February 21, 2002

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Mr. Mark D. Fredericksen
Koley, Jessen, Daubman & Rupiper
One Pacific Place, Suite 800
1125 S. 103rd Street
Omaha, NE 68124

COPYRIGHT
OFFICE

RE: 8 COLUMN 10 INCH BALLOT
Control No. 60-703-309(K)

Dear Mr. Fredericksen:

101 Independence
Avenue, S.E.

ADMINISTRATIVE RECORD

On October 19, 1999, the Copyright Office received a Form VA application, a deposit, and fee to register a voting ballot design entitled 8 COLUMN 19 INCH BALLOT. You submitted it on behalf of Election Systems and Software (ES&S) as two dimensional artwork.

Washington, D.C.
20559-6000

In a letter dated October 21, 1999, from Visual Arts Examiner Wayne E. Crist, the Examining Division refused to register the 8 COLUMN 19 INCH BALLOT because the work consists only of a blank form. Blank forms and similar works designed to record rather than convey information are not entitled to copyright protection under copyright law. Mr. Crist stated that copyright does not extend to the idea, method, or system embodied in the design and that neither did copyright extend to individual titles, arrangement or typography. Thus the work did not exhibit the necessary original authorship required to register this claim.

By letter dated February 8, 2000, you requested that the Copyright Office reconsider its refusal to register the 8 COLUMN 19 INCH BALLOT. You acknowledge the doctrine of Baker v. Selden, 101 U.S. 99 (1879), that blank forms are not copyrightable because of the absence of original copyrightable expression, but you distinguish applicant's ballot from the system described in Baker. You analogize the content of applicant's ballot to the forms in Norton Printing Company v. Augustana Hospital, 155 U.S.P.Q. 133 (N.D.Ill. 1967), and Harcourt Brace & World, Inc. v. Graphic Controls Corp., 329 F.Supp. 517 (S.D.N.Y. 1971), which were held copyrightable.

The ES&S voting ballot consists of a number of black squares and ovals, but you do not claim copyright in the ovals. Instead, you argue that the copyrightable material in the instant work is the ballot's black squares that are specifically located and arranged to convey information to the ballot producer and ballot scanner. Although you acknowledge that the work is ultimately designed to permit recording of information, you assert that this includes original work which conveys information, and point to the information which the ballot producer must read to permit the printing of a ballot of a certain type, including certain modes, codes and controls. You assert that this information is conveyed by means of the selected and arranged black boxes on the front and back of the ballot. This leads to the conclusion, you assert, that because the ultimate purpose of the selection and arrangements of the black boxes is to convey information, the black boxes constitute graphic expression that is copyrightable.

In a letter dated September 5, 2000, from Attorney Adviser Virginia Giroux, the Examining Division again refused to register the claim in this ballot, stating that as a blank form the ballot did not contain material that is subject to copyright protection. After reviewing the legal requirements for registration of a form in terms of the necessary authorship, and analyzing the ballot in light of the cases you submitted, Ms. Giroux stated that the 8 COLUMN 19 INCH ballot, analogous to a system or process, contains no elements, either alone, or in combination, upon which a registration can be based.

In your response, received January 9, 2001, you submitted a second appeal requesting that the Board of Appeals reconsider its refusal to register this work. Again you rely on Norton v. Augustana, and argue that the detailed separate categories and areas for examination on the patient form are analogous to the content of applicant's ballot. You stress that the type code, split code and other codes are information transmitted to a machine to enable production and interpretation of this ballot. As evidence of the information conveyed by your ballot, you state that:

> the location and arrangement of the black squares in the code channel provide a wide variety of information to the ballot scanner...several boxes represent a type code, other box arrangements identify a "split" code. Other marked boxes provide header codes and the like. Thus the conveyance of information occur[s] prior to completion of the ballot by a voter. The fact that this information is intended to be transmitted to a machine for processing rather than to a person is not believed to be distinguishable from the information conveyed to doctors by a health examination checklist, such as those found to be copyrightable in Norton Printing Company v. Augustana Hospital.

