infringe [the exclusive right of reproduction] a substantial copy of the whole or of a material part must be produced,”<sup>58</sup> and thus the copying of the key was insufficient to constitute infringement of the Perris maps.<sup>59</sup> Given that the two maps “are not

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<sup>52</sup> *Perris*, 99 U.S. 674 (1879).

<sup>53</sup> Chief Justice Waite, Supreme Court Docket Book, Oct. Term 1878, *Perris v. Hexamer*, No. 93, at 131 (on file with Library of Congress, Morrison R. Waite Papers, Box 32).

<sup>54</sup> *See Perris*, 99 U.S. at 675–76.

<sup>55</sup> *See id.* at 676.

<sup>56</sup> *See id.*

<sup>57</sup> *Id.*; *see Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140–41 (1992).

<sup>58</sup> *Perris*, 99 U.S. at 676.

<sup>59</sup> *Id.* at 675–76.

only not copies of each other, but they do not convey the same information,”<sup>60</sup> there could be no finding of infringement.<sup>61</sup> In essence, the Court held that because the two maps were of different cities and were thus fundamentally different works, the copying of the key was insufficient to constitute infringement.<sup>62</sup>

The Court did not give a label for this doctrine, but at first this part of the decision was cited and applied for by a number of cases following *Perris*.<sup>63</sup> For instance, in *Morrison v. Pettibone* the Court cited this rule from *Perris* to set aside a jury verdict of infringement and order a new trial, holding that “infringement [that] was manifestly intended at any incomplete stage, but was not carried out, cannot operate to turn the mere embryo into a copy.”<sup>64</sup> Likewise, the Ninth Circuit applied *Perris*, among other cases, in holding that even if, arguendo, Charlie Chaplin had read the plaintiff’s book, *Against Gray Walls or Lawyer’s Dramatic Escapes*, and incorporated small parts into his film *Modern Times*, that did not mean that it rose to the level of infringement.<sup>65</sup> This rule would eventually lead to the doctrine of de minimis copying—that only a small amount of copying does not rise to the level of infringement.<sup>66</sup> However, *Perris* itself has been rarely recognized as a major source of this doctrine.<sup>67</sup>

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<sup>60</sup> *Id.* at 676.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Walter Malins Rose, *Notes on U.S. Reports, in 25 CASES ARGUED AND DECIDED IN THE SUPREME COURT OF THE UNITED STATES* 705 (2d ed. 1901).

<sup>64</sup> 87 F. 330, 332 (C.C.N.D. Ill. 1897).

<sup>65</sup> *Kustoff v. Chaplin*, 120 F.2d 551, 560 (9th Cir. 1941).

<sup>66</sup> *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

<sup>67</sup> *See, e.g.*, 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:10 (2013). *See infra* Part V for a recent exception.

One interesting omission of the Court was the failure to use the still-new doctrine of fair use to resolve the issue of actual copying.<sup>68</sup> Many of the early fair use cases were argued by counsel for Perris, but it is unclear to what extent the Court considered them.<sup>69</sup> A number of subsequent decisions would likewise discuss the holding of *Perris* regarding the substantiality of copying required in the context of the fair use doctrine,<sup>70</sup> but *Perris* does not apply the fair use analysis from *Folsom v. Marsh* and subsequent cases, and is not generally recognized today as part of the history of the fair use doctrine.<sup>71</sup> Nonetheless, given that it has been forcefully argued that *Folsom v. Marsh* itself was much more about the scope of infringement—just like the first holding in *Perris*, it is entirely reasonable to place this holding as being part of the line of nineteenth century decisions that led to the doctrine of fair use in the twentieth century.<sup>72</sup> Alan Latman’s observation of “the partial marriage between the doctrine of fair use and the legal

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<sup>68</sup> See generally *Perris v. Hexamer*, 99 U.S. 674 (1879) (discussing the commonality of map legends, but failing to mention its fair use).

<sup>69</sup> See Brief for Appellants, *supra* note 44, at 4–7, 9. The syllabus to the Lawyer’s Edition notes that counsel for the appellants, cited *Jollie v. Jacques*, 1 Blatchf. 618; *Green v. Bishop*, 1 Cliff. 199; *Drury v. Ewing*, 1 Bond, 540; *Folsom v. Marsh*, 2 Story, 100; *Emerson v. Davies*, 3 id. 768; *Gray v. Russell*, 1 id. 11; *Story’s Executors v. Holcombe*, 4 McLean, 309; [and] *Daly v. Palmer*, 6 Blatchf. 256. *Perris*, 99 U.S. at 674.

<sup>70</sup> See *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664, 666 (7th Cir. 1950) (citing *Perris*, 99 U.S. at 676) (“[W]hat is fair use depends upon many circumstances. It has generally been construed that an infringement consists in copying some substantial or material part of a work.”); see also *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470, 477 (E.D.S.C. 1924) (citing *Perris*, 99 U.S. at 676) (“It has been said that in deciding questions of this sort the court must look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which this may prejudice the sale, diminish the profits, or supersede the objects of the original work.”), *aff’d*, 2 F.2d 1020 (4th Cir. 1924).

<sup>71</sup> See, e.g., PATRY, *supra* note 67, at § 10:10.

<sup>72</sup> L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 447–48 (1998).

maxim *de minimis non curat lex*” is relevant here—it can be hard to separate the embryonic fair use and *de minimis* doctrines for copyright.<sup>73</sup>

The closing line of this first holding, that there had been no copyright infringement because there had not only been no copying, but indeed the two works “[did] not convey the same information,” is an interesting approach to the copyright infringement analysis, albeit one that has not found its way into the case law.<sup>74</sup> Interestingly, this has become part of the fair dealing analysis in the United Kingdom, where one of the leading cases held that if the copied material is “used to convey the same information as the author, for a rival purpose, that may be unfair.”<sup>75</sup>

#### *B. The Second Holding: Protectibility of Systems and Designations*

Having addressed the charges of literal copying at issue in this case, the Court then turned to whether the symbols and colors used by Perris and reused by Hexamer could be protected by copyright, and once again found in the negative.<sup>76</sup> On this count the Court held that Perris et al. held no exclusive right in “the form of the characters they employ to express their ideas.”<sup>77</sup> The Court made clear that “it has never been supposed that a simple copyright of the map gave the publisher an exclusive right to the use upon other maps of the particular signs and

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<sup>73</sup> ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 30 (Comm. Print 1960); *see* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 n.34 (1984) (quoting *id.*).

