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## **ARE WE READY TO ANSWER THE QUESTION?: BAKER V. SELDEN, THE POST-FEIST ERA, AND DATABASE PROTECTIONS**

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### SUMMARY:

... Feist, however, did not solve the problems that the courts seem to have in deciding whether to provide copyright protection for certain databases. ... There is no doubt that databases can fall within the scope of copyright protection. ... Often, those who deny copyright protection to databases do so because the mode of arranging facts is a procedure, process, system, or method of operation, all of which, even if original, are not given protection under the Copyright Act. ... In Feist, the question arose about what degree of creativity was necessary to justify copyright protection for a directory of telephone numbers. ... In CDN, the issue concerned a wholesale coin price guide and the question of whether the guide contained sufficient originality to merit copyright protection. ... "Subject matter created by and original to the author merits copyright protection. ... The section states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. ... Thus we see the increase in the desire to protect databases, the collection of factual material for databases, and database content. ...

### TEXT:

#### I. INTRODUCTION

Feist Publications, Inc. v. Rural Telephone Service Co. n1 has been lauded as one of the preeminent copyright cases of the twentieth-century. n2 There can be no doubt that Feist changed the way we examine copyrightability, particularly in the area of database protection. In Feist, the Supreme Court changed the traditional examination of copyrightability for databases from a "sweat-of-the-brow" theory, to one of originality. n3 It does not matter how much work has been employed to create a database; what matters is whether there is a minimal level of creativity evident in the database. n4 Feist, however, did not solve the problems that the courts seem to have in deciding whether to provide copyright protection for certain databases. n5 Feist addressed part of the question the courts grapple with - whether originality can exist in a database - but not the second part of the question - if originality does exist, can certain databases be excluded from protection under section 102(b) of the 1976 Copyright Act?

This article attempts to address precisely this question in the context of database protection. There is no doubt that databases can fall within the scope of copyright protection. n6 Such protection is not for the facts/data included within the database per se, n7 but rather for the creative arrangement, selection, or coordination of the facts/data. n8 Since Feist, the courts continue to struggle with defining originality as it relates to databases. The courts have split into two differing views: one view finds any originality in a database sufficient to warrant protection, while the alternate view rarely affords protection for a database. n9 Often, those who deny copyright protection to databases do so because the mode of arranging facts is a procedure, process, system, or method of operation, all of which, even if original, are not given protection under the Copyright Act. n10

Part I of this article focuses on the Feist decision itself. In addition, an examination of two representative post-Feist cases dealing with databases is made, with particular attention paid to the language used in denying or granting copyrightability based on originality. Part II takes a step back from Feist and examines the 1879 Supreme Court decision in Baker v. Selden. n11 This section examines the definitions given in Baker as they relate to 'systems' and 'methods,' as well as the question raised by the Court as to whether the subject matter of the case was more appropriate for patenting than for copyrighting. n12 In addition, this section examines the question of why Baker has largely been ignored for so long.

Various courts have used several words interchangeably when discussing databases. Part III examines whether or not there is consistency in defining these words. Often the courts have not provided any clarification of the way in which words describing databases are used. Thus, the words are examined by comparing their respective definitions from three different sources: The Oxford English Dictionary, Webster's Third New International Dictionary of the English Language Unabridged, and Black's Law Dictionary. Part IV examines why these definitions are important and how, historically, courts have tended to overextend intellectual property rights for a few, to the detriment of others. Also, Part IV focuses on whether the extension of such rights, post-Feist, can be consistent with the Baker decision.

Finally, this article argues that Feist and Baker together make up the analysis that a court must undergo to determine copyrightability, and concludes that there is a point at

which works will not be afforded copyright protection, regardless of how much work or creativity has gone into their creation.

## II. FEIST

### A. Background

Historically, compilations were protected by some courts under the "sweat of the brow" theory. n13 In 1991, however, the Supreme Court made it clear that "sweat of the brow" was, in fact, not the proper mode of analysis in determining the copyrightability of a compilation; rather, the proper question was one of originality. n14

In Feist, the question arose about what degree of creativity was necessary to justify copyright protection for a directory of telephone numbers. n15 Rural Telephone Service was a public utility that had compiled a list of all its subscribers, which it was required by state regulation to publish. n16 Because Rural provided phone service to its subscribers, Rural readily had all of the subscribers' information (names, addresses, and telephone numbers). n17

Feist Publications was creating a telephone directory that would encompass a large geographic area and include subscribers of several different telephone services. n18 Feist licensed the right to use the lists of subscribers from several different telephone services, however Rural refused to license its list to Feist. n19 Feist, even without Rural's permission, went ahead and copied the listings from Rural's directory anyway. n20 Rural retaliated by suing Feist for copyright infringement. n21

The district court granted summary judgment for Rural, n22 and the Tenth Circuit affirmed. n23 Both courts believed that telephone directories had traditionally been protected as copyrightable subject matter. n24 The Supreme Court, however, reversed this decision. n25 Simply because telephone directories had been copyrightable in the past, did not mean that they were copyrightable per se. n26 An examination as to authorship, and thus originality, needed to be undertaken. n27

The problem, as the Court saw it, concerned:

the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. . . . The most fundamental axiom of copyright law is that "no author may copyright his ideas or the facts he narrates." . . . At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. . . . Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope. n28

The Court believed that the key to answering this quandary lay in an understanding of why facts are not copyrightable. n29 For something to be original, there must be "independent creation plus a modicum of creativity." n30 Thus, for something to be original, it must be the result of an author's independent creation. Facts, by definition, are not independently created. Facts, the Court explains, are the result of discovery by an

individual, rather than creation by an individual. n31 Facts are a part of the public domain and, thus, are not copyrightable. n32

However, this is not to say that original compilations of facts cannot be copyrighted. n33 If there is sufficient originality in the selection or arrangement of the facts, then protection can extend to the selection or arrangement itself, leaving the facts themselves unprotected. n34 "No matter how original the format, however, the facts themselves do not become original through association." n35 According to the Court, this principle reflects the policy behind copyrights; namely, that copyrights are not intended to reward authors, but instead are intended to promote the introduction of new arts/works to the community at large. n36

This principle encourages authors to create and release new works to the public, but it also encourages others to build upon the ideas that previous authors have already contributed to the public domain. n37 The Court then examined the issue of the idea/expression doctrine, stating that section 102(b) deals, for all practical purposes, with the "idea" portion of the doctrine, while section 102(a) is the section that spells out the "expression" portion of the doctrine. n38 The Court interpreted Congress's separation of the two parts of the doctrine, in relation to compilations, by stating that if facts are selected, arranged or coordinated "in such a way," the arrangement can sometimes be considered an original work. n39 However, sometimes the arrangement will not amount to an original work. n40 "Arrangement," the Court warns, cannot be a means of making copyright a tool by which an author can prevent others from using the facts or data that are contained within a copyrighted work. n41

The Court then examined its doctrine in the context of Rural's white pages and determined that Feist had taken a substantial amount of factual information from Rural's directory. n42 The question, however, was whether Feist had copied those elements that made the work original. n43 The data that Feist took consisted of telephone numbers, names, and addresses - factual information that could not be deemed to be an independent creation of the author. n44 Thus, the Court had to examine whether the way in which the directory was arranged evidenced sufficient originality to protect it. n45 The Court found that it did not. n46 "There is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. . . . It is not only unoriginal, it is practically inevitable." n47

#### B. Splits in the Court

Feist dramatically changed the way the lower courts examined the copyrightability of materials with regards to originality. An original work of fiction, though it may contain age-old ideas of the story, was protected as its expression was original. However, this was not the issue in Feist. The issue in Feist became what amount of originality was necessary in arranging a compilation in order to make the compilation eligible for copyright protection. n48

The courts seem to have split into two main modes of analysis. There are some courts that seem to examine the arrangement and find originality in the very minutiae of selection. n49 Other courts appear to deny protections altogether, unable to think of a case in which protection could, or should, be afforded to a factual compilation. n50

## 1. CDN, Inc. v. Kapes

In *CDN, Inc. v. Kapes*,<sup>n51</sup> the United States Court of Appeals for the Ninth Circuit was faced with many of the same questions that the Feist Court faced. In *CDN*, the issue concerned a wholesale coin price guide and the question of whether the guide contained sufficient originality to merit copyright protection.<sup>n52</sup>

Kenneth Kapes, an operator of a coin business, developed a compilation of coin prices, which he listed on the Internet.<sup>n53</sup> The prices of the coins were created by a computer program that Kapes developed to create retail prices from wholesale prices.<sup>n54</sup> *CDN, Inc.* published a weekly report of wholesale prices for coins, entitled the *Coin Dealer Newsletter*, that included the prices for virtually every collectible coin.<sup>n55</sup> The *Coin Dealer Newsletter* is widely used by dealers in the market.<sup>n56</sup> Although the exact process of Kapes' computer program was unknown, Kapes acknowledged using *CDN's* wholesale price lists.<sup>n57</sup>

