Should Copyright Protect Evaluative Tools?

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Professor Field doubts that medical instruments and tools are copyrightable regardless of discipline or form.

Last April, in *Copyright Protection for Written Examinations* I noted long-felt skepticism about the copyrightability of standardized exams used to evaluate scholastic or professional capacity. An equally significant related issue was recently addressed by John Newman and Robin Feldman: "For three decades after its publication, in 1975, the Mini–Mental State Examination (MMSE) was widely distributed in textbooks, pocket guides, and Web sites and memorized by countless residents and medical students. The simplicity and ubiquity of this 30-item screening test… made it the de facto standard for cognitive screening. …. In 2000, its authors… began taking steps to enforce their rights," *Copyright and Open Access at the Bedside*, 365 N.Eng. J.Med. 2447 (Dec. 29, 2011) (Newman and Feldman). Consequently, "The MMSE form is gradually disappearing from textbooks, Web sites, and clinical tool kits." *Id*. at 1248. Moreover, "The Sweet 16," an apparently simplified protocol developed at Harvard and distributed for free non-profit use, has been withdrawn following a claim of infringement." *Id*. *See also* a remaining brief discussion of the Sweet 16 and an announcement of its withdrawal.

Newman and Feldman see the action taken to halt use of the Sweet 16 to be "unprecedented for a bedside clinical assessment tool, [and to have] sent a chill through the academic community." *Id*. at 2448. Finding it to be a potential "harbinger of more to come," they worry that other clinical tools "might be pulled back behind a wall of active copyright enforcement by the authors or their heirs." *Id*. To forestall that, they argue, at

2449, that reproduction and use of such things should be governed by licenses of the type advocated by Creative Commons.

Indeed, prior to withdrawal, its authors noted: “The Sweet 16 is a copyrighted *instrument*. It can be used free of charge only by *nonprofit* organizations and educational institutions (such as universities). All uses of the Sweet 16, including any reproduction, presentation or publication must include the following [copyright notice].” *See* previously cited discussion webpage (emphasis added).

But demand for any license presumes the existence and enforceability of copyright. Regarding enforceability, if not also existence, consider the “clear clinical benefit to using well-tested, well-validated, continually improved clinical tools in complex patient care — as demonstrated by the MMSE's use before 2000.” Newman and Feldman, at 2449 (emphasis added). Should the MMSE’s authors be permitted to wait 25 years until others have tested, further validated and indeed made their tool a standard before asserting rights?

More fundamentally, terms like “instrument” and “tool” spark concern about the appropriateness of the MMSE for copyright protection. The reasons given in Baker v. Selden, 101 U.S. 99 (1879), for refusing to recognize copyright as a basis for protecting a book keeping system are compelling. “The very object of publishing a book… is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.” *Id*. at 103. Elaborating, *Baker* says, “The *description of the art* in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured

at all, by letters-patent." *Id*. at 105 (emphasis added).

The initial publication of what is now known as the MMSE, begins, "Examination of the mental state is essential in evaluating psychiatric patients," and concludes, "When given to 69 patients… [t]he Mini-Mental Status was useful in quantitatively estimating the severity of cognitive impairment, in serially documenting cognitive change, and in teaching residents a method of cognitive assessment." Marshal F. Folstein, Susan E. Folstein and Paul R. Mchugh, *"Mini-Mental State" A Practical Method for Grading the Cognitive State of Patients for the Clinician*, 12 J. Psychiat. Res. 189, 196 (1975). Its text and instructions are also provided; *id*. at 196-98. As seen from the perspective of *Baker*, the MMSE *is* the art; it *describes* nothing; its object is *use*, not explanation.

The statute essentially codifies *Baker*: "In no case does copyright protection… extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, *regardless of the form* in which it is… embodied in such work." 17 U.S.C. § 102(b). That a diagnostic protocol is text-based offers no reason to find it copyrightable.

Consider also the merger doctrine. Justifications were well articulated in Morrissey v. The Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967). Addressing the rules for a game, *Morrissey* says, "When the uncopyrightable subject matter is very narrow, so that 'the topic necessarily requires,' if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter." (citations, including *Baker,* omitted.) Indeed, it seems doubtful that the language of the MMSE could be substantially altered without compromising its clinical utility. Yet it also apparently forced withdrawal of the

Sweet 16.

Students have long assumed that the last quoted sentence from *Baker* signaled patentable subject matter. Only recently, however, has the patentability of business methods and diagnostic protocols been seriously entertained. As most readers will know, many medical professionals oppose patentability of the latter in particular based on a belief that “[r]estrictive licensing of such basic tools wastes resources, prevents standardization, and detracts from efforts to improve patient care.” Newman and Feldman at 2449. Others may disagree about the desirability of protection, but such protection “can only be secured, if it can be secured at all, by letters-patent.” *Baker*, 101 U.S. at 105.