<sup>74</sup> *Perris*, 99 U.S. at 676; *see* Bullinger v. Mackey, 4 F. Cas. 649, 649–50 (C.C.E.D.N.Y. 1879) (No. 2,127) (analyzing whether a work conveys the same information in determining infringement); *see also* W. Publ. Co. v. Edward Thompson Co., 169 F. 833, 861, 863 (C.C.E.D.N.Y. 1909) (addressing the plaintiff’s argument that something cannot be a copy if it is not identical).

<sup>75</sup> Hubbard v. Vosper [1972] 2 QB 84 at 94.

<sup>76</sup> *Perris*, 99 U.S. at 676. One difficulty of the *Perris* opinion is that it never makes this pivot clear—it requires knowing the works and briefing to understand that different subject matter is being considered.

<sup>77</sup> *Id.*

key which he saw fit to adopt for the purposes of his delineations.”<sup>78</sup> The Court thus concluded that Hexamer had not engaged in copyright infringement of the plaintiff’s work: “All he ha[d] done at any time ha[d] been to use to some extent their system of arbitrary signs and their key.”<sup>79</sup> In other words, the Supreme Court refused to recognize any protection under copyright law for the legend, symbols, or color scheme of a map.

There are two aspects to this holding—a narrower one about the copyrightability of headings or symbols for classifying and organizing information, and a broader one about the dichotomy between idea and expression.<sup>80</sup> As one unpublished decision citing *Perris* for this proposition explained, “[t]he copyright laws are designed to protect the publisher or artist against individuals who might seek to copy the production. The *idea* is not protected.”<sup>81</sup> As a general statement of the dichotomy between idea and expression, *Perris* was generally cited in tandem with *Baker v. Selden*, and was usually cited second since *Baker* was a year later.<sup>82</sup> Eventually, cases would stop citing *Perris*, and only cite *Baker* as the bedrock of the dichotomy between idea and expression.<sup>83</sup> However, as will be explored in greater detail below, *Perris* is in some ways a

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *See id.*

<sup>81</sup> Longgood v. Elliot-Wehner Foundry & Mfg., No. 1881, 1932 WL 27369, at \*1 (W.D. Mo. Sept. 14, 1932) (citing *Perris*, 99 U.S. at 676).

<sup>82</sup> Int’l News Serv. v. Associated Press, 248 U.S. 215, 255 n.1 (1918) (Brandeis, J., dissenting); Dunham v. Gen. Mills, Inc., 116 F. Supp. 152, 154 (D. Mass. 1953); Russell v. Ne. Publ’g Co., 7 F. Supp. 571, 572 (D. Mass. 1934); Aldrich v. Remington Rand, Inc., 52 F. Supp. 732, 734 (N.D. Tex. 1942); Simms v. Stanton, 75 F. 6, 10 (C.C.D. Cal. 1896) (“A copyright gives no exclusive property in the ideas of an author. These are public property, and any one may use them as such.”).

<sup>83</sup> *See, e.g.*, Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991).

superior vehicle for understanding this dichotomy, since it is not freighted by the patent versus copyright distinction that was at issue in *Baker*.<sup>84</sup>

In fact, the omission of the patent/copyright distinction—the concept that patents and copyrights represent protections for fundamentally different types of mental creations, is notable in the Supreme Court’s decision in *Perris*, especially since the Circuit Court’s extremely terse decision *does* focus on the fact that Perris had not received a patent for his system of organizing and identifying features on his maps.<sup>85</sup> Indeed, there is no mention anywhere of the elder Perris trying to receive a patent for his use of colors and symbols for his maps, and this makes sense—it seems highly unlikely such a patent would be granted.<sup>86</sup>

In addition to being more broadly about the dichotomy between idea and expression, *Perris* has special applicability to cases about copyright in symbols and colors, and is of course directly on point in cases regarding copyrights in map symbols.<sup>87</sup> *Perris* has thus been applied to preclude a finding of infringement in cases of similarly arranged charts for false teeth,<sup>88</sup> making a third-party map of West’s National Reporter System,<sup>89</sup> correcting one’s own map with reference to a copyrighted map,<sup>90</sup> regarding display of an iron railings in catalogs at similar

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<sup>84</sup> See *Perris*, 99 U.S. at 676; see also *Baker v. Selden*, 101 U.S. 99, 103 (1880).

<sup>85</sup> Transcript of Record, *supra* note 9, at 30.

<sup>86</sup> See 35 U.S.C. § 101 (2012).

<sup>87</sup> See *S.S. White Dental Co. v. Sibley*, 38 F. 751, 752 (C.C.E.D. Pa. 1889); *Christianson v. W. Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945); *Chamberlin v. Bekins Van & Storage Co.*, 23 F.2d 541, 541 (S.D. Cal. 1928); *Blumcraft of Pittsburgh v. Newman Bros.*, 246 F. Supp. 987, 989 (S.D. Ohio 1965); *Official Aviation Guide Co. v. Am. Aviation Assocs.*, 150 F.2d 173, 175 (7th Cir. 1945); *Alexandria Drafting Co. v. Amsterdam*, Nos. 95-1987, 95-6036, 1997 WL 325769, at \*7, \*9 (E.D. Pa. June 4, 1997) (mem.) (subsequently vacated on June 25, 1998).

<sup>88</sup> See *S.S. White Dental Co.*, 38 F. at 752.

<sup>89</sup> See *Christianson*, 149 F.2d at 203–04.

<sup>90</sup> See *Chamberlin*, 23 F.2d at 542–43.

angles and lighting,<sup>91</sup> keying airline schedules to maps,<sup>92</sup> and copying “trap streets” into maps of one’s own creation.<sup>93</sup> However, almost all of such cases were reported long before the beginning of the digital age, and none of these decisions deal with issues of digital copying.<sup>94</sup>

Following the lawsuit, both Perris and Hexamer continued making maps of their respective cities.<sup>95</sup> Perris died in 1887,<sup>96</sup> and two years later the Perris Company was absorbed by Sanborn, which had become the dominant force in fire insurance maps.<sup>97</sup> Hexamer continued to publish and revise fire insurance maps until his death in 1905.<sup>98</sup> His son C.J. Hexamer continued in the business until 1915, until he too sold the business to Sanborn.<sup>99</sup> Sanborn has continued in this business to this day, advertising 1.2 million fire maps dating back to 1866.<sup>100</sup>

### III. IN THE SHADOW OF *BAKER V. SELDEN*

Although the case had already been pending before the Supreme Court for several years before *Perris* was decided, the following term the Court decided *Baker v. Selden*, a case about whether a book describing an accounting system would prevent the publication of a book

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<sup>91</sup> See *Blumcraft of Pittsburgh*, 246 F. Supp. at 989.

