ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF TERMINATION OF INQUIRY

37 CFR Part 202

REGISTRATION OF CLAIMS TO COPYRIGHT; NOTICE OF TERMINATION OF INQUIRY REGARDING BLANK FORMS

The following excerpt is taken form Volume 45, Number 187 of the Federal Register for Wednesday, September 24, 1980 (pp. 63297-63300).

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

Registration of claims to Copyright; Notice of Termination of Inquiry Regarding Blank Forms

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of termination of inquiry.

SUMMARY: This notice of termination of inquiry is issued to advise the public that the Copyright Office of the Library of Congress is closing docket RM 79-6 without further action and does not intend to institute additional rulemaking proceedings at this time on the specific subject of registration of claims to copyright in "blank forms." "Blank forms" are works defined in existing Copyright Office regulations, 37 CFR 202.1(c) as "forms * * * which are designed for recording information and which do not in themselves convey information." The Copyright Office may propose a rewording of the regulation in connection with a later rulemaking proceeding on noncopyrightable subject matter generally, but this rewording would not be intended to change the principle of the present regulation that registration cannot be made for mere blank forms.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559. Telephone (202) 287-8380

ML-244

SUPPLEMENTARY INFORMATION: Existing Copyright Office regulations preclude registration of claims to copyright in certain works that are not subject to copyright. Blank forms are included in this category of noncopyrightable works.

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

(a) * * *

(b) * * *

(c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, score cards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information. [37 CFR 202.1(c)]

On December 5, 1979, the Copyright Office published a notice of inquiry (44 FR 69977) advising the public of its intention to review registration practices concerning blank forms. The notice cited several recent cases where courts held copyrightable works that some might consider to fall within the broad language of the blank form regulation.

As we stated in the notice, these cases do not conflict directly with the regulation since the Copyright Office actually registered the works. We also announced a modification of our practices with respect to answer sheets, in response to the decision in *Harcourt, Brace and World, Inc., v. Graphic*[1] *Controls Corp.*, 329 F. Supp. 517 (S.D.N.Y. 1971). We elicited public comment, views and information to assist us in a review of the validity of the blank form regulation under the new Copyright Act and relevant judicial precedent.

Specifically, the notice of inquiry requested comments on whether 37 CFR 202.1(c) should be amended to state simply that works which are designed for recording information and do not convey information are not copyrightable, whether the existing regulation's list of examples should be revised, or whether the regulation should be otherwise changed. We also solicited comments respecting Copyright Office practices in the case of works that contain small amounts of traditional authorship. Comments were to be filed on or before January 31, 1980.

Sixteen responses were submitted to the Copyright Office. Except for one brief reply from a student and one lengthy comment from counsel for the defendant in *Harcourt, Brace and World, Inc. v. Graphic Controls Corp., Supra,* all coments were filed either by designers of business forms, data processing forms, standardized tests, bank forms, hospital forms, or intrument charts, etc. or by counsel for such clients. All comment letters advocated liberalization of Copyright Office policy with respect to claims to copyright in blank forms with the exception of the one from counsel for the defendant in the *Harcourt* case.

The Copyright Office has carefully considered each of the responses to its notice of inquiry, as well as the legal and policy reasons underpinning its blank form regulation. Based on this review, the Copyright Office has concluded that the principle of the existing regulation remains valid under the current Copyright Act. An item that serves merely as means for recording information and does not itself convey

[1] Error; line should read: "Brace and World, Inc. v. Graphic"

information or contain original pictorial expression does not constitute copyrightable subject matter.

The Copyright Office is charged with administering the provisions of the Copyright Act, 17 U.S.C. 101 et. seq. (1976), and with issuing regulations consistent with the Act for the administration of its duties, (17 U.S.C. 702). We have no authority to promulagate practices inconsistent with [2] the Act nor to register claims to copyright for works outside the scope of federal statutory protection, (17 U.S.C. 410).

The Act clearly limits the subject matter of copyright to original works of authorship (17 U.S.C. 102(a)), and excludes from copyright protection "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 [a] work," (17 U.S.C. 102(b)). This means that copyright may be claimed only in the "expression" embodied in a work of authorship, and not in its "idea." [*Mazer* v. *Stein*, 347 U.S. 201 (1954)]

The House Report accompanying the 1976 copyright revision bill states that Section 102(b) "in no way enlarges or contracts the scope of copyright protection under the [previous 1909 copyright] law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between [copyrightable] expression and [uncopyrightable] idea(s) remains unchanged." [H.R. Rep. No. 94–1476, 94th Cong. 2d. Sess., at 57 (1976)]. Moreover, the legislative history indicates that Congress intended to maintain the same standard of original authorship that had been established under the previous copyright law. [S. Rep. No. 94–473, 94th Cong. 1st Sess., at 50 (1975)] Thus, earlier case law remains valid to define the scope and applicability of the principle embodied in the blank form regulation.