You disagree with the position stated in Ms. Giroux's response to your first appeal on behalf of the Examining Division. You dispute the Examining Division's application to this case of Bibbero Systems, Inc. v. Colwell Systems, Inc., 893 F.2d 1104 (9th Cir. 1990) (the court found that the uncompleted superbill conveyed no information about the patient, the patient's diagnosis, or the patient's treatment). In contrast, you state that the selected and arranged boxes convey specific information about the number of response ovals, the appropriate type codes, split code, and headers. Thus you assert that applicant's voting ballot constitutes a translation of copyrightable expression which conveys information.

In conclusion, you state that because the applicant's voting ballot conveys a wide variety of information by the particular arrangement and location of its black boxes which translate into text, this work should be registered as original and creative authorship.

DECISION

After reviewing the application, the work itself, and the arguments you presented, the Copyright Office Appeals Board affirms the Examining Division's refusal to register this voting ballot because it is a blank form consisting of rows of ovals and rectangles which, alone or in combination with the other material on the ballot, do not represent sufficient pictorial, graphic, or literary authorship to constitute copyrightable material.

I. UNDER FEIST, COPYRIGHT PROTECTION REQUIRES AT LEAST A CERTAIN A MINIMUM AMOUNT OF ORIGINALITY.

The fundamental basis of copyright protection is a work's originality. Originality has two components: independent creation and a certain minimum amount of creativity. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991). This standard is mandated by the copyright clause, U.S. Constitution Art. 8, Sec. 8. The Copyright Office's administrative duty in its consideration of whether a work is registrable is the application of this two-prong originality criterion in a manner consistent with that criterion as indicated by Feist and by other pre-1991 precedent themselves consistent with Feist. The Office applies the same originality standard to all works, including blank forms. While the standard is low, "[t]here remains a narrow category of works in which the creative spark is so utterly lacking or trivial as to be virtually nonexistent." Feist at 359.

Your appeal addresses the second requirement: whether the work exhibits a minimum amount of creativity. The Copyright Office applies the Feist creativity standard as part of its requirement to determine affirmatively or negatively whether works constitute copyrightable subject matter under section 17 U.S.C.§ 410. Section 410(a) states that:

When, after examination, the Register of Copyrights

> determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.

Section 410(b) states this Office responsibility in the negative:

> In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.

Thus, the Copyright Office is charged with determining whether a given work contains a sufficiently quantum of authorship, i.e., whether it meets the creativity component, to sustain registration. See, e.g., John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986).

II. THE BALLOT FORM DOES NOT, IN ITSELF, CONVEY INFORMATION THAT CONSTITUTES COPYRIGHTABLE SUBJECT MATTER

Your second appeal disagrees with the Examining Division's decision in the response from Ms. Giroux that this form conveys no information. You assert that even prior to completion of the ballot by a voter, the ballot conveys information to a machine for processing. [Your letter of 1/9/2001, at 7.] The Blank Form rule which the Office follows is a corollary of the basic principle "that originality . . . is the touchstone of copyright in . . . fact-based works." Feist, 499 U.S. at 359-60. Thus, blank forms designed for the recording of information that "do not in themselves convey information" cannot be copyrighted. 37 C.F.R. §202.1(c)(2000). Instead, only forms that convey information in tangible form such that its representation possesses sufficient creative expression are subject to copyright.

A. Common Shapes Cannot be Copyrighted.

As a starting point to the analysis, we note that a pictorial or graphic work "must embody some creative authorship in its *delineation or form.* Neither the ballot's ovals, which you admit are not copyrightable, nor its black boxes, including the black "checks" themselves exhibit any creative authorship. They are merely common shapes that cannot

be copyrighted. Consequently, the general requirement of originality for pictorial or graphic works is not met with respect to the ovals and boxes per se. Compendium II of Copyright Office Practices §503.02(b) (1984) ("[I]t is not possible to copyright common geometric figures").