<sup>92</sup> See *Official Aviation Guide Co.*, 150 F.2d at 175.

<sup>93</sup> See *Alexandria Drafting Co. v. Amsterdam*, Nos. 95-1987, 95-6036, 1997 WL 325769, at \*7, \*9 (E.D. Pa. June 4, 1997) (mem.) (subsequently vacated on June 25, 1998).

<sup>94</sup> See *S.S. White Dental Co. v. Sibley*, 38 F. 751, 751 (C.C.E.D. Pa. 1889); *Christianson v. W. Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945); *Chamberlin*, 23 F.2d at 540; *Blumcraft of Pittsburgh*, 246 F. Supp. at 987; *Official Aviation Guide Co.*, 150 F.2d at 173; *Alexandria Drafting Co.*, 1997 WL 325769, at \*1.

<sup>95</sup> OSWALD, *supra* note 4, at 17, 23.

<sup>96</sup> *Obituary of William G. Perris*, N.Y. DAILY TRIB., May 14, 1887, at 5.

<sup>97</sup> OSWALD, *supra* note 4, at 17.

<sup>98</sup> *Id.* at 23.

<sup>99</sup> *Id.*

<sup>100</sup> *Sanborn Fire Insurance Maps*, SANBORN, <http://www.sanborn.com/sanborn-fire-insurance-maps/> (last visited Oct. 6, 2017).



describing a similar accounting system.<sup>101</sup> The story of *Baker v. Selden* has already been told elsewhere,<sup>102</sup> but a brief recitation of the case and its background is relevant to understanding why *Baker* and not *Perris* became the dominant case regarding the dichotomy between idea and expression.

#### A. *Baker v. Selden*

*Baker v. Selden* was a dispute, much like *Perris v. Hexamer*, between the plaintiff's heirs and the defendant.<sup>103</sup> Selden had developed a new system of double-entry bookkeeping for government accounting, and had received a copyright for his book of forms that embodied this system.<sup>104</sup> Selden's book was mostly made up of forms—Selden printed up a large number of copies of these books, but wound up deeply in debt when they failed to sell.<sup>105</sup> A few years after Selden's publication, Baker published his own system of double-entry bookkeeping for government accounting, with additional innovations making it easier to use, embodied in a cheaper volume.<sup>106</sup> Baker's system was a major success, and four years later, in 1871, Selden died, leaving his estate deeply in debt with the copyright in his bookkeeping text as its only asset.<sup>107</sup> The following year Selden's widow sued Baker for copyright infringement for his booking system which incorporated many of the innovations of Selden's booking system.<sup>108</sup> In

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<sup>101</sup> See *Baker v. Seldon*, 101 U.S. 99, 99–100 (1880).

<sup>102</sup> See, e.g., Pamela Samuelson, *The Story of Baker v. Selden: Sharpening the Distinction Between Authorship and Invention*, in *INTELLECTUAL PROPERTY STORIES* 159, 159–93 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

<sup>103</sup> See Samuelson, *supra* note 102, at 162–63; see also Transcript of Record, *supra* note 9, at 1.

<sup>104</sup> Samuelson, *supra* note 102, at 160.

<sup>105</sup> *Id.* at 161.

<sup>106</sup> *Id.* at 161–62.

<sup>107</sup> *Id.* at 162.

<sup>108</sup> *Id.* at 162–63.

1874, the Circuit Court in Ohio ruled in favor of Selden’s widow and found that Baker had infringed Selden’s copyright.<sup>109</sup> The case then went to the United States Supreme Court, where both parties were represented by fairly prestigious counsel—Baker was represented by a former Governor of Ohio and a former state judge,<sup>110</sup> while Selden was represented by a former member of Congress from Ohio.<sup>111</sup>

Justice Bradley’s decision was issued in January of 1880 and sided firmly with Baker.<sup>112</sup> The Court explained that what was protected by Selden’s copyright was his book, not the system embodied in that book, holding that “there is a clear distinction between the book, as such, and the art which it is intended to illustrate.”<sup>113</sup> The Court then discussed the distinction between patents and copyrights, and that the publication of a book in no way protected the system embodied in the book.<sup>114</sup> Indeed, Pamela Samuelson has argued persuasively that *Baker v. Selden* is really much more about the distinction between patents and copyrights than it is the distinction between idea and expression.<sup>115</sup> The Court thus held that Baker had not infringed

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<sup>109</sup> Samuelson, *supra* note 102, at 165–66. No opinion was written by Judge Swing in this case, but the appellate record printed by the U.S. Supreme Court contains the ruling of Judge Swing as recorded on the docket. *Id.* See generally Brief of Petitioner-Appellant, *Baker v. Selden*, 101 U.S. 99, No. 95 (indicating that Judge Swing ruled on the docket). Interestingly, Judge Swing would express a broad view of the copyright clause of the Constitution several years later, in the first case to address the constitutionality of the 1870 Trademark Act. See *Duwell v. Bohmer*, 8 F. Cas. 181, 182–83 (S.D. Ohio 1878) (No. 4213). That same year he was part of a divided court in the criminal prosecutions of W. W. Johnson, T.E. McNamara, and N. S. Reeder for trademark infringement, which would become one of the three cases that comprised the *Trade-Mark Cases*, which overruled his decision in *Duwell*. See 100 U.S. 82, 85–86, 91 (1879).

<sup>110</sup> Samuelson, *supra* note 102, at 172–73.

<sup>111</sup> *Id.*; Biography of Milton Southard, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, [bioguide.congress.gov/scripts/biodisplay.pl?index=S000688](http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000688) (last visited Oct. 6, 2017).

<sup>112</sup> *Baker v. Selden*, 101 U.S. 99, 99, 107 (1880).

<sup>113</sup> *Id.* at 102, 107.

<sup>114</sup> *Id.* at 103.

Selden’s copyright, and then further held that books of blank forms were not generally eligible for copyright.<sup>116</sup> Although the Chief Justice’s docket books indicate that Justices Harlan and Clifford voted contrary to the Court’s ultimate ruling, no written dissent was issued, either as a result of a vote change to achieve consensus or simply due to the overwhelming workload the Court faced at the time.<sup>117</sup> By contrast, the vote in *Perris* was unanimous.<sup>118</sup>

### B. *Baker v. Selden Ascendant*

Counsel for Baker reprinted the entire text of the Court’s recent *Perris* opinion in the final pages of their brief, noting “[h]ow admirably this decision applies to the case at bar.”<sup>119</sup> However, the decision in *Baker* failed to cite to *Perris*, for reasons that are unclear.<sup>120</sup>

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<sup>115</sup> See Samuelson, *supra* note 102, at 177 (“Modern readers come to the *Baker* decision expecting to find in it a classic statement of the idea/expression distinction, . . . [t]o come afresh to the *Baker* decision [one will] . . . discern how important the patent/copyright distinction was to the *Baker* ruling.”).