*CDN* filed a complaint against Kapes, alleging copyright infringement, claiming that Kapes had used *CDN's* prices as a baseline to arrive at the retail prices that Kapes listed on the Internet.<sup>n58</sup> Kapes argued that although there was some original copyrightable material in the wholesale price guide, he did not actually copy any of it.<sup>n59</sup> The parties agreed to waive a trial and stipulate that the dispositive issue for the court was whether the prices listed in *CDN's* wholesale price guide were copyrightable subject matter under section 102 of the 1976 Copyright Act.<sup>n60</sup> The district court found that *CDN's* prices were original creations, not uncopyrightable facts.<sup>n61</sup> Kapes then appealed.<sup>n62</sup>

On appeal, the circuit court affirmed the lower court's holding.<sup>n63</sup> The court looked to the purpose behind sections 102(a) and 103.<sup>n64</sup> In doing so, the court addressed the problem with copyrighting facts/ideas.<sup>n65</sup> "Subject matter created by and original to the author merits copyright protection. Items not original to the author, i.e., not the product of his creativity, are facts and, as such, are not copyrightable."<sup>n66</sup> To provide some reinforcement for this statement, the court looked to *Feist*.<sup>n67</sup>

In *Feist*, the Court examined the selection and arrangement of the facts to determine originality.<sup>n68</sup> In *CDN*, the circuit court recognized that the issue was not whether the selection and arrangement was original, but was rather whether the prices themselves were original.<sup>n69</sup> Therefore, the court felt Kapes's argument that the selection was obvious or dictated by the coin industry standards was irrelevant to the discussion.<sup>n70</sup>

The court then examined what *CDN, Inc.* does to determine the prices of the various coins.<sup>n71</sup>

*CDN's* process to arrive at wholesale prices begins with examining the major coin publications to find relevant retail price information. . . .

*CDN* also reviews the online networks for the bid and ask prices posted by dealers. . . . *CDN* does not republish data from another source or apply a set formula or rule to generate prices. . . .

That this process takes much time and effort is wholly irrelevant to whether the end product of this work is copyrightable. . . .

"Copyright rewards originality, not effort." . . . To arrive at . . . an estimate, CDN employs the process described above that satisfies the "minimal degree of creativity" demanded by the Constitution for copyright protection. This is not a process that is "so mechanical or routine as to require no creativity whatsoever."

. . . .

What is important is the fact that . . . CDN arrives at the prices they list through a process that involves using their judgment to distill and extrapolate from factual data. It is simply not a process through which they discover a preexisting historical fact, but rather a process by which they create a price which, in their best judgment, represents the value of an item as closely as possible. If CDN merely listed historical facts of actual transactions, the guides would be long, cumbersome, and of little use to anyone. . . . This process imbues the prices listed with sufficient creativity and originality to make them copyrightable. n72

It is interesting to note that after examining this way of determining prices, the court looks at the idea/expression question. n73 In doing so, however, the court expressed its frustrations with the idea/expression doctrine. n74 While calling the idea/expression doctrine a "venerable principle of copyright law," the court also seems to believe the idea/expression doctrine is problematic to copyright law. n75

"When the 'idea' and its 'expression' are thus inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by the patent law." But accepting the principle in all cases, including on these facts, would eviscerate the protection of the copyright law. n76

The court briefly examined *17 U.S.C. section 102(b)* and the case of *Baker v. Selden* by simply stating, "Ideas, like facts, are not entitled to copyright." n77

## 2. *Warren Publishing, Inc. v. Microdos Data Corp.*

In *Warren Publishing, Inc. v. Microdos Data Corp.*, n78 the court seems to examine the same issue as CDN, but from a different angle. Where courts that follow CDN would determine ways in which copyright protection could be provided, the Warren court and its progeny would avoid providing copyright protection altogether. In Warren, the Eleventh Circuit seems to have found the place to draw its line for copyrightability.

*Warren Publishing, Inc.* annually compiles and publishes a printed directory called the *Television & Cable Factbook*. n79 This directory contains information on cable systems, i.e., the number of subscribers, the number of channels offered, and the type of equipment the cable system operators employ. n80 In the directory, *Warren Publishing* claims it makes a determination as to what community is considered the principal community served by each cable system operator, and then prints all its data under that principal community alone. n81

Microdos' program, also a compilation of facts about cable systems, comes in a software package separated into three databases. n82 Warren filed suit against Microdos, alleging copyright infringement, as well as unfair competition. n83 The district court found that the principal community system used by Warren was "sufficiently creative and original to be copyrightable," n84 and therefore granted summary judgment to Warren on that issue, and also enjoined Microdos from violating Warren's copyright. n85 Microdos appealed this interlocutory order. n86

The appellate court in Warren, unlike the appellate court in *CDN*, was not amenable to applying protections to Warren's database so it vacated and remanded the case. n87 The appellate court in Warren, like the *CDN* and *Feist* courts, also focused on the question of whether the compilation, in its selection, coordination or arrangement, had the requisite originality present to make it copyrightable. n88

The appellate court in Warren looked at section 102(b) of the Copyright Act and determined that section 102(b) was a limiting principle on section 102(a). n89 In refuting the dissent's contention that 102(b) is not a limiting principle, but rather a codification of the idea/expression doctrine best understood to simply mean that facts could not be copyrighted, the court said:

The dissent takes exception to the characterization of section 102(b) as a "limiting principle." The dissent attempts to support this argument by making the unarguable points that section 102(b) is a codification of the idea/expression dichotomy and that use of the term "idea, procedure, process, system, method of operation, concept, principle or discovery" to characterize expression does not itself preclude copyrightability. Even given these unarguable points, Section 102(b), nonetheless, is a limiting principle and is "universally understood to prohibit any copyright in facts." Of course, section 102(b) does more than prohibit facts from being copyrighted; it emphasizes that copyright protection does not extend to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries. Thus, if the expression is characterized as a "system," for example, it is not copyrightable if the characterization is accurate. n90

The appellate court is concerned that, although the district court concluded that Warren's "system" of selection was indeed a system, it still granted Warren copyright protection, ignoring section 102(b). n91

The district court determined that Warren's original selection, entitling it to copyright protection, was that it had contacted the cable operators to determine which community was considered the lead community within the cable operator's system. n92 The appellate court disagrees that this can be sufficient because "these acts are not acts of authorship, but techniques for the discovery of facts." n93 Again, while the appellate court seems concerned with whether or not the way Warren gathered information could be considered a process, procedure, method of operation, or system, the court comes back to the question of whether or not the end result is a fact, or an original work of authorship. n94 At no point does this court attempt to define what makes something a process so that it

falls within the purview of section 102(b). The closest definition of "process" provided by this court is "techniques for the discovery of facts." n95

### 3. Insufficiency of Any 'Standard' for Database Protection

The question, then, is why are the courts still having problems applying the law to compilations? Why, after Feist and all that the decision implies, do we still have a split in the courts? Feist steadfastly held that copyright protection could be found in the arrangement of facts, as long as there was a modicum of originality in the arrangement. n96 How then, can the courts interpret this determination so differently? If the only real question, as may be interpreted from the post-Feist definitions, is whether something is a fact or not, why are the courts still reaching different holdings about the issue? The answer may lie in a case that is over a century old, and which has often been relegated to a footnote regarding the idea/expression dichotomy.

## III. BAKER V. SELDEN

### A. Background

In 1859, Charles Selden obtained a copyright for his book, Selden's Condensed Ledger, or Book-keeping Simplified, which dealt with a new form of book-keeping. n97 In 1860 and 1861, Selden was able to obtain copyrights for several other books which improved upon his system of book-keeping. n98 Selden filed an action against a Mr. Baker, claiming that Baker had infringed Selden's copyright in the book-keeping system by using a plan similar to Selden's. n99 The court found for Selden, and Baker appealed to the Supreme Court. n100

The Court, in examining whether Baker infringed Selden's copyright, initially focused on the work in question itself.

The book or series of books of which the complainant claims the copyright consists of an introductory essay explaining the system of bookkeeping referred to . . . . This system effects the same results as book-keeping by double entry; but, by a peculiar arrangement of columns and headings, presents the entire operation, of a day, a week, or a month, on a single page . . . . The defendant uses a similar plan so far as results are concerned; but makes a different arrangement of the columns, and uses different headings. n101

The Court appeared more interested in delineating those parts of the work that are a system or method, and those parts that are considered an arrangement of this method. n102

This distinction is important for the Court to define in the beginning of its analysis because the real question that the Court wants to ask is, "whether the exclusive property in a system of book-keeping can be claimed, under the law of copyright, by means of a book in which that system is explained." n103 The conclusion of the Court was that it could not. n104 The Court states that to protect the system explained in the book with a copyright would, in essence, be to extend the boundaries of copyright itself, blurring the

lines between copyright and patent. n105 How then, can one determine where this line is; a line where copyright ends and patent, or other protections or lack thereof, begin?

### 1. Use v. Explanation Dichotomy Idea v. Expression

The Baker Court identified a line from which one can determine copyrightability at its lowest level; either a 'method of operation' or a 'method of statement.' n106 If the work is a 'method of operation,' it may not be copyrightable, while a 'method of statement' may be copyrightable. n107 How the court defines these two concepts is important.

'Method of operation' indicates a 'system' or 'function' that is an integral part of the work itself. n108 To provide protection for a 'method of operation' would be to possibly grant a monopoly right to an individual. The Court seems to indicate that a 'method of operation' concerns the use of an idea. n109 Protecting the use of an idea is much more restrictive in nature and, thus, is delineated to the field of patents. n110

Patents provide more expansive protection than copyrights, n111 however the duration of patents is shorter than copyrights, n112 because of the necessity to allow society to grow from the introduction of the work to the public. In addition, patents ensure that something is new before patent protection is provided for an invention. n113 For the very reason that we want these inventions introduced into the public, we provide such protections.