B. The Front of the Ballot Is Not Copyrightable.

Nor does the *overall* arrangement or organization of the geometric shapes on the front of the form constitute copyrightable pictorial authorship; such authorship also does not convey information as required under 37 C.F.R. §202.1(c). You noted in your appeal that the black rectangles assist a sensor in aligning a column of ovals. The unlettered black rectangles work with the black squares running vertically on the timing track, which provide the scanner with a horizontal guide. [Your letter of 2/9/2000, at 4-5.] These marks can fairly be said to be part of the method, system or device of scannable-ballot technology. As such, they are subject to the provision in the copyright act which provides that:

> 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.

17 U.S.C. 102(b).

If there is anything copyrightable about the front of the ballot, it must consist of graphic, i.e., pictorial, or literary authorship. In arguing that the form conveys information, you assert that without the markings on the front of the ballot, the information recorded on the ballot could not be read by the scanner. [Your letter of 1/9/2001, at 6.] The Board does not agree that these markings convey information under 37 C.F.R. §202.1(c). The marks are indicators or guides used in the functioning of a machine-operated method of "reading" the ballots, thus being portions of this work designed for *recording* information and, therefore, do not meet the regulatory requirement that they *convey* information.

We offer two analogies. Consider first the traditional credit card imprinter. It has a frame that holds the card in place while a roller, operated by a lever, transfers an impression of the card onto a sales slip. The frame ensures that the card will not move when the roller goes over it and the information on the card is transferred to the appropriate place on the credit card slip. The frame itself is not original in its delineation or form. Like the black rectangles and squares on the front of the ballot, the frame is a functional part of a system for transferring information. In addition to being specifically

excluded from copyright by 17 U.S.C. §102(b), their placement is dictated by their function, and thus they do not constitute creative expression. We offer a second analogy of traditional graph paper. Graph paper is nothing more than horizontal and vertical lines. The user defines the horizontal and vertical axes and records data by selecting the appropriate position on each axis and marking the point where they meet. The paper itself does not convey information. Similar to graph paper, the rectangles and squares on the ballot merely identify columns and rows. The ovals may be said to be akin to the points where the horizontal and vertical cross. No information is conveyed until the axes are specifically defined and the voter fills in the appropriate ovals. Graph paper, as a blank form, is not copyrightable. 37 C.F.R. § 202.1(c).

We see no original authorship on the front of the ballot form and its markings cannot be copyrighted.

C. The Reverse Side of the Ballot Is Not Copyrightable.

The reverse side of the ballot also uses boxes. You state that is it not, per se, the placement and arrangement of the black boxes which is believed to be protectible graphic design. Rather, the particular location and arrangement of the black checks and boxes represents literary expression of the author. [Your letter of 1/9/2001, at 3.] You assert that it is the text represented by a particular sequence of checked boxes that is protected expression. [Id., at 5-7.]



For a work to be registrable as literary authorship, it must be expressed in tangible form rather than inferred. As an analogy, a diagonal stripe across a circle containing a figure means that the activity represented by the symbol is prohibited, but that does not mean that the pictorial figure itself is copyrightable. In other words, to be registrable, the "translation" of an idea must be converted into fixed expression that in itself exhibits a sufficient quantum of creativity. A series of rectangles on a page cannot be said to be a substitute for copyrightable text. As a metaphor for some undefined text, it constitutes an idea. As a means of communication, it constitutes a method. Both are denied copyright protection. 17 U.S.C. 102(b).

D. The Principle of *Baker v. Selden*

Section 102(b) is a codification of the early case of Baker v. Selden, 101 U.S. 99, 102

(1879), where the Court explained that a bookkeeping system including blank forms with ruled lines and headings did not preclude another from publishing a book containing similar forms to achieve the same result. The court reasoned that:

> To give 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. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained, and it can only be secured by a patent from the government.

Id. Baker went on to conclude that:

> blank account-books are not the subject of copyright: and that the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book.