<sup>116</sup> *Baker*, 101 U.S. at 107.

<sup>117</sup> See Chief Justice Waite, Supreme Court Docket Book, Oct. Term 1879, *Baker v. Seldon*, No. 95, at 126 (on file with Library of Congress, Morrison R. Waite Papers, Box 32); see also FRANKFURTER & LANDIS, *supra* note 40, at 77. Lee Epstein et al. would disagree. EPSTEIN, *supra* note 41, at 362–63 (asserting that the subsequent lack of a recorded dissent reflects the change of a vote to reflect consensus).

<sup>118</sup> See Chief Justice Waite, Supreme Court Docket Book, Oct. Term 1878, *Perris v. Hexamer*, No. 93, at 131 (on file with Library of Congress, Morrison R. Waite Papers, Box 32). Although not *per se* germane to this article, it is interesting to note that two other well-known Supreme Court cases on copyright from this era that have generally been considered unanimous in fact were not. See Chief Justice Waite, Supreme Court Docket Book, Oct. Term 1879, Nos. 705, 711, 719, at 55–57 (on file with Library of Congress, Morrison R. Waite Papers, Box 32) [hereinafter Docket Book for Trade-Mark Cases]; see also Chief Justice Waite, Supreme Court Docket Book, Oct. Term 1883, *Burrow-Giles v. Sarony*, No. 1071, at 163 (on file with Library of Congress, Morrison R. Waite Papers, Box 30) [hereinafter Docket Book for Burrow-Giles]. In the *Trade-Mark Cases* Justice Clifford would have held the 1870 Trademark Act constitutional, while in *Burrow-Giles v. Sarony*, Justice Harlan would have voted that no copyright infringement had occurred in the copying of a photograph of Oscar Wilde. See Docket Book for Trade-Mark Cases, *supra*, at 55–57; see also Docket Book for Burrow-Giles, *supra*, at 163. These check marks in a docket book pose fascinating counterfactuals, and it is a pity no more information exists on why they disagreed with the majority.

<sup>119</sup> Brief of Petitioner-Appellant at 26, *Baker*, 101 U.S. 99, No. 95 (“There, as here, the parts were separate. Certain parts were claimed to infringe. Other parts of the new maps were very unlike the original, and as to these there was no infringement. Still more, there was *no infringement as to the parts which were alike*.”).

<sup>120</sup> See generally *Baker*, 101 U.S. 99 (citing several English cases, but no United States cases).

Regardless, in the early years after these decisions were issued, they were treated as being of relatively equal importance.<sup>121</sup> For instance, Copinger’s Britain-based treatise on copyright law used *Perris* as the case used for the proposition that “[t]here can be no copyright in a mere plan of a work; nor any exclusive property in a general subject or in the particular method of treating it,” while *Baker* was relegated to a footnote.<sup>122</sup> However, in the twentieth century *Baker* began to pull away in importance, and as of January 1, 2017, it had been cited in 334 cases, according to Westlaw.<sup>123</sup> By contrast, *Perris* has been cited by thirty-seven reported decisions, including only once in the twenty-first century and five more times between 1960 and 1999.<sup>124</sup> An even starker illustration of their differing importance comes from the trial court documents available on Westlaw: *Baker* is cited 448 times up to January 1, 2017,<sup>125</sup> while *Perris* is only cited once.<sup>126</sup> *Baker v. Selden* “remains an enduring authority for its preeminent role in arbitrating between protectable expression and unprotectable ideas in copyrighted works.”<sup>127</sup> *Perris v. Hexamer* has become a curio.

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<sup>121</sup> See, e.g., WALTER ARTHUR COPINGER, LAW OF COPYRIGHT, IN WORKS OF LITERATURE AND ART 41–42 (4th ed. 1904).

<sup>122</sup> *Id.* Both *Perris* and *Baker* were decided slightly too late to appear in Eaton Drone’s seminal 1879 treatise. EATON S. DRONE A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES, EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS (1979)

<sup>123</sup> Citing References to *Baker v. Selden*, *supra* note 3.

<sup>124</sup> Citing References to *Perris v. Hexamer*, *supra* note 3.

<sup>125</sup> Citing References to *Baker v. Selden*, *supra* note 3.

<sup>126</sup> Citing References to *Perris v. Hexamer*, *supra* note 3.

<sup>127</sup> Olson, *supra* note 1, at 604.

#### IV. *PERRIS* AS A FORGOTTEN CASE

With *Perris v. Hexamer* essentially forgotten in the twenty-first century, even as its contemporary *Baker v. Selden* remains a central part of the canon, two immediate questions are raised—why *Perris* became a forgotten case, and why we should care.

##### A. *Why was Perris Forgotten*

Although on examination *Perris* gives us a powerful vision of copyright for ideas and systems, on the surface it is a cursory opinion by a Chief Justice who would die of overwork a decade later.<sup>128</sup> It does not explain its reasoning, and understanding that both literal copying and arguments for protection of a system were involved requires a close reading of the terse statement of facts.<sup>129</sup>

The most basic reason to think why *Perris v. Hexamer* is generally forgotten, while *Baker v. Selden* is still widely cited, is simply that *Perris* is an extremely short opinion by an overworked Chief Justice that does not always elaborate as fully on its reasoning as it could, and is bereft of citations.<sup>130</sup> The opinion of Justice Bradley in *Baker v. Selden*, on the other hand, is approximately five times the length of *Perris*, and explains its rationale with reference to authority.<sup>131</sup> A number of studies have found a correlation between opinion length and the number of citations that opinion received.<sup>132</sup> For instance, in a piece analyzing treatment of

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<sup>128</sup> Biography of Morrison Waite, HISTORY CENT., <http://www.historycentral.com/Bio/rec/MorrisonWaite.html> (last visited Oct. 6, 2017).

<sup>129</sup> See *Perris v. Hexamer*, 99 U.S. 674, 675 (1879).

<sup>130</sup> See Citing References to *Baker v. Selden*, *supra* note 3. See generally *Perris*, 99 U.S. 674 (a two page opinion citing no cases).

<sup>131</sup> See *Baker v. Selden*, 101 U.S. 99, 100–07 (1880).