By its very nature, copyright is not intended as a reward for putting effort into a work, but rather as a reward for the creativity put into a work. This creativity is important to the encouragement and learning of society as a whole. The exclusion for 'methods of operation,' then, makes sense. "The very object of publishing a book on science or the useful arts 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." n114 The 'method of operation,' thus, must fall within patent's area of protection, rather than copyright's. n115

'Method of statement' indicates an expression unique to the work/author. n116 It is precisely this type of work that can be copyrighted under the Baker holding. n117 The 'method of statement' is defined by the Court as the means by which one takes an idea and puts that idea forth to the public, not, as with the 'method of operation,' the means by which one may implement the idea. n118

This is why Selden's book was copyrightable. The explanation of the process of his accounting system fully falls within copyright's protections. n119 Selden can keep others from expressing, in his exact words, how to use the system he has devised. n120 He cannot, however, keep individuals from actually using the system. n121 The expression is protected precisely because it allows the individual to determine how to use the system he has created. n122 Copyright affords protection because society learns from Selden's accounting principles, through the expression of his idea. n123

### B. Reactions to Baker

Baker v. Selden has not always been considered a ground breaking case in terms of precedence, n124 and it has rarely been discussed in much detail. n125 Baker is often cited in connection with discussions of section 102(b), n126 or when a court wants to

discuss the idea versus expression dilemma. n127 Some have even dismissed Baker as a minor event in the scheme of the development of copyright law. n128

One of the most outspoken proponents of minimizing Baker's effects is Melville B. Nimmer. In Baker, "the Supreme Court enunciated a rule with respect to works the function of which is solely or primarily utilitarian." n129 This limited reading of Baker cannot, in the context of the case itself, be correct. The Baker Court did not appear to hold that copyright would not protect a work that is solely utilitarian. Instead, the Baker Court seemed to imply that the utilitarian aspects of any work (i.e., those things that allow one to use the idea) are not copyrightable.

Nimmer's reading, however, has often been used by the courts, especially in the post-Feist era. n130

By examining in detail the concepts presented in these cases, as well as their definitions, we may be able to understand why database protection cannot simply be classified based on the use of the term "originality." Instead, maybe the focus should be on what aspect of the work itself requires protection, regardless of whether originality is present.

#### IV. DEFINITIONS

Many terms are used in the case law, as well as in legislation, that consistently appear when one is discussing compilations or databases.

These terms include: arrangement; method; operation; procedure; process; statement; and system. However, these terms have often been used interchangeably. In other words, they have been used to define one concept in one instance, and used to define a seemingly opposite concept in another.

Each of these words, though linked in some ways, can have many varied definitions depending on the particular situation. While the courts do not appear to set definitions for these words in stone, they do appear to imply very narrow meanings when they use them. This may be a mistake. As can be seen in each of the definitions that follow, n131 their application could be used in numerous ways.

##### A. Section 102(b) of the Copyright Act of 1976

Section 102(b) of the Copyright Act of 1976 sets forth those works that, even if original works of authorship, are never afforded protections. The section states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." n132 Section 102(b) was added to the Copyright Act during the 1976 restructuring. n133 The Copyright Act of 1909 did not include section 102(b), nor any other provision delineating what subject matter could not be copyrighted. n134

Whether, and/or how, the Baker principles were directly responsible for the creation of section 102(b), is widely debated. n135 The legislative record shows that Congress first wrote 102(a), with no mention of section 102(b). n136 Section 102(b) was added after testimony presented by Arthur Miller on the protections for computer programs, while discussing Baker. n137 Arthur Miller was concerned that copyright protection for

computer programs, without the addition of something akin to section 102(b), would be the equivalent of providing patent protection under the rubric of copyright protection. n138 There is no mention of Baker in the legislative history, however the record does state that section 102(b)'s purpose is to "restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged." n139 Additionally, several courts have stated that section 102(b) merely codified Baker. n140

## B. Arrangement

Arrangement n141 is often used by the courts in discussing the copyrightability of databases. In fact, Feist identifies 'arrangement' as one of the factors a court should apply an originality standard to in order to grant copyright protection to databases. n142 Baker also speaks of the "peculiar arrangement" used by authors. n143

The Oxford English Dictionary has defined 'arrangement' as, "the action of arranging or disposing"; "a structure or combination of things arranged in a particular way or for any purpose;" and "the adaptation of a composition for voices or instruments for which it was not originally written." n144 Webster's definition of 'arrangement,' "the act or action of arranging or putting in correct, convenient, or desired order," "the style, manner, or way in which things are arranged," and "a structure or combination of things arranged in a particular way or for a specific purpose," echoes the Oxford definition. n145 Black's Law Dictionary provides no definition of 'arrangement.' n146

These definitions of 'arrangement' are important as each definition emphasizes the style and manner in which things are ordered. The focus of these definitions tends to be more on the expression of the facts, rather than on the use of the facts. This provides some insight into exactly why the Feist Court relied on the use of the word 'arrangement,' but did not define it.

## C. Method

'Method' is another important term to define. 'Method' is used by the Baker Court for both protected and unprotected works (i.e., 'method of operation' and 'method of statement'). n147 Section 102(b) excludes 'methods of operation' from copyrightability, but does not single out 'method' per se. n148 Thus, use of the term 'method' may hold some indication of where a line could be drawn between 'use' and 'expression' when used in connection with 'operation' or 'statement.'

Oxford English Dictionary defines 'method' as, a "procedure for attaining an object." n149 Oxford continues to define 'method' as "the rules and practice proper to a particular art;" "a way of doing anything, esp. according to a defined and regular plan; a mode of procedure in any activity, business, etc.;" "a branch of Logic or Rhetoric which teaches how to arrange thoughts and topics for investigation, exposition, or literary composition;" and "a system; scheme of classification." n150 It is interesting to note the use of the terms 'procedure,' 'process,' and 'system' in section 102(b). n151 It is also interesting to note that 'arrange' is used more in a use-based sense. In other words, a 'method' teaches one how to arrange for either use (investigation) or expression (literary composition).

Webster's follows the Oxford definition of 'method,' defining 'method' as "a procedure or process for attaining an object." n152 Additionally, 'method' can be

classified as "a systematic procedure, technique, or set of rules employed;" "a systematic plan followed in presenting material for instruction;" and "orderly arrangement, development, or classification." n153

Black's Law Dictionary, on the other hand, presents only one way of examining 'method.' Black's states that 'method' is "a mode of organizing, operating, or performing something, esp. to achieve a goal." n154 Black's also indicates a definition of use of the word 'method' in patent law. n155 'Method,' in the patent sense, does not mention 'arrangement' at any point. Additionally, in patent law, 'method' is seen as a placement of things in the "most convenient order." n156

#### D. Operation

'Operation', when added to 'method of,' can be interpreted as giving a strong indication of the unprotectability of a work. Oxford defines 'operation' as the "action, performance, work, deed;" the "manner of working, the way in which anything works." n157 Oxford also defines 'operation' as "a mode of action; an active process, vital or natural." n158 Webster's and Black's follow suit. Webster's defines 'operation' as, "a doing or performing;" "the quality or state of being functional or operative;" and the "capacity for action or functioning." n159

Black's defines 'operation' as the "process of operating or mode of action." n160

Each of these definitions deals specifically with the functionality of something, i.e., the way in which it works. Functionality cannot be copyrighted under section 102(b). n161 This notion has been read into the exclusion of 'methods of operation' in section 102(b), as well as from the decision of *Baker v. Selden*. When the terms 'method' and 'operation' are placed together, it can provide a powerful explanation for denying something copyright protection.

#### E. Procedure

'Procedure' is often found within the definitions for the other terms discussed herein. A 'procedure' is specifically listed within section 102(b) as being excluded from copyright protection, even if the work is original. n162 Again, the definitions provided in each of the three sources are compatible. Oxford defines 'procedure' as "the fact or manner of proceeding with any action, or in any circumstance or situation; a system of proceeding; proceeding, in reference to its mode or method." n163 Oxford goes on to state that 'procedure' is "the fact of proceeding or issuing from a source;" "a set of instructions for performing a specific task;" and "the mode or form of conducting . . . proceedings." n164

The definition is further elaborated upon in Webster's, where 'procedure' is defined as "a particular way of doing or of going about the accomplishment of something." n165 Additionally, Webster's states that a 'procedure' is "a series of steps followed in a regular orderly definite way: method." n166 Black's reaffirms both the Oxford and Webster's definitions by defining a 'procedure' as "a specific method or course of action." n167

#### F. Process

'Process' is another word that is often used interchangeably within the definitions of the other terms found in section 102(b). A 'process' is even explicitly listed in section

102(b). n168 Oxford defines 'process' as "the fact of going on or being carried on, as an action, or a series of actions or events;" "a course or method of operation;" and "a particular method of operation in any manufacture." n169 Webster's and Black's also define 'process' as a "method." n170 Webster's states that a 'process' is "a particular method or system of doing something, producing something, or accomplishing a specific result." n171

Black's defines 'process' as "a series of actions, motions or occurrences." n172 Black's also, however, provides a lengthier definition of the term 'process' as it applies to patent law.

