Title: What Section 102(b) Excludes From Copyright Protection and Why

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Abstract:

Section 102(b) of the Copyright Act of 1976 provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

This article will explore two puzzling things about sec. 102(b). One is that the "procedure, process, system, and method of operation" exclusion from copyright protection has been given very little serious attention in the caselaw and law review literature in the past twenty-five years. Second, some things (e.g., information and facts) are not explicitly excluded from protection by sec. 102(b); yet courts and commentators have regularly considered them to be as unprotectable as ideas. Put simply, why are some words virtually read out of sec. 102(b), while others are read into the statute? More generally, what does sec. 102(b) exclude from copyright protection, and why?

The article will argue that the "process, procedure, system, method of operation" exclusions from copyright derive principally from Baker v. Selden, 101 U.S. 99 (1880) and its progeny. One important reason that copyright excludes procedures, processes, systems and methods of operation from protection is explained in *Baker*:

> A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective, [may] be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein….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.

Id. at 102. This aspect of the *Baker* ruling was unpersuasive to Melville Nimmer whose treatise on copyright law reinterpreted *Baker* as an idea/expression case, and courts in the past twenty-five years have largely followed Nimmer's re-interpretation of *Baker*. Because of this, the policy rationales for limiting the scope of copyright protection to procedures and the like have become obscured. However, sec. 102(b) was added to the Copyright Act in 1976, so the exclusion of procedures, processes, systems, and methods of operation should be given more

credence. This article aims to revive *Baker* and its progeny and offer guidance for courts in cases raising sec. 102(b) defenses involving processes, procedures, systems, and methods of operation.

The second puzzle about sec. 102(b) is perhaps more easily resolved. Section 102(b) seems to have been added to the copyright statute at least in part to ensure that courts would not allow copyright protection for computer programs to extend to procedures, processes, systems, and methods of operation embodied in software. Congress did not, however, intend to overturn longstanding caselaw holding that such things as information and facts are unprotectable as well. Although the Supreme Court in Feist Publications v. Rural Telephone Service, 499 U.S. 340 (1991) tied the exclusion of facts from copyright to the exclusion of discoveries from copyright in sec. 102(b), the more persuasive rationale for excluding facts and information from the scope of copyright is that facts and information are fundamental building blocks from which knowledge is created, expression is constructed, and progress of science and the useful arts is promoted.

Clarification of the policy rationales for excluding some innovative elements of copyrighted works from the scope of protection will provide needed guidance for courts, commentators, practitioners, and follow-on innovators who want to draw unprotected elements from copyrighted works in the course of making new works. This will promote greater progress of science and the useful arts than a rule that excludes only abstract ideas and discovered facts from the scope of copyright protection, as some courts have done.