<sup>132</sup> See e.g., Ryan C. Black & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 471, 484 (2010).

Supreme Court opinions from 1969 to 1985, Ryan C. Black and James F. Spriggs II found that an opinion in the seventy-fifth percentile for length received on average fourteen percent more citations than an opinion in the twenty-fifth percentile.<sup>133</sup> A further study by these authors, looking to Supreme Court opinions from 1946 to 2004, found a minor positive correlation between length and amount of citation over the first few decades, but that the effect disappeared within fifteen years.<sup>134</sup> However, the authors of these pieces acknowledge that for the era starting in 1953 the median opinion was 4,067 words, while for opinions written before 1886, the median was 1,380 words.<sup>135</sup> Further, while the Court was issuing over 250 opinions per year in the late nineteenth century, it issued only 65 in 2005.<sup>136</sup> Thus, the question remains whether the minor effect observed by Black and Spriggs is more pronounced for earlier eras of the Supreme Court where the Court was churning out many more opinions of more variable significance.

To answer this question I turned to the Free Law Project, which makes the entire run of the United States Reports available freely on CourtListener.com, along with many other more recent opinions.<sup>137</sup> CourtListener has over four million opinions in its database, with all citations between opinions in the database, making analysis comparatively straightforward.<sup>138</sup> The entire

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<sup>133</sup> Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 676–77 (2008).

<sup>134</sup> Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 351 (2013).

<sup>135</sup> *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, *supra* note 133, at 639–40.

<sup>136</sup> *Id.* at 633.

<sup>137</sup> *Opinions – Supreme Court of the United States*, JACOB BURNS LAW LIBRARY RESEARCH GUIDES, <http://law.gwu.libguides.com/scotus/opinions> (last visited Sept. 17, 2017).

<sup>138</sup> *Frequently Asked Questions*, COURTLISTENER, <https://www.courtlistener.com/faq/> (last visited Sept. 17, 2017). CourtListener does have a number of major omissions that result in lower citation counts than one would find in Westlaw and Lexis, the most major being lower federal court opinions from before 1925, and Federal District Court opinions until much more recently. *See* DITTAKAVI RAO, A SHORT AND QUICK GUIDE TO NO-COST AND/OR LOW-COST LEGAL RESEARCH USING THE INTERNET 19 (2015),

library of Supreme Court opinions was analyzed, and four data points were extracted – the year the opinion was filed, the word count of the opinion, the number of citations to the opinion, and the number of internal citations in the opinion. The Courtlistener database has some weaknesses compared to commercial databases like Westlaw and Lexis, chiefly a lack of coverage of older federal and state cases, but these weaknesses should be uniform for all cases of certain periods, and serve to highlight relative influence of an opinion in the past 40 years.

A review of all 29,344 Supreme Court opinions<sup>139</sup> shows that for the first quartile of opinions in terms of age (the period ending in 1887),<sup>140</sup> the correlation between word count and rate of citation is statistically significant, although not as significant as it would be for the final two quartiles, representing opinions from 1920 forward.<sup>141</sup> This study provides substance to the intuition that a short opinion like *Perris* is less likely to become canonical.

The fact that *Perris* does not make clear it is about both literal and non-literal copying is also perhaps why the decision is not discussed more—without a careful reading of the case it is not clear the decision is talking about two different types of alleged copying which require a different type of approach.<sup>142</sup> Since *Perris* is about both literal copying of the map legend and the allegation that using the same symbols and colors on a map constitutes copying, it actually

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<http://www.law.duq.edu/sites/default/files/documents/Library/Research%20Guides/No-Cost-Legal-Research-2015-Rao.pdf>.

<sup>139</sup> Opinions of less than 200 words were excluded from the analysis, since these are almost uniformly not substantive.

<sup>140</sup> Quartiles are by number of opinions, not by years.

<sup>141</sup> See Search Results for Supreme Court Opinions Before 1887, COURTLISTENER, [https://www.courtlistener.com/?type=o&q=&type=o&order\\_by=score+desc&stat\\_Precedential=on&filed\\_before=1887-12-31](https://www.courtlistener.com/?type=o&q=&type=o&order_by=score+desc&stat_Precedential=on&filed_before=1887-12-31) (last visited Oct. 6, 2017); see also Search Results for Supreme Court Opinions After 1920, COURTLISTENER, [https://www.courtlistener.com/?q=&type=o&order\\_by=citeCount+desc&stat\\_Precedential=on&filed\\_after=1919-12-31](https://www.courtlistener.com/?q=&type=o&order_by=citeCount+desc&stat_Precedential=on&filed_after=1919-12-31) (last visited Oct. 6, 2017).

<sup>142</sup> See *Perris v. Hexamer*, 99 U.S. 674, 675–76 (1878).

speaks to two different types of conduct.<sup>143</sup> However, it is easy to think that its holding about de minimis copying is really all it has to say, and that was largely how it was applied outside the context of copying of maps, where the second holding would also be applied.<sup>144</sup> Indeed, as discussed above, there are perilously few reported decisions that apply the broader holding of *Perris* regarding nonliteral copying outside the context of maps.

Another possibility worth taking seriously is that to interpret *Perris* as being the equal of *Baker* in terms of its holding is to over-read a short decision which could be easily read as a casual dismissal of the plaintiff's allegations. The Court referenced no authority in *Perris*, and decisions citing no authority are much less likely to be cited in the future.<sup>145</sup> Looking at the same data from CourtListener, but this time counting the number of citations to authorities in cases, the correlation is even stronger in the quartile of cases ending in 1887, although perhaps not to a significant degree (the difference is much greater for cases between 1887 and 1920).<sup>146</sup> However, it is not clear that the difference in authorities and length alone account for the obscurity of *Perris*.

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<sup>143</sup> See *id.* at 675.

<sup>144</sup> See PATRY, *supra* note 67, at § 10:10; see also *S.S. White Dental Co. v. Sibley*, 38 F. 751, 752 (C.C.E.D. Pa. 1889).

<sup>145</sup> See Olson, *supra* note 1, at 606. At least one commenter has implied that the obscurity of *Perris* is due to the fact that it “did not cite any authorities for the holding it expressed.” Olson, *supra* note 1, at 606.