A means or method employed to produce a certain result or effect, or a mode of treatment of given materials to produce a desired result, either by chemical action, by the operation or application of some element or power of nature, or of one substance to another, irrespective of any machine or mechanical device; in this sense a "process" is patentable, though, strictly speaking, it is the art and not the process which is the subject of patent. Broadly speaking, a "process" is a definite combination of new or old elements, ingredients, operations, ways, or means to produce a new, improved or old result, and any substantial change therein by omission, to the same or better result, or by modification or substitution, with different function, to the same or better result, is a new and patentable process. n173

This definition seems to follow the Baker v. Selden concept that a process, or the use of an idea expressed in a copyrighted work, while it may have some original qualities, may fit more within the area of patent protection, than copyright protection. However, it is important to remember that the Black's Law Dictionary definitions are intended to specifically apply definitions to legal concepts and use. Thus, the Black's definition is narrow because of its legal applications.

#### G. Statement

'Statement' is used in coordination with 'method' by the Baker Court as the signifier of when a work is an 'expression,' rather than an 'idea,' and is thus copyrightable. n174 The question, then, is how 'statement' differs from 'operation,' if at all.

'Statement' is defined in Oxford as "the manner in which something is stated;" "a written or oral communication setting forth facts, arguments, demands or the like;" and "a presentation of a subject or theme." n175 In relation to computers, the Oxford definition of 'statement' is "an expression in a program language that specifies some operation or task, corresponding to one or more instructions according to the context and the level of the language." n176 Webster's goes a bit further in providing a definition that could bring a database into the realm of copyright protection by defining 'statement' as "a work of art or a part or an aspect of such a work that expresses most clearly and forcefully a theme, basic idea, or intention of the artist." n177 Finally, Black's defines 'statement' as "an allegation, a declaration of matters of fact." n178

#### H. System

'System' is also used in the language of section 102(b) as a characteristic of a work that cannot be protected by copyright, even if originality exists in the system. n179 Oxford defines 'system' as "an organized or connected group of objects;" "a group of terms, units, or categories, in a paradigmatic relationship to one another;" or a "set of principles, etc.; a scheme, method." n180 Webster's and Black's also use 'method' in defining 'system.'

Webster's defines 'system' as "the body considered as a functional unit;" "a method or design as shown by other acts;" "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose;" and "an organization or network for the collection and distribution of information, news or entertainment." n181 Black's provides an even more basic definition, defining 'system' as an "orderly combination or arrangement, as of particulars, parts, or elements into a whole;" a "methodic arrangement of parts;" and "method." n182

### I. Bringing It All Together

The rich playing field that these definitions open up to the attorney arguing a case, the legislator creating a law, and the courts interpreting the law is amazing. There are many links between some of these terms; the interweaving of the use of 'process' in the definition of 'operation,' for instance. This shows precisely the opposite of what definitions are usually intended to accomplish. These definitions are often used by the courts to prove a scientific point. However, when examined apart from the case law or statutory perspective, the definitions are not as black and white as the courts and legislature often make them out to be.

These definitions are not words with singular meanings that can be applied in set situations. These words have numerous meanings and can be applied in many different ways. The use of these terms in section 102(b) opens up the statute's interpretation. The definitions indicate that section 102(b) is simply a restatement of the concept that facts cannot be copyrighted, nothing more. Therefore, section 102(b) becomes a more intriguing and insightful guide as to where courts may draw the line with respect to copyrightability.

Realizing that these definitions are not synonyms for 'facts,' but instead identify a whole large area of works that, although much effort and expense may have been put into developing them, just do not fall within the purview of copyright protections, makes section 102(b) a much broader tool to aid the courts in making determinations of copyrightability. Indeed, these definitions indicate that the law of copyright itself is as broad in what it will accept, as in what it will not accept, as copyrightable subject matter.

### V. How Does This Debate Relate to Database Protections Today?

Baker v. Selden was decided in 1879 during a period of transition for society, as well as for the law of patents. n183 Many comparisons can be drawn between the late-1800s and today. Often, protection is requested, through legislative channels, for new technologies and for the compilation of materials related to new businesses, with the reasoning being that these materials will make us more productive, decrease the effort individuals must expend, and create wealth. n184 These reasons were also used in the 1800's when discussing technology and its effects.

More and more enthusiasts saw the technology of the Industrial Revolution, organized and applied as it was in England, as a double opportunity. First, it offered means for speeding the development of the country by processes requiring fewer hands and limited capital.

Second, the anticipation of riches by entrepreneurs and inventors made the application of technology actionable. n185

Legislators often recognized these needs and provided additional protections to encourage growth and development. n186

However, there is a tendency with new inventions and techniques to go overboard in acquiescing to the inventor/producer. n187 During the late-1700s to mid-1800s, much of the developing technology was focused on inventions, and in particular, on machinery. n188 This led to the concept that the inventions were the results of the labor of individuals and, as such, they deserved recognition through the law of patent. n189 The Patent Act was re-written in 1836 to include provisions that would award patents on the basis of originality, novelty and utility. n190 Thereafter, applications for, and the granting of, patents increased significantly. n191 In 1848, only 643 patents were issued, but by 1860, over 4500 patents were granted in one year. n192

The increase of inventions during this time period, and the inevitable increase of patents, was welcomed, or, at least, not rejected by any means, by the public at large. n193 During the early part of the Industrial Revolution, new inventions took the forefront in society, creating new markets and new demands for the products that were the result of these markets. n194 There was concern, however, that, due to lack of understanding and attention by the patent registrars, too many patents were being issued for applications that lacked any originality and technical specificity. n195 Many people, from all walks of life, complained that the patents were actually over-protecting inventions and, due to the costs involved in challenging these patents in court, these patents were inhibiting inventive activity and threatening the patent system itself. n196

By the 1830s, litigation concerning patents, and an increase in complaints, led to a restructuring of the patent system through the 1836 Act. n197 These changes to the patent system provided employment for technical experts who examined patents applications looking for novelty and usefulness. n198 The number of patent applications filed initially took a nose-dive when twenty to fifty percent of patent applications were rejected within the first few years, however by the mid-1840s, the number of patent applications being filed increased at a stronger pace. n199

At the time, the United States was considered wealthy in natural resources, with a well-educated citizenry and a government that encouraged innovation and enterprise in a very 'hands-off' manner. n200 Patent applications grew at an astonishing rate and, as a result, so did the granting of patents themselves. n201 Many people in the United States experienced a sustained economic growth, n202 but did not feel the effect of these patents on their everyday lives. n203

One group of people, however, did experience the brunt of the effects of patents on their everyday livelihood: the farmers. n204 Many of the new patents being issued during the 1840s to 1870s were for farm equipment. n205 Farmers found that many of the tools and machinery they had been using were suddenly claimed by another as a 'new' invention that was protected by a patent. n206 This trend continued until

practically every device or tool that the farmer had in his home or on his farm, from a "clevis to a fence post," was covered by a patent. "Let the farmer," said the editor of the *Prairie Farmer*, "take an inventory of his utensils, beginning with the wringer, the sewing machine and the reaper, and he will see that his in-door and out-door instruments . . . represent numerous inventions, bearing official stamp of originality." n207

Outside the farming community, however, people were oblivious to the negative effects that patents were having and saw the patent system, on the whole, as a necessary part of the 'new economy.' n208

With patents being increasingly granted, however, more and more grumbling came from those who could not use these inventions and technologies - even if they improved upon them without paying fees. n209 Farmers and other small businessmen felt that Congress and state and local governments were providing too much protection to individual inventors, and thus were actually impeding progress and people's ability to improve upon the machinery used in their industries. n210

Toward the late 1860s, many farmers and small businessmen began to blame the problems they were having on the patent administrators.