Id., at 107. Under Baker and its progeny, the Copyright Office has followed a longstanding practice of denying registration of a claim in a form designed merely to record information if that form contains less than a de minimis amount of original literary or artistic expression. Baker had obtained a copyright on his book containing both a system and the textual explanation of that system. You have submitted only a blank form.

Moreover, it is doubtful whether the *selection* of the boxes creates a sequence that conveys information. [See your letter of 2/9/2001.] For reference, you also submitted Exhibit B, which is not under consideration in this appeal. You believe it illustrates the point that when any four boxes from spaces 40 to 49 are marked along with one or two boxes in the 51 to 55 range of spaces, the *sequence* will identify a precinct and more than 1600 sequences are possible to identify precincts. By your description, the forms do not actually convey any information to the producer until the appropriate sequences are chosen. You concede that "it is the text represented by a particular sequence of checked boxes which is believed to be protectible expression." Again, the ballot form alone does not express any particular sequence. Accordingly, from this perspective, because it is a sequence that may convey information, until specific selections are made, the form is blank.

From the perspective that the sequence on the back of the ballot in question, 11, 21, 39, 41, 42, 43, 51, represents text that can be translated using a manual, you state that "The copyright claimant has simply provided a language which utilizes black boxes arranged in

specific format to translate these textual messages." [Your letter of 1/9/2001, at 5.] A language, as a system of communication, is not subject to copyright. 17 U.S.C. 102(b). The nature of original creative material contributed by an author must be expressed in literary or artistic authorship; it may not be virtual, or implied, expression; nor may it be a concept or an idea related to actual expression; nor may it be a method which might cause the creation of fixed, protectible expression at some future point in time.

E. Case Law concerning Blank Forms

Citing Norton v. Augustana, 155 U.S.P.Q. 133 (N.D. Ill. 1967), as support, you point out that "[t]he fact that this information is intended to be transmitted to a machine for processing rather than to a person is not believed to be distinguishable from the information conveyed to doctors by a health examination checklist, such as those found to be copyrightable in Norton." We agree that the intended use of the information does not disqualify a work from being considered copyrightable when it possesses the necessary quantum of authorship. As we noted in our 1980 termination of the inquiry regarding Blank Forms, "Our blank form regulation does not preclude registration of any genre of works *per se*; we examine each form on the basis of whether or not it contains a sufficient amount of original literary or artistic expression to be entitled to copyright protection." 45 Fed. Reg. 63297 (September 24, 1980).

The Board disagrees, however, with your assertion that this work on appeal contains the necessary creative authorship. The Copyright Office registered the forms in Norton as having met the minimum creative authorship amount, and thus, by implication consistent with the Office's regulation, such forms "conveyed information." The district court in Norton pointed out the fact that the forms in that case were detailed and contained multiple separate categories; the instant forms do not have comparable, multiple and detailed, categories or terms such as would possibly sustain a claim. Although the Ninth Circuit in Bibbero Systems, Inc. v. Colwell Systems, Inc., 893 F.2d 1104 (9th Cir. 1990) stated that Norton "should be disapproved," 893 F.2d at 1107, Norton's general principle remains a valid articulation of the basis for registration: "All business, medical, legal and other forms are thus not per se excluded from copyright protection, but the determination turns on whether they actually convey information or whether they are merely to be used to record it." Norton, 155 U.S.P.Q. at 134. We point out, again, that the Copyright Office registers works which contain sufficient textual or pictorial authorship even though such works may, indeed, be used to record further information.