<sup>146</sup> See Search Results for Supreme Court Opinions Before 1888, COURTLISTENER, [https://www.courtlistener.com/?type=o&q=&type=o&order\\_by=score+desc&stat\\_Precedential=on&filed\\_before=1887-12-31](https://www.courtlistener.com/?type=o&q=&type=o&order_by=score+desc&stat_Precedential=on&filed_before=1887-12-31) (last visited Oct. 6, 2017); see also Search Results for Supreme Court Opinions Between 1887 and 1920, COURTLISTENER, [https://www.courtlistener.com/?q=&type=o&order\\_by=score+desc&stat\\_Precedential=on&filed\\_after=1920&filed\\_before=1887](https://www.courtlistener.com/?q=&type=o&order_by=score+desc&stat_Precedential=on&filed_after=1920&filed_before=1887) (last visited Oct. 6, 2017).



B. *Perris v. Hexamer v. Baker v. Selden*

*Perris* and *Baker* have largely been treated as being about the same question, sometimes distilled into the concept of the idea/expression dichotomy.<sup>147</sup> However, the facts of the cases are distinct in a way that actually makes *Perris* much more pertinent to modern questions of copyright than *Baker*. In *Baker*, the Court found that a work was not eligible for copyright to the extent it merely represented the embodiment of an abstract system for accounting that might be appropriate for a patent, but not for a copyright.<sup>148</sup> In *Perris*, on the other hand, there was no real argument about whether the various symbols and colors would be appropriate for a patent at the level of the Supreme Court;<sup>149</sup> the question was whether copyright protected the use of the same colors and symbols for a specific purpose.<sup>150</sup> The Court was also faced with the question of whether the copying of the legend by Hexamer constituted infringement, a question that was not at issue in *Baker*—the short preamble in the Selden book does not seem to have been copied by Baker.<sup>151</sup> Put another way, *Perris* points to a view of the dichotomy between idea and expression that is closer to the question of nonliteral copying in the software context than it is to the patent versus copyright distinction of *Baker v. Selden*.

One situation where *Perris* is superior to *Baker* is the arrangement of commands in a computer program. For instance, in the First Circuit’s well-known opinion in *Lotus Development*

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<sup>147</sup> See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 255, n.1 (1918) (Brandeis, J., dissenting); *Simms v. Stanton*, 75 F. 6, 10 (C.C.D. Cal. 1896); *Dunham v. Gen. Mills, Inc.*, 116 F. Supp. 152, 154 (D. Mass. 1953); *Aldrich v. Remington Rand, Inc.*, 52 F. Supp. 732, 734 (N.D. Tex. 1942); *Russell v. Ne. Publ’g Co.*, 7 F. Supp. 571, 572 (D. Mass. 1934).

<sup>148</sup> *Baker v. Selden*, 101 U.S. 99, 105 (1880).

<sup>149</sup> See generally *Perris v. Hexamer*, 99 U.S. 674 (1878) (discussing only copyright).

<sup>150</sup> *Perris*, 99 U.S. at 675.

<sup>151</sup> Compare *Perris*, 99 U.S. at 675–76 (emphasizing the commonality of map legends), with *Baker*, 101 U.S. at 100–01 (focusing on the plaintiff’s system of book-keeping rather than the preamble of the plaintiff’s book).

*Corp. v. Borland International*, when facing the question of whether the copying of the menus from the spreadsheet program “Lotus 1-2-3” into Borland’s spreadsheet application constituted copyright infringement, the Court specifically rejected *Baker* as being a relevant precedent despite Borland’s “vigorous” arguments in favor of its applicability.<sup>152</sup> However, the Court noted that “unlike *Selden*, Lotus does not claim to have a monopoly over its accounting system,” it only claimed “the commands it uses to operate the computer.”<sup>153</sup> With *Perris*, on the other hand, the work claimed for copyright was a table of symbols and colors (or, put another way, commands), and the use of those symbols in using a creative work for which infringement was not claimed (the map itself).<sup>154</sup> It is not clear why the Court did not cite *Perris*, but it likely was not even suggested. On appeal of the case to the United States Supreme Court, after succeeding under more recent case law in the First Circuit, Borland’s merits brief devoted an entire subsection to *Baker v. Selden* and cited it extensively elsewhere—yet it does not even mention *Perris v. Hexamer*.<sup>155</sup>

Perhaps the most direct analogy of *Perris* in a computer context is a high-stakes case that remains ongoing despite several decisions—*Oracle v. Google*.<sup>156</sup> In that case, the copyright issue

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<sup>152</sup> 49 F.3d 807, 813–14 (1st Cir. 1995) (“Borland even supplied th[e] court with a video that, with special effects, show[ed] *Selden*’s paper forms ‘melting’ into a computer screen and transforming into Lotus 1-2-3.”).

<sup>153</sup> *Lotus Dev. Corp.*, 49 F.3d at 814.

<sup>154</sup> *See Perris*, 99 U.S. at 675.

<sup>155</sup> *See* Brief for Respondent at 56, *Lotus*, 49 F.3d 807 (No. 93-2003). The Supreme Court affirmed per curiam without an opinion. *See* *Lotus Dev. Corp. v. Borland Int’l*, 516 U.S. 233, 233 (1996) (per curiam). Among those briefs to the Supreme Court, available on Lexis and Westlaw (and thus searchable), the only citation to *Perris v. Hexamer* made to the Supreme Court in a brief in the modern era was by Rural Telephone Service as respondent in their case against Feist Publications, where they cited *Perris* for the proposition that copying phony telephone directory entries constituted copying of a substantial amount of the work. Brief for Respondent at 44, *Feist Publ’ns. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (No. 89-1909).

<sup>156</sup> *See Oracle Am. v. Google*, 750 F.3d 1339, 1356 (Fed. Cir. 2014).

was whether the reuse of class names by Google for the Java programming language infringed Oracle’s copyright in the original Java programming language, where the evidence showed that Google had otherwise written its own version of the programming language from scratch.<sup>157</sup> The analogy to *Perris* is straightforward—in both cases there is a class of defined functions (a table with definitions of map symbols in *Perris*),<sup>158</sup> which are then used as part of a copyrighted work where no infringement is alleged (the programming language in *Oracle*, and the city maps in *Perris*).<sup>159</sup> However, despite the millions upon millions of legal fees and costs spent in this case, there is no indication that anyone has cited *Perris*.<sup>160</sup>

#### V. CONCLUSION: A RESURGENT *PERRIS V. HEXAMER* IN THE TWENTY-FIRST CENTURY?

In 2013, a lawsuit was brought arguing that Madonna’s hit song *Vogue* from 1990 infringed the copyright in the 1983 dance track *Love Break* by The Salsoul Orchestra—specifically that a horn hit sampled from the 1983 song lasting roughly one-fifth of a second constituted infringement.<sup>161</sup> The district court held that the sample was not infringing, and the Ninth Circuit affirmed.<sup>162</sup> In the Ninth Circuit, the Court relied on *Perris v. Hexamer* to reject the rule in the *Bridgeport Music* cases that no amount of copying of a sound recording is permissible, and thus held that there is a de minimis exception to copyright law even for sound

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<sup>157</sup> *Id.*

<sup>158</sup> *See Perris*, 99 U.S. at 675.