It was the opinion of many that the great number of patents resulted from laxity in administering the law; that sufficient case was not taken at the Patent Office to ascertain whether the inventions were really novel; and that patents were granted on trifling modifications which required no genius to originate and were therefore not entitled to protection. So apparent was this evil that it led to such a keen student of rural life as Professor Seaman A. Knapp of the Iowa State College to remark: "A goodly portion of the patent wrongs have grown out of reckless methods of the patent office. It has been accustomed to grant most of the applicants and let the questions of infringement be fought out in the courts." n211

It was a combination of the financial effects felt by both the farmer and the small businessman, and the disregard for their plight by society in general, that led these two groups to lobby for change. n212

Farmers started to lobby heavily for Congress to change the laws. n213 Outcries from the community started to be heard almost daily in newspapers around the country. n214 This criticism prompted many Congressmen to introduce reform bills in the House, only to be denied by the Senate. n215 By the mid-to-late 1870s, farmers were heavily supported. n216 The courts were beginning to decide cases in favor of the farmers, n217

the patent administrators had begun to reject patents again, n218 and the House of Representative passed three separate reform bills between 1877 and 1884. n219

The farmers, however, did not have sufficient power to finish what they had set out to accomplish. n220 In 1879, public sentiment began to run against the farmers. n221 Thomas Edison, a beloved figure to many Americans, wrote a letter against the reform bill of 1879 stating:

I am sure that this provision will not only act oppressively upon many inventors, but will strongly tend to discourage and prevent the perfection of useful inventions by those most fitted for that purpose, and most likely to accomplish it . . . . It would be very burdensome to me. n222

In addition, newspapers and trade journals started to turn on the farmers, calling for a stop to 'unjust attacks' on inventors. n223 The support of Congress started to wane and, eventually, the courts also began to ignore the pleadings of farmers and small businessmen before them. n224 As a result, many claim farmers felt a greater and greater sense of grievances perpetrated upon them by society at large, which culminated in the Populist revolt in the 1890s. n225

Many of these complaints of the late 1800s, as well as the reasoning used to justify greater protections, are used in much the same way to argue for greater intellectual property protections today. While technological innovations are inventions in the traditional sense (i.e., computers, hardware, machinery, and biotechnology), much of the innovation lies in the area of content/information. n226 Thus we see the increase in the desire to protect databases, the collection of factual material for databases, and database content. n227 Data itself is becoming more and more valuable, especially in the area of the Internet. n228

Businesses have started looking for ways to present data en masse to the public, and protect it at the same time. n229 If they are not able to do this in copyright, then they will try to do this through patent. n230 Many have begun to argue that, as in the 1800s, the government is once again providing too much protection for things that should be in the public domain. n231

In the late 19th century, patents were the stuff of popular myth. Thomas Edison, dubbed the wizard of Menlo Park, was a folk hero. Crowds mobbed his laboratory to see his inventions. Robber barons fought for control of his patents, and court battles over them fascinated the public.

Intellectual property does not grip the public imagination in quite the same way today, yet something similar to those great patent wars seems to be happening. The pace of patenting is accelerating. Business is heading for the courts again. And criticism of the recent award of patents on wide areas of Internet business is growing. Academics and Internet activists are concerned that the government is turning the Internet over to private monopolies. Patents are becoming political once more. n232

The same battles that were fought in the 1800s are being fought again today, both in the areas of patents with business method patents, and in the area of copyrights with potential legislation that would force the protection of databases and compilations where the courts will not. n233

Congress' push to provide database protection, if not through copyright, then through a separate act, is a dangerous concept. The Supreme Court tried to address what happened when patents were denied and inventors turned to copyright in *Baker v. Selden*, n234 and Congress in turn codified much of the Baker concepts in section 102(b) of the Copyright Act of 1976. n235 We seem to be back to the pre-Baker times however, with individuals increasingly turning to each form of intellectual property protection in the hopes of attaining at least one form of protection and, if not, getting Congress to create new rights.

For example, in April 1998, the United States Patent and Trademark Office ("USPTO") held a conference on the issue of database protection and, in particular, a bill that had been introduced into Congress that would provide separate protections for database proprietors. n236 The USPTO issued a report on the recommendations that emerged from this conference. n237 While the USPTO emphasized that no true consensus had been reached, a series of five basic principles were issued in response to the conference. n238 These principles are concerns that the USPTO hopes will be addressed in any database protection bill that gets passed by Congress. n239

The number one principle on the list states that "a change in the law to protect commercial database developers from Warren Publishing-like situations is desirable." n240 In other words, copyright decisions that the USPTO and the business community disagreed about are being used by the USPTO as the basis for creating a new intellectual property right, in a sort of attempt to by-pass the copyright laws. n241

"Situations like Warren Publishing . . . are likely to arise in digital commerce and . . . some protection in such situations is desirable." n242 The USPTO is able to identify cases that the legislation could be based on (mind you, it is not 'copyright' legislation per se).

The database protection regime set out in H.R. 2652 would clearly meet the goal of addressing these [Warren Publishing-type] situations. At the same time, this goal could probably be met with a modified "*NBA v. Motorola*" approach (as amended by suggestions of Professors Ginsburg and Reichman) built on the elements of a misappropriation claim being: (i) the plaintiff generates or collects information at some expense, (ii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it, (iii) the defendant's use of the information is in competition with a product or service offered by the plaintiff or likely to be offered by the plaintiff, and (iv) the ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that the existence or quality of the product would be substantially threatened. n243

Circumventing existing systems of intellectual property rights for the appeasement of a portion of our market is a dangerous precedent to be setting. This appeasement is evident in the current patent system with the granting of business method patents. In 1998, the Federal Circuit upheld the right of a financial institution to patent a business method; a practice that was excepted from the patent laws until this case. n244 Since that time, business method patents have taken off, particularly in the area of e-commerce. n245

While this has made some businessmen very happy, it has made others quite fearful.

One of those previous assumptions [that State Street unsettled] was that certain things thought not to be patentable now appear to fall under patent protection. In the State Street case, the method of business under discussion was a novel structure for mutual funds and a new computer program to calculate the value of those funds.

Such methods have long been crucial to financial firms, so when the State Street decision indicated they could be protected private intellectual property, shock waves rippled through the business world.

Many worried that a storm of litigation would follow, as firms fought over patent rights on methods that have become integral to the operations of their firms and were thought to be in the public domain. n246

This fear was especially evident in the Internet companies. n247 The Internet companies were thought to be in line to be hit the hardest since they would likely generate the largest number of patent applications for methods of doing business. n248

This onset of patents and new legislation to protect a booming market and a happy populace is very reminiscent of the mid-1800s. Grumbling about the expansion of intellectual property rights has already begun. n249 Legislation, in an attempt to curtail the onset of business method patents, is already being drafted. n250 Many are concerned that the legislation, like the rule it seeks to amend, may not even be compatible with patent law. n251 Others, however, see the legislation as a necessary amendment for those who, like the farmers of the mid-to-late 1800s, have traditionally been using certain methods and techniques, n252 since these people will now be faced with expending many resources battling patent holders. n253 "There is a moral in the story of the earlier patent wars. Patent-holders (even Edison) abused the system. As a result, the patenting system fell out of favour. Patent protection was weakened. Business suffered. History has a habit of repeating itself." n254

## VI. CONCLUSION

Compilations and databases are entitled to some protections. What these protections should be, however, properly falls within the purview of the courts to decide using existing systems of intellectual property law. It is dangerous to extend new rights in intellectual property with only the 'here and now' in mind. Legislators may find it easy to create new rights, emphasizing that we must protect emerging businesses and technology,

and thereby appease the business community. This is not, however, what these intellectual property rights were intended for.

Copyright and patent laws were created to encourage individuals and companies to release their works into the public domain. Granting limited rights to those who exploit their works in return for monetary or other consideration is one way of getting authors/inventors to do just that. The intent behind these laws themselves, however, is not one of profit; it is one of access. This concept seems to be getting lost.

More and more authors are claiming that others are using their work and they do not get to see the profit from that use even if the use transforms the work into something different. This is moving extremely close to the granting of copyrights in the idea; or to compensating individuals for their ideas. Again, this type of movement has dangerous implications for the future of the public domain.

There may be some creators of databases and/or compilations who will not be granted intellectual property rights in their work. This is an unfortunate, but necessary, result of a system that has worked quite well to date. The copyright, patent, trademark, and trade secret laws have exceptions because there are exceptions. There will be works that do not fall within the purview of any of these laws.

The Baker Court tried to express this very point when it stated that the system used by Selden did not fall within the purview of copyright. n255 The Baker Court knew that Selden had attempted to patent his system, and had failed. n256 By stating that Selden's protections would lie in a letters-patent, if at all, n257 the Court was indicating that there are some works that just will not get protection; and this is the way it should be.

Feist addressed the issue of whether originality was the defining factor in authorship, rather than 'sweat of the brow.' Feist, however, was not meant to be the final say in whether or not databases and compilations should get protections. In determining copyrightability, there are two avenues one must go down. The first is that which Feist addressed: Is there authorship through the requisite amount of originality? The second, and more difficult question, is that addressed by Baker: Even if there is authorship, is this really something that is meant to be protected, at least under the guise of copyright?

The courts have been struggling to interpret Feist precisely because they are trying to use 'originality' as the factor to determine both authorship and whether the work is that which copyright was created to protect. These are two distinct questions that need to be treated in a distinct manner. Perhaps Feist was the Court's attempt at re-opening the questions the Baker Court had put forth: Where does one decide that some things are simply not protectable under this form of intellectual property law?

Finally, the Baker Court also reminds us that intellectual property laws are not entirely about business. Intellectual property rights are granted because, in the end, they aid society in some way. "The title of the act of Congress is, 'for the encouragement of learning' . . . [the act] was not intended for the encouragement of mere industry, unconnected with learning and the sciences." n258 This is something that the legislature, the courts, and society should try hard to remember.

FOOTNOTES:

n1 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).

n2 See Ryan J. Swingle, Note, *Tasini v. New York Times: The Problem of Unauthorized Secondary Usage of an Author's Works*, 5 *J. Intell. Prop.* 601, 626 (1998).

n3 499 U.S. at 359-60, 18 U.S.P.Q.2d at 1283. One could argue that the Supreme Court did not really change the law, but instead merely clarified what the law already was.

The 1976 revisions to the Copyright Act leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works. Nor is there any doubt that the same was true under the 1909 Act. The 1976 revisions were a direct response to the Copyright Office's concern that many lower courts had misconstrued this basic principle, and Congress emphasized repeatedly that the purpose of the revisions was to clarify, not change, existing law.