The principle underlying this registration practice was again articulated in Safeguard Business Systems, Inc. v. The Reynolds and Reynolds Company, 14 U.S.P.Q.2d 1829 (E.D. Pa. 1990) which stated that the Third Circuit rejected a *per se* rule against the copyright of any blank form and instead, quoting Whelan Associates v. Jaslow Dental Laboratory, 797 F.2d 1222 (3d Cir. 1986), in principle allowed copyright protection to those works used for purposes of blank forms "if they are sufficiently innovative that their arrangement of

information is itself innovative... [O]nly those that by their arrangement and organization convey some information can be copyrighted." Whelan, 797 F.2d at 1243. Having stated the principle, the Safeguard court goes on to mention the inconsistency among courts in interpreting the blank form principle (Safeguard, 14 U.S.P.Q. 2d at 1832) and concludes that, given the slight amount of information present in the works, the particular blank forms at issue in that case were not copyrightable because "the *de minimis* information conveyed on the Safeguard day sheets is not entitled to copyright protection...." Id. The work on appeal contains a similar *de minimis* amount of authorship which does not sustain registration.

The blank form at issue in Bibbero, the clinical record form known as a "superbill," listed checklists for a doctor to indicate diagnosis and applicable fee, textual instructions to the patient for filing insurance claims, textual clauses assigning insurance benefits and authorizing release of patient information. As described, the form was registered by the Copyright Office because of the presence of sufficient textual and compilation authorship; no such authorship is present in the form in question in this appeal. As you know, however, copyright registration made within five years of first publication constitutes prima facie evidence of copyrightability (17 U.S.C. 410(c)) which may be rebutted. The Bibbero court in its consideration of the "superbill" concluded that the form "convey[ed] no information about the patient..." and that "the fact that there is a great deal of printing on the face of the form– because there are many possible diagnoses and treatments– does not make the form any less blank." 893 F.2d at 1107-08. The court found these works to be uncopyrightable blank forms for recording information rather than conveying information, thus rendering its interpretation of the Office's blank forms regulation consistent with other "blank forms" cases such as John H. Harland Co., v. Clarke Checks, Inc., 711 F.2d 966, 971 (11th Cir. 1983). There, the Harland Check Memory Stub, incorporating a previously registered pictorial image, was held uncopyrightable based on its composition of the preexisting graphics, "lines on which the writer can record the date, the dollar amount of the check, the payee of the check, and the purpose of the check. (Citation omitted.) Thus, [the Stub] is merely designed for recording information and does not convey information or contain original pictorial expression." Id. at 972.

We note, further, that, in attempting to distinguish this work from the work in Bibbero, you assert that this work falls under the exception providing that "where a work consists of text integrated with blank forms, the forms have explanatory force because of the accompanying copyrightable textual material." Bibbero, 893 F.2d at 1107. You state that "the selection and arrangement of black checks and boxes...are translations of copyrightable expression...which convey information. [Your letter of 2/9/2001, at 8.] Your assertion that the arrangement of black boxes is a "translation" from plain English into, shall we say "Boxese," is unpersuasive because even slight text on a form is not copyrightable– consider, for example, the heading, "ES&S 8 ½" x `9" - 8 Column - 600 Response," which is uncopyrightable as a title, under 37

C.F.R. §202.1(a).[1] Literary works too, must be sufficiently creative under Feist. As stated above, the expression of the literary material must be exhibited in some form of expression that itself demonstrates a sufficient amount of fixed, literary authorship. Like the expression in Bibbero, which contained much more in text than do the boxes placed in predetermined locations in this work, this box-placement expression is "too simple to be copyrightable as text in and of [itself]." Bibbero, at 1108. Like the black rectangles and squares used to align the form vertically and horizontally in the scanner, the material on the reverse side may fairly be said to be part of the method, system or device of scannable ballot technology. The technology may be original and creative and it may be protectible under patent law, but as far as literary or artistic authorship on the form itself is concerned, the fixed expression which is the subject of this appeal is not protectible under copyright law.

CONCLUSION

For the reasons stated above, the Board of Appeals concludes that the 8 COLUMN 9 INCH BALLOT cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

Nanette Petruzzelli

Nanette Petruzzelli
Chief, Examining Division
for the Appeals Board
United State Copyright Office

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[1] "Words and short phrases such as names, *titles*, and slogans; familiar symbols or designs...: are not subject to copyright and applications for registration of such works cannot be entertained. (Emphasis added.) 37 C.F.R. §202.1(a).