<sup>159</sup> *See Oracle Am.*, 750 F.3d. at 1348; *see also Perris*, 99 U.S. at 676.

<sup>160</sup> Joe Mullen, *Google Twists the Knife, Asks for Sanctions Against Oracle Attorney*, ARSTECHNIA (July 4, 2016, 9:30 AM), <https://arstechnica.com/tech-policy/2016/07/following-courtroom-win-google-wants-sanctions-against-oracle-lawyer/> (discussing that Google’s costs in this case alone were \$3.9 million, and legal fees were presumably several times more than that—and that doesn’t even count Oracle’s fees and costs).

<sup>161</sup> *VMG Salsoul v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016).

<sup>162</sup> *VMG Salsoul*, No. CV12-05967BRO(CWx), 2013 U.S. Dist. LEXIS 184127, at \*38 (C.D. Cal. Nov. 18, 2013), *aff’d*, 824 F.3d. at 887.

recordings.<sup>163</sup> This opinion from June 2016 was the first reported citation to *Perris* since 1978, and yet the decision retains its force as a Supreme Court precedent on what is—and is not—copying.<sup>164</sup>

There is no reason why *Perris* should not undergo a similar resurgence in the area of the dichotomy between idea and expression, especially concerning software copyrights. While it has only been sporadically cited and mostly involved copying under the 1831 Copyright Act,<sup>165</sup> *Perris v. Hexamer* offers an approach that is substantially superior to attempting to analogize *Baker v. Selden* to increasingly inapposite factual and legal situations.

#### APPENDIX: THE MAPS AND LEGENDS

The Perris and Hexamer maps are available in multiple places online, most notably through the New York Public Library and Free Library of Philadelphia, respectively.<sup>166</sup> Since the litigation was focused in part on the copying of the legends from the maps, I have included reproductions of the keys at issue below:

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<sup>163</sup> *VMG Salsoul*, 824 F.3d at 880–81.

<sup>164</sup> See Citing References to *Perris v. Hexamer*, *supra* note 3. It isn't clear where the citation to *Perris* came from aside from research by the Court or its clerks. The brief for Madonna does not mention *Perris*. See Brief for Appellee at v–vi, *VMG Salsoul*, 824 F.3d 871 (No. 2:12-CV-05967BRO).

<sup>165</sup> See, e.g., *Munson v. City of N.Y.*, 3 F. 338, 338 (C.C.S.D.N.Y. 1880) (citing *Perris* and addressing a patent dispute from a patent issued 1867). The claims under the revised Hexamer legend from 1872 would be covered by the 1870 Act. See Act of July 8, 1870, Ch. 230, §§ 87–88, 90, 16 Stat. 198, 212–13 (1870).

<sup>166</sup> Search for Perris and Hexamer Maps, N.Y. PUB. LIBRARY DIG. COLLECTION, <https://digitalcollections.nypl.org/> (search “Perris Maps” in search bar); Search for Perris and Hexamer Maps, FREE LIBRARY OF PHILA., <http://www.freelibrary.org/> (search “Hexamer” or “Perris”; click “map” on the left).

<b>SPECIALLY HAZARDOUS</b>		
<p><b>Brick or Stone Stores.</b></p> <p><input type="checkbox"/> First class</p> <p><input type="checkbox"/> Second class</p> <p><input type="checkbox"/> Third class</p> <p><b>Brick or Stone dwellings</b></p> <p><input type="checkbox"/> First class (Slate or metal roof &amp; coped)</p> <p><input type="checkbox"/> Second class (Slate or metal roof not coped)</p> <p><input type="checkbox"/> Third class (Slate &amp; shingle roof)</p> <p><input type="checkbox"/> Fourth class (Shingle roof)</p> <p><b>With Stores under</b></p> <p><input type="checkbox"/> First class (Slate or metal roof &amp; coped)</p> <p><input type="checkbox"/> Second class (Slate or metal roof not coped)</p> <p><input type="checkbox"/> Third class (Slate &amp; shingle roof)</p> <p><input type="checkbox"/> Fourth class (Shingle roof)</p> <p><input type="checkbox"/> Framed dwellings</p> <p><input type="checkbox"/> Framed dwellings with stores under</p>	<p><input type="checkbox"/> Brick <b>FIRST CLASS</b> <input type="checkbox"/> Framed</p> <p>Bakers</p> <p>Boat builders</p> <p>Brewers</p> <p>Brush manufactories</p> <p>Comb makers</p> <p>Copper Smith, with forges</p> <p>Ryers</p> <p>Floor cloth manufactories</p> <p>Hat manufactories</p> <p>Malt houses</p> <p>Oil manufactories</p> <p>Oil cloth manufactories</p> <p>Private Stables</p> <p>Tobacco manufactories</p> <p>Type and Stereotype foundries</p> <p>Wheelwrights</p> <p><input type="checkbox"/> Brick <b>SECOND CLASS</b> <input type="checkbox"/> Framed</p> <p>Book binders</p> <p>Brass foundries</p> <p>Coach makers</p> <p>Cotton presses and Cotton mills</p> <p>Iron foundries</p> <p>Livery Stables</p> <p>Paper mills</p> <p>Printers of books and Job printers</p> <p><input type="checkbox"/> Brick <b>THIRD CLASS</b> <input type="checkbox"/> Framed</p> <p>Blind and Sash makers</p> <p>Bleaching works</p> <p>Cabinet makers work shops</p> <p>Carpenters shops</p> <p>Candle makers</p> <p>Chair makers work shops</p> <p>Distillers</p>	<p><b>THIRD CLASS CONTINUED</b></p> <p>Gas manufactories</p> <p>Flour mills</p> <p>Ink makers (Printers ink)</p> <p>India rubber or gutta percha manufactories</p> <p>Lamp black &amp; ivory black manufactories</p> <p>Looking glass and Picture frame makers</p> <p>Musical instrument makers</p> <p>Omnibus stables</p> <p>Organ makers</p> <p>Piano forte makers</p> <p>Rectifiers of Liquors by fire heat</p> <p>Soap makers</p> <p>Tallow melters or chandlers</p> <p>Wool mills</p> <p><input type="checkbox"/> Brick <b>FOURTH CLASS</b> <input type="checkbox"/> Framed</p> <p>Brimstone works</p> <p>Camphene or spirit gas manufactories</p> <p>Coffee and spice mills</p> <p>Chemical laboratories</p> <p>Drug and spice mills</p> <p>Five work manufactories</p> <p>Match manufactories</p> <p>Planing, grooving or moulding mills</p> <p>Rope and Cordage makers</p> <p>Saw mills</p> <p>Sugar refineries</p> <p>Tar boiling houses</p> <p>Turpentine distilleries</p> <p>Varnish makers</p>
		<p><input type="checkbox"/> Extensions with skylight</p> <p><input type="checkbox"/> Skylights lighting more than the top floor</p> <p><input type="checkbox"/> Skylights lighting the top floor only</p> <p><input type="checkbox"/> Boilers of steam engines</p> <p><input type="checkbox"/> Smoke houses</p> <p><input type="checkbox"/> Retorts</p> <p><input type="checkbox"/> Outbuildings</p> <p><input type="checkbox"/> Buildings communicating</p> <p>Skylights less than 3 feet square generally omitted.</p>