Id.

n4 See *id.* at 358, 18 U.S.P.Q.2d at 1283.

n5 See, e.g., *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1213, 229 U.S.P.Q. (BNA) 282, 287 (8th Cir. 1986) (holding that a parts numbering system lacked the requisite originality to receive copyright protection).

n6 See 17 U.S.C. § 103(a) (1994) (providing copyright protection for compilations).

n7 See 17 U.S.C. § 102(b) (1994) (denying copyright protection for any "discovery, regardless of the form in which it is described").

n8 See 17 U.S.C. § 103(b) (1994).

n9 See *infra* Parts II.B.1, II.B.2.

n10 See 17 U.S.C. § 102(b) (1994).

n11 101 U.S. 99 (1879).

n12 *Id.* at 102-103.

n13 However, this was not the only theory under which protection was granted. Some courts did find protection based on originality, deeming "sweat of the brow" a violation of the "basic tenets of copyright law." See Julia Reytblat, *Is Originality in Copyright Law a "Question of Law" or a "Question of Fact?": The Fact Solution*, *Cardozo Arts & Ent. L.J.* 181, 186 (1999). See, e.g., *Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co.*, 281 F. 83, 88 (2d Cir. 1922) (formulating the "sweat of the brow" doctrine of copyrightability).

n14 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359-60, 18 U.S.P.Q.2d (BNA) 1275, 1283 (1991) (holding that "originality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works").

n15 See *id.* at 362, 18 U.S.P.Q.2d at 1284.

n16 See *id.* at 342, 18 U.S.P.Q.2d at 1276.

n17 See *id.* at 343, 18 U.S.P.Q.2d at 1277.

n18 See *id.*

n19 See *id.*

n20 See *id.*

n21 See *id.* at 344, 18 U.S.P.Q.2d at 1277.

n22 See *Rural Tel. Serv. Co. v. Feist Publications, Inc.*, 663 F. Supp. 214, 219 (D. Kan. 1987) (holding that Feist's copying of facts amounted to copyright infringement) [hereinafter Rural 1].

n23 See *Rural Tel. Serv. Co. v. Feist Publications, Inc.*, No. 88-1679, 1990 U.S. App. LEXIS 25881, at \*5 (10th Cir. Mar. 8, 1990) [hereinafter Rural 2].

n24 See *Rural 1*, 663 F. Supp. at 218; *Rural 2*, 1990 U.S. App. LEXIS 25881, at \*3-4.

n25 See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364, 18 U.S.P.Q.2d (BNA) 1275, 1285 (1991) (holding that since Rural's white pages were not copyrightable, Feist did not infringe by using Rural's listings).

n26 See *id.* at 348-49, 18 U.S.P.Q.2d at 1279.

n27 *Id.*

n28 *Id.* at 344-45, 18 U.S.P.Q.2d at 1277-78.

n29 See *id.* at 345, 18 U.S.P.Q.2d at 1278.

n30 *Id.* at 346, 18 U.S.P.Q.2d at 1278.

n31 See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347, 18 U.S.P.Q.2d (BNA) 1275, 1278-79 (1991).

n32 See *id.* at 348, 18 U.S.P.Q.2d at 1279.

n33 See *id.*

n34 See *id.* at 348-49, 18 U.S.P.Q.2d at 1279.

n35 *Id.* at 349, 18 U.S.P.Q.2d at 1279.

n36 See *id.*

n37 See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50, 18 U.S.P.Q.2d (BNA) 1275, 1279 (1991).

n38 See *id.* at 355-56, 18 U.S.P.Q.2d at 1282.

n39 *Id.* at 358, 18 U.S.P.Q.2d at 1283.

n40 See *id.* at 358-59, 18 U.S.P.Q.2d at 1283.

n41 See *id.* at 359, 18 U.S.P.Q.2d at 1283.

n42 See *id.* at 361, 18 U.S.P.Q.2d at 1284.

n43 See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 18 U.S.P.Q.2d (BNA) 1275, 1284 (1991).

n44 See *id.*

n45 See *id.* at 362, 18 U.S.P.Q.2d at 1284.

n46 See *id.*

n47 *Id.* at 363, 18 U.S.P.Q.2d at 1285 (citation omitted).

n48 See *id.* at 362, 18 U.S.P.Q.2d at 1284.

n49 See *infra* Part II.B.1. See also, e.g., *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 67-70, 33 U.S.P.Q.2d (BNA) 1183, 1187-90 (2d Cir. 1994).

n50 See *infra* Part II.B.2. See also, e.g., *Matthew Bender & Co. v. West Pub. Co.*, 158 F.3d 674, 681-90, 48 U.S.P.Q.2d (BNA) 1560, 1565-73 (2d Cir. 1998).

n51 197 F.3d 1256, 53 U.S.P.Q.2d (BNA) 1032 (9th Cir. 1999).

n52 *Id.* at 1257, 53 U.S.P.Q.2d at 1033.

n53 See *id.*

n54 See *id.*

n55 See *id.* at 1257-58, 53 U.S.P.Q.2d at 1033.

n56 See *id.* at 1258, 53 U.S.P.Q.2d at 1033.

n57 See *id.* at 1257, 53 U.S.P.Q.2d at 1033.

n58 See *id.* at 1258, 53 U.S.P.Q.2d at 1033.

n59 See *id.*

n60 See *id.*

n61 See *id.*

n62 See *id.*

n63 See *id.* at 1262, 53 U.S.P.Q.2d at 1036-37.

n64 See *id.* at 1259, 53 U.S.P.Q.2d at 1034.

n65 See *id.*

n66 *Id.*

n67 See *id.*

n68 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362-64, 18 U.S.P.Q.2d (BNA) 1275, 1284-85 (1991).

n69 See *CDN, Inc. v. Kapes*, 197 F.3d 1256, 1259, 53 U.S.P.Q.2d (BNA) 1032, 1034 (9th Cir. 1999).

n70 *Id.*

n71 See *id. at 1260*, 53 *U.S.P.Q.2d at 1035*.

n72 *Id. at 1260-61*, 53 *U.S.P.Q.2d at 1035* (emphasis added) (citations omitted).

n73 See *id. at 1261-62*, 53 *U.S.P.Q.2d at 1035-36*.

n74 See *id.*

n75 *Id. at 1261*, 53 *U.S.P.Q.2d at 1036*.

n76 *Id.* (emphasis added) (citation omitted).

n77 *Id.*

n78 115 *F.3d 1509*, 43 *U.S.P.Q.2d (BNA) 1065 (11th Cir. 1997)*.

n79 See *id. at 1511*, 43 *U.S.P.Q.2d at 1066*.

n80 See *id. at 1512*, 43 *U.S.P.Q.2d at 1066*.

n81 See *id.*

n82 See *id.*

n83 See *id. at 1513*, 43 *U.S.P.Q.2d at 1067*.

n84 *Warren Publ'g, Inc. v. Microdos Data Corp.*, No. 1:90CV-1654-JOF, 1992 *U.S. Dist. LEXIS 14551*, at \*15 (N.D. Ga. Mar. 31, 1992).

n85 See *id. at \*25*.

n86 See *Warren Publ'g, Inc. v. Microdos Data Corp.*, 115 *F.3d 1509*, 43 *U.S.P.Q.2d (BNA) 1065 (11th Cir. 1997)*.

n87 *Id. at 1520-21*, 43 *U.S.P.Q.2d at 1074*.

n88 *Id. at 1516*, 43 *U.S.P.Q.2d at 1070*.

n89 *Id. at 1514*, 43 *U.S.P.Q.2d at 1068-69*.

n90 *Id. at 1514 & n.13*, 43 *U.S.P.Q.2d at 1068-69 & n.13* (citations omitted).

n91 See *Warren Publ'g, Inc. v. Microdos Data Corp.*, 115 *F.3d 1509*, 1517, 43 *U.S.P.Q.2d (BNA) 1065*, 1071 (11th Cir. 1997).

n92 See *Warren Publ'g, Inc. v. Microdos Data Corp.*, No. 1:90-CV-1654-JOF, 1992 *U.S. Dist. LEXIS 14551*, at \*14-16 (N.D. Ga. Mar. 31, 1992).

n93 *Warren Publ'g, Inc. v. Microdos Data Corp.*, 115 *F.3d 1509*, 1519, 43 *U.S.P.Q.2d (BNA) 1065*, 1073 (11th Cir. 1997).

n94 See *id.*

n95 *Id.*

n96 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 *U.S. 340*, 348, 18 *U.S.P.Q.2d (BNA) 1275*, 1279 (1991).

n97 See *Baker v. Selden*, 101 *U.S. 99*, 99-100 (1879). It is interesting to note that Mr. Selden did not have patent protection for his accounting system itself. See *id. at 104* ("It was not patented, and is open and free to the use of the public.")

n98 See *Baker*, 101 U.S. at 100.

n99 See *id.*

n100 *Id.*

n101 *Id.*

n102 See *id.* at 100-01.

n103 *Id.* at 101.

n104 See *Baker v. Selden*, 101 U.S. 99, 107 (1879).

n105 See *id.* at 102 ("To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.").

n106 See *Baker v. Selden*, 101 U.S. 99, 103-04 (1879).

n107 See *id.*

n108 See *id.* at 102.

n109 See *id.* at 104.

n110 See *id.*

n111 Compare 35 U.S.C. § 271 (1994 & Supp. IV 1998) (noting that a patent owner can prohibit others from making, using, offering to sell, selling, or importing their patented invention), with 17 U.S.C. § 106 (1994 & Supp. V 1999) (noting that a copyright owner retains the exclusive rights to reproduce copies of the copyrighted work; prepare derivative works based on the copyrighted work; distribute copies of the copyrighted work to the public; perform the copyrighted work publicly; and display the copyrighted work publicly).

n112 Compare 35 U.S.C. § 154(a)(2) (1994) (noting that a patent generally lasts for 20 years from the date on which the patent application was filed), with 17 U.S.C.

§ 302(a) (1994 & Supp. V 1999) (noting that a copyright generally lasts for the life of the author, plus 70 years after the author's death).

n113 35 U.S.C. § 101 (1994).

n114 *Baker v. Selden*, 101 U.S. 99, 103 (1879).

n115 See *id.* at 104.

n116 See *id.*

n117 See *id.*

n118 See *id.* at 103-04.

n119 See *id.* at 103.

n120 See *id.* at 104.

n121 *Baker v. Selden*, 101 U.S. 99, 104 (1879).

n122 See *id. at 103*.

n123 See *id.*

n124 For a criticism of Baker's importance, see 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.18C[1], at 2-204.1 to 2-204.2 (Matthew Bender & Co. ed., rel. no. 53, Dec. 2000) [hereinafter Nimmer].

n125 See, e.g., *CDN Inc. v. Kapes*, 197 F.3d 1256, 1261 (9th Cir. 1999).

n126 See, e.g., *American Dental Assoc. v. Delta Dental Plans Assoc.*, 126 F.3d 977, 981, 44 U.S.P.Q.2d (BNA) 1296, 1300 (7th Cir. 1997); *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 458, 30 U.S.P.Q.2d (BNA) 1762, 1765 (11th Cir. 1994); *Sega Enterprises Ltd. v. Accolade, Inc.*, 1993 U.S. App. LEXIS 78, \*39 (9th Cir. 1993).

n127 See, e.g., *CDN Inc. v. Kapes*, 197 F.3d 1256, 1261, 53 U.S.P.Q.2d (BNA) 1032, 1036 (9th Cir. 1999); *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1248 (11th Cir. 1999).

n128 See Nimmer, *supra* note 124, § 2.18D[1], at 2-204.7 to 2-204.8.

n129 *Id.*, § 2.18B[1], at 2-201 to 2-202.

n130 This is not always true. For instance, though the case itself interpreted *Baker v. Selden* in much the same way as the Warren court did, the oral arguments for *Lotus Development Corp. v. Borland International, Inc.* indicate that the Supreme Court gives Baker a broader interpretation. See United States Supreme Court Official Transcript, *Lotus Dev. Corp. v. Borland Int'l, Inc.*, No. 94-2003, 1996 U.S. Trans. LEXIS 7, at \*34-38 (U.S. Jan 8, 1996). It should also be remembered that the idea/expression doctrine, and the non-copyrightability of facts, existed before *Baker v. Selden*. Thus, Baker must have been an expansion of the law in one form or another as the Court most likely would not have used its time and energy on simply restating a point of law not that was not in real contention.

n131 It should be noted that the definitions have been excerpted by the author. Many of the definitions were longer and more varied than discussed herein, with particular meanings delineated for specific situations. The reader is encouraged to spend some time examining the full definitions and coming to his or her own conclusions regarding the use of the words in any particular context.

n132 Copyright Act of 1976, Pub. L. No. 94-553, § 102(b), ch. 1, 90 Stat. 2541, 2544-45 (codified as amended at 17 U.S.C. § 102(b) (1994)).

n133 See H.R. Rep. No. 94-1476, at 56-57 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5670.

n134 Copyright Act of 1909, Pub. L. No. 60-349, § § 1-64, ch. 320, 35 Stat. 1075, 1075-88 (approved Mar. 4, 1909).

n135 See Pamela Samuelson, *Computer Programs, Users Interfaces, and Section 102(b) of the Copyright Act of 1976: A Critique of Lotus v. Paperback*, 6 High Tech. L.J. 209, 227-235 (1991). See also Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 *Harv. L. Rev.* 1149, 1171-1176 (1998); J. H. Reichman, *Computer Programs As*

Applied Scientific Know-How: Implications of Copyright Protection for Commercialized University Research, 42 *Vand. L. Rev.* 639, 692-93 & n.288 (1989).

n136 See 1 *The Kaminstein Legislative History Project: A Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976* 34-42 (Alan Latman & James F. Lightstone eds., 1981).

n137 See Hearings on S. 597 Before the Senate Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, 90th Cong. 570, 571-73 (1967).

n138 See Hearings on S. 597 Before the Senate Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, 90th Cong. 192, 197 (1967).

n139 H.R. Rep. No. 94-1476, at 57 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5670. See also *Warren Publ'g, Inc. v. Microdos Data Corp.*, 115 *F.3d* 1509, 1529-30, 43 *U.S.P.Q.2d* (BNA) 1065, 1082 (11th Cir. 1997); *Toro Co. v. R & R Prods. Co.*, 787 *F.2d* 1208, 1211-12, 229 *U.S.P.Q.* (BNA) 282, 284 (8th Cir. 1986).

n140 See, e.g., *NEC Corp. v. Intel Corp.*, 10 *U.S.P.Q.2d* (BNA) 1177, 1179 (N.D. Cal. 1989); *Signo Trading Int'l Ltd. v. Gordon*, 535 *F. Supp.* 362, 365, 214 *U.S.P.Q.* (BNA) 793, 795 (N.D. Cal. 1981).

n141 It is important to note that I will not be examining the definitions of selection and coordination. Selection, arrangement and coordination have been identified by the Feist court as elements to look at in determining originality of a compilation. As will be examined later in this piece, arrangement, selection and coordination have more to do with determining originality per section 102(a), than with the exclusions found in 102(b). I include this definition, however, as "arrangement" was the predominant concept used by the Feist court, and it has been widely adopted by the lower courts.

n142 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 *U.S.* 340, 348 (1991).

The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. . . . Thus, even a directory that contains absolutely no protectable written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.

*Id.* (emphasis added) (citation omitted).

n143 *Baker v. Selden*, 101 *U.S.* 99, 100 (1879).

n144 I *The Oxford English Dictionary* 645 (2d ed. 1989).

n145 *Webster's Third New International Dictionary of the English Language Unabridged* 120 (1993).

n146 See *Black's Law Dictionary* 104 (7th ed. 1999).

n147 *Baker v. Selden*, 101 U.S. 99, 103-04 (1879).

n148 17 U.S.C. § 102(b) (1994).

n149 IX The Oxford English Dictionary 690 (2d ed. 1989) (emphasis added).

n150 Id. at 690-91 (emphasis added).

n151 17 U.S.C. § 102(b) (1994).

n152 Webster's Third New International Dictionary of the English Language Unabridged 1422 (1993) (emphasis added).

n153 Id. at 1422-23 (emphasis added).

n154 Black's Law Dictionary 1005 (7th ed. 1999).

n155 "In patent law, 'engine' and 'method' mean the same thing, and may be the subject of a patent." Black's Law Dictionary (for westlaw.com), available in WL (2001).

n156 Id.

n157 X The Oxford English Dictionary 848 (2d ed. 1989).

n158 Id.

n159 Webster's Third New International Dictionary of the English Language Unabridged 1581 (1993).

n160 Black's Law Dictionary (for westlaw.com), available in WL (2001).

n161 17 U.S.C. § 102(b) (1994).

n162 Id.

n163 XII The Oxford English Dictionary 543 (2d ed. 1989) (emphasis added).

n164 Id.

n165 Webster's Third New International Dictionary of the English Language Unabridged 1807 (1993).

n166 Id.

n167 Black's Law Dictionary 1221 (7th ed. 1999) (emphasis added).

n168 17 U.S.C. § 102(b) (1994).

n169 XII The Oxford English Dictionary 545-46 (2d ed. 1989) (emphasis added).

n170 Black's Law Dictionary 1223 (7th ed. 1999); Webster's Third New International Dictionary of the English Language Unabridged 1808 (1993).

n171 Webster's Third New International Dictionary of the English Language Unabridged 1808 (1993) (emphasis added).

n172 Black's Law Dictionary (for westlaw.com), available in WL (2001).

n173 Id.

n174 *Baker v. Selden*, 101 U.S. 99, 104 (1879).

n175 XVI The Oxford English Dictionary 559-60 (2d ed. 1989) (emphasis added).

n176 *Id.* at 559 (emphasis added).

n177 Webster's Third New International Dictionary of the English Language Unabridged 2229 (1993).

n178 Black's Law Dictionary (for westlaw.com), available in WL (2001).

n179 *17 U.S.C. § 102(b)* (1994).

n180 XVII The Oxford English Dictionary 496-97 (2d ed. 1989).

n181 Webster's Third New International Dictionary of the English Language Unabridged 2322 (1993).

n182 Black's Law Dictionary (for westlaw.com), available in WL (2001).

n183 *101 U.S. 99* (1879).

n184 See, e.g., Database Data: Position Statement (visited Apr. 5, 2001) <<http://www.databasedata.org/Statement/statement.html>>; Hearings on S. 597 Before the Senate Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, 90th Cong. 570, 571-73 (1967).

n185 Brooke Hindle & Steven Lubar, *Engines of Change: The American Industrial Revolution, 1790-1860*, 44 (1991) [hereinafter *Engines of Change*].

n186 As an example, take the emergence of the modern theory of negligence. Negligence arose during the 1870s, partially because the industrial revolution was coming to a conclusion and businesses did not need special protections that would allow for development. See G. Edward White, *Tort Law in America: An Intellectual History* 12-62 (1980).

n187 *Engines of Change*, supra note 185, at 75 ("A much exaggerated emphasis came to be placed on invention, and the process of invention was personified to an unreal degree.").

n188 See *id.* at 44-72.

n189 See *id.* at 75.