Figure 1<sup>167</sup>

<sup>167</sup> This is the legend from the title page of the 1855 Maps of the City of New York First, Second, Third, & Fourth Ward, by William Perris, which Ernest Hexamer would have worked on. William Perris, Maps of the City of New York: Volume 2 Index Map (on file with The N.Y. Pub. Library Digital Collections), <https://digitalcollections.nypl.org/items/510d47e0-bfd7-a3d9-e040-e00a18064a99> (last visited Oct. 6, 2017).

<b>SPECIALLY HAZARDOUS</b>		
<p>Brick or Stone Stores</p> <p><input type="checkbox"/> First class</p> <p><input type="checkbox"/> Second class</p> <p><input type="checkbox"/> Third class</p> <p><input type="checkbox"/> Fourth class</p> <p>Brick or Stone dwellings</p> <p><input type="checkbox"/> First class (Slate or metal roof &amp; coped)</p> <p><input type="checkbox"/> Second class (Slate or metal roof not coped)</p> <p><input type="checkbox"/> Third class (Slate &amp; shingle roof)</p> <p><input type="checkbox"/> Fourth class (Shingle roof)</p> <p>With Stores under</p> <p><input type="checkbox"/> First class (Slate or metal roof &amp; coped)</p> <p><input type="checkbox"/> Second class (Slate or metal roof not coped)</p> <p><input type="checkbox"/> Third class (Slate &amp; shingle roof)</p> <p><input type="checkbox"/> Fourth class (Shingle roof)</p> <p><input type="checkbox"/> Framed dwellings</p> <p><input type="checkbox"/> Framed dwellings with stores under</p>	<p><input type="checkbox"/> Brick <b>FIRST CLASS</b> <input type="checkbox"/> Framed</p> <p>Bakers</p> <p>Boat builders</p> <p>Brewers</p> <p>Brush manufactories</p> <p>Comb makers</p> <p>Copper Smith, with forges</p> <p>Dyers</p> <p>Floor cloth manufactories</p> <p>Hat manufactories</p> <p>Malt houses</p> <p>Oil manufactories</p> <p>Oil cloth manufactories</p> <p>Private Stables</p> <p>Tobacco manufactories</p> <p>Type &amp; Stereotype foundries</p> <p>Wheelwrights</p> <p><input type="checkbox"/> Brick <b>SECOND CLASS</b> <input type="checkbox"/> Framed</p> <p>Book binders</p> <p>Brass foundries</p> <p>Coach makers</p> <p>Cotton presses &amp; Cotton mills</p> <p>Iron foundries</p> <p>Livery Stables</p> <p>Paper mills</p> <p>Printers of books &amp; Job printers</p> <p><input type="checkbox"/> Brick <b>THIRD CLASS</b> <input type="checkbox"/> Framed</p> <p>Blind &amp; Sash makers</p> <p>Blanching works</p> <p>Cabinet makers work shops</p> <p>Carpenters Shops</p> <p>Candle makers</p> <p>Chair makers work shops</p> <p>Distillers</p>	<p><input type="checkbox"/> Buildings 3 stories high</p> <p><input type="checkbox"/> Extensions with skylight</p> <p><input type="checkbox"/> Skylights lighting more than the top floor</p> <p><input type="checkbox"/> Skylights lighting the top floor only</p> <p><input type="checkbox"/> Boilers of steam engines</p> <p><input type="checkbox"/> Smoke houses</p> <p><input type="checkbox"/> Retorts</p> <p><input type="checkbox"/> Outbuildings</p> <p><input type="checkbox"/> Buildings communicating</p> <p>Skylights less than 3 feet square generally omitted.</p>
	<p><b>THIRD CLASS CONTINUED</b></p> <p>Gas manufactories</p> <p>Flour mills</p> <p>Ink makers (Printers ink)</p> <p>India rubber or gutta percha manufactories</p> <p>Lamp black &amp; ivory black manufactories</p> <p>Looking glass &amp; Picture frame makers</p> <p>Musical instrument makers</p> <p>Omnibus stables</p> <p>Organ makers</p> <p>Pianoforte makers</p> <p>Rectifiers of liquors by fire heat</p> <p>Soap makers</p> <p>Tallow melters or chandlers</p> <p>Wool mills</p> <p><input type="checkbox"/> Brick <b>FOURTH CLASS</b> <input type="checkbox"/> Framed</p> <p>Brinstone works</p> <p>Lamp-glass or spirit gas manufactories</p> <p>Coffee &amp; spice mills</p> <p>Chemical laboratories</p> <p>Drug &amp; spice mills</p> <p>Fire work manufactories</p> <p>Match manufactories</p> <p>Planing, grooving or moulding mills</p> <p>Rope &amp; Cordage makers</p> <p>Saw mills</p> <p>Sugar refineries</p> <p>Tur-boiling houses</p> <p>Turpentine distilleries</p> <p>Varnish makers</p>	

Figure 2<sup>168</sup>

<sup>168</sup> This is the legend from Maps of the City of Philadelphia, published in 1860 by Hexamer and Lochner, available at <https://libwww.freelibrary.org/digital/item/MHXLBH00001>. It is an obvious copy of the legend from the Perris map with a listing for three-story buildings awkwardly added on the top right. Subsequent editions of the Hexamer maps utilized a modified version of this system, and have a key on each plate instead of one key at the beginning of the volume, eliminating a claim of direct copying and limiting the issue to one of copying the system.