Invention was celebrated as the creative origin of new processes, of individual wealth, and of national well-being. It was seen as an individual achievement and as the cause of the great technological and economic changes that took place in the period before the Civil War.

This understanding was accompanied by the expectation that every technological change not only was the result of specific invention, but was the product of a known and identified inventor. Invention was thus personified, and inventors became eponyms by whom the inventions credited to them were known.

*Id.*

n190 See Patent Act of 1836, § 6, ch. 357, 5 Stat. 117, 119 (codified as amended at 35 U.S.C. §§ 101-02 (1994)).

n191 See generally Kenneth L. Sokoloff, *Inventive Activity in Early Industrial America: Evidence from Patent Records, 1790-1846*, 48 *J. Econ. Hist.* 813, 818-19 (1988) [hereinafter Sokoloff, *Inventive Activity*].

n192 See *Engines of Change*, supra note 185, at 79.

n193 See Sokoloff, *Inventive Activity*, supra note 191, at 81350.

n194 See *id.*

n195 See *id.* at 817-18. See also Earl W. Hayter, *The Patent System and Agrarian Discontent, 1875-1888*, 34 *Mississippi Valley Hist. Rev.* 59, 64 (1947).

n196 See *id.* at 818.

n197 See *id.* at 818-19.

n198 See *id.* at 818.

n199 See *id.*

n200 See generally Kenneth L. Sokoloff & B. Zorina Khan, *The Democratization of Invention During Early Industrialization: Evidence from the United States, 1790-1846*, 50 *J. Econ. Hist.* 363, 363-78 (1990) [hereinafter Sokoloff, *Democratization*].

n201 See *Engines of Change*, supra note 185, at 79.

n202 See *id.* at 74-75. See also Hugo A. Meier, *Technology and Change: Technology and Democracy, 1800-1860*, 211, 211-12 (John G. Burke & Marshall C. Eakin eds., 1979).

n203 See *Engines of Change*, supra note 185, at 270.

n204 See generally Hayter, supra note 195 at 59-82.

n205 See *id.* at 61.

n206 See *id.* at 61-62.

n207 *Id.*

n208 See *Engines of Change*, supra note 185, at 74-75, 93. See generally Hayter, supra note 195 at 59-82.

n209 See *Engines of Change*, supra note 185, at 91-93. See also Hayter, supra note 195, at 59-82. Ralph Waldo Emerson noted, "machinery is good, but mother-wit is better. Telegraph, steam and balloon and newspaper are like spectacles on the nose of age, but we will give them all gladly to have back again our young eyes. . . . 'Things are in the saddle, and ride mankind.'" *Engines of Change*, supra note 185, at 93 (emphasis in original).

n210 See *id.* at 66, 73-82.

n211 Hayter, supra note 195, at 64 (citations omitted).

n212 See id. at 72.

n213 See id. at 71-72.

n214 See id. at 79. Some of the attacks on the courts and Congress were quite strong.

No State is now suffering as much perhaps as Iowa for want of protection in patents. It was to be hoped that the average Iowa Congressman would have remembered the dear farmer before this, but perhaps they will wake up by the next election to the importance of the farmer. If they will not, some of them might get fast on some of our barb wire fences.

Id.

n215 See id. at 80.

n216 See id. at 79-81.

n217 See id. at 76-77.

n218 See id. at 79-81.

n219 See id. at 78-82.

n220 See id. at 80-81.

n221 See id.

n222 Id. at 81.

n223 Id.

n224 See id. at 81-82.

n225 See id. at 82.

n226 See Morgan Stanley Dean Witter Technology Group Again Leads the Field in 1999, *Business Wire*, Jan. 5, 2000.

n227 See Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1st Sess. 1999); Consumer and Investor Access to Information Act of 1999, H.R. 1858, 106th Cong. (1st Sess. 1999).

n228 See generally Ted Kemp, *It's Come to This: Start-Up Bills Itself the 'Anti-DoubleClick'*, *iMarketing News*, Mar. 20, 2000, at 17.

n229 See Michael Gross, *Estonia Sells Its Gene Pool: A Genetic Database Project is an Ethical Timebomb*, *The Guardian*, Nov. 9, 2000, at 2; SIIA Announces 'Monetizing Digital Content' Conference Unique Event Focuses on Internet-Enabling Technologies and Tactics for Information Providers, *PR Newswire*, July 26, 2000.

n230 We have seen the recent rise of business method patents, thus far exclusively around the processes of collecting data through the Internet or customer use and its presentation in an electronic format, over the past year. See Allan Drury, *Internet Creates Work for Lawyers; New Dot-Coms Need Legal Advice, and Fights for Web-Site Names*

Need Litigating, Portland Press Herald, Oct. 10, 2000, at 1C; Seller Beware! Your Own Business Methods May Make You a Target for Patent Litigation, The Metropolitan Corporate Counsel, Feb. 2000, at 9.

n231 See Patent Wars: The Knowledge Monopolies: A 21st Century Gold Rush to the Patent Office: Better Get Yourself Armed: Everybody Else Is, The Economist, Apr. 8, 2000, at 75.

n232 See id. at 75.

n233 See Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1st Sess. 1999); Consumer and Investor Access to Information Act of 1999, H.R. 1858, 106th Cong. (1st Sess. 1999).

n234 See supra note 97.

n235 Copyright Act of 1976, Pub. L. No. 94-533, § 102(b), ch. 1, 90 Stat. 2541, 2544-45 (codified as amended at 17 U.S.C. § 102(b) (1994)).

n236 See H.R. 2652, 105th Cong. (1998).

n237 See Patent and Trademark Office Report on Recommendations from the April 1998 Conference on Database Protection and Access Issues (July 1998) <<http://www.uspto.gov/web/offices/dcom/olia/dbconf/dbas e498.htm>>.

n238 See id. at III.A.

n239 See id.

N240 Id.

n241 See id.

n242 Id. at III.A.

n243 Id. at III.A.

n244 See *State Street Bank & Trust Co. v. Signature Fin. Group.*, 149 F.3d 1368, 1370, 47 U.S.P.Q.2d (BNA) 1596, 1598 (Fed. Cir. 1998).

n245 See Patent Nonsense, The Economist, Apr. 8, 2000, at 78.

n246 Brian Johnson, New "Business Method" Patents Stir Up Storm (visited November 21, 2000) <<http://www.office.com/global/0,2724,24116865,FF.html>>.

n247 See id.

n248 See id.

n249 See e.g., Statement of James G. Neal Before the Subcommittee on Courts and Intellectual Property Committee on Judiciary Hearing on "Collections of Information Antipiracy Act", 106th Cong. (Mar. 18, 1999) available online at <<http://www.arl.org/info/letters/nealtest.html>>; Int'l Council for Science/Committee on Data for Sci. & Tech., Scientific Access to Data and Information: A Summary of Database Protection Activities, ICSU (last modified Nov. 30, 2000) <<http://www.codata.org/codata/dataaccess/summary.html> >.

n250 See Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1st Sess. 1999); Consumer and Investor Access to Information Act of 1999, H.R. 1858, 106th Cong. (1st Sess. 1999).

n251 See Brenda Sandburg, Congress Does a Database Dance, (June 4, 1999) available online at <<http://www.callaw.com/stories/edt0604.html>>.

n252 Brian Johnson, New "Business Method" Patents Stir Up Storm (visited November 21, 2000) <<http://www.office.com/global/0,2724,24116865,FF.html>> (It is "a compromise between competing interests, between groups that wanted to maximize the rights of patent holders, and other groups that wanted a defense for prior users.

It was something of a tug-of-war between these sides.").

n253 "Now, it will be foolhardy to start a new business venture --especially on the Internet --without first checking to make sure that the business concept has not been patented by someone else. . . . It will be impossible to operate such businesses without advice from patent counsel." Robert M. Kunststadt, Opening Pandora's Box, IP Mag. (Jan. 1999) <<http://www.ipmag.com/99jan/kunststadt.html>>.

n254 Patent Wars: The Knowledge Monopolies: A 21st Century Gold Rush to the Patent Office: Better Get Yourself Armed: Everybody Else Is, *The Economist*, Apr. 8, 2000, at 78.

n255 *Baker v. Selden*, 101 U.S. 99, 104 (1879).

n256 See John S. Wiley, Jr., Copyright at the School of Patent, 58 *U. Chi. L.R.* 119, 168 (1991).

n257 See *id.* at 102.

n258 *Id.* at 105.