These statutory provisions, coupled with relevant case law, establish that a work which lacks even a minimal amount of original, creative expression should be denied registration regardless of whether it embodied a new or original idea. *See Bailie* v. *Fisher*, 258 F. 2d 425 (D.C. Cir. 1958). Conversely, a work that evidences more than a minimal amount of original, creative expression should be accepted for registration even though it contains an uncopyrightable idea, procedure or process. Copyright registration does not necessarily mean that every element of the registered work is subject to copyright.

These principles, although sometimes misunderstood, are firmly established by case law involving blank forms. In the early case of *Baker* v. *Seldon*, 101 U.S. 99 (1879), the United States Supreme Court held that Selden's copyright on a book explaining a bookkeeping system that included 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 to the author of the book an exclusive property in the art described therein, when no examination of its novelty has every been officially made, would be a [3] 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.
> [101 U.S. at 102]
>
> * * * * *
>
> The conclusion to which we have come is, that blank account-books are not the subject of copyright; and that the mere copyright of Seldon'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.
> [101 U.S. at 107]

The *Baker* case and its progeny are embodied in the longstanding practice of the Copyright Office to deny registration of a claim in a form designed merely to record information if that form contains no original literary or artistic expression (i.e., it is "blank"). If a work does evidence at least an appreciable amount of amount of such original, creative [4] expression, the Copyright Office will register a claim, regardless of whether or not the work also contains uncopyrightable elements designed for the simple recordation of information. For example, we commonly register contracts, insurance policies, and other textual documents, as well as bank checks with pictorial or artistic authorship and the like, even though such works are designed, in part, to record information. It is the province of the courts to adjudicate the extent of protection accorded such a registered claim.

Our further review of the cases cited in our original notice of inquiry (44 FR 69977) leads us to conclude that they do not warrant modification of our practices respecting blank forms. Those cases, which some may interpret as inconsistent with the blank form regulation, involve works that were registered by the Office on the basis of sufficient original, creative expression, notwithstanding their form aspect. In each of the cases, the respective court affirmed the copyrightability of the integrated work, on grounds that it possessed original literary or artistic authorship. [*Edwin K. Williams & Co. v. Edwin K. Williams & Co.—East*, 542 F. 2d 1053 (1976) (account books containing several pages of instructions on use of forms and advice on management of service stations); *Manpower, Inc. v. Temporary Help of Harrisburg, Inc.*, 246 F. Supp. 788 (E. D. Pa. 1965) (vacation schedule forms containing original art work and arrangements); *Professional Systems & Supplies, Inc. v. Databank Supplies & Equipment Co., Inc.*, 202 U.S.P.Q. 693 (W.D. Okla. 1979) (forms for promissory notes containing directions for use); *Cash Dividend Check Corp. v. Davis*, 247 F. 2d 458 (9th Cir. 1957) (check with text describing a stamp-check plan to convert savings stamps into cash); *Frederick Chusid & Co. v. Marshall Leeman & Co.*, 326 F. Supp. 1043 (S.D.N.Y. 1971) (multipage "personal data" form).]

One additional case, *Norton Printing Co. v. Augustana Hospital*, 155 U.S.P.Q. 133 (N.D. Ill. 1967), while denying defendant's motion to dismiss and finding that medical laboratory test forms registered by the Office in fact conveyed information, contained dicta questioning the Copyright Office's regulation. The court opined that our distinction between works that convey information and are therefore registrable, and those which merely record information and are not registrable "would appear to be without foundation in the Copyright Act or in Article I, Section 8 of the Constitution, which generally provides for copyright creation and protection. It is argued that where originality and intellectual effort exist on the creation or design of forms, copyright protection shoud be available as it is to other 'writings,' such as commercial circus posters, mass-produced lamp basis, and cartoon figures." [155 U.S.P.Q. at 134, citing *Nimmer on copyright*, § 37.31 at 153 (1966).]

The *Norton* court found it unnecessary to repudiate the principle of the regulation in deciding the case. Moreover, its criticism of the Copyright Office practice seems misplaced. The court apparently assumed that the Copyright Office's denial of registration for mere blank forms is based upon the perceived intended use in recording information.

The Copyright Office does not apply the regulation that way. We apply a standard consistent with that applied to all works submitted for registration: does the work evidence an appreciable quantum of original, creative expression? If so, the work is treated as a proper subject of copyright, and will be considered for registration. Thus, 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.

The Office practice of denying registration for forms that lack a sufficient quantity of creative authorship

[2] Error; line should read:
"promulgate practices inconsistent with"

[3] Error; line should read:
"has ever been officially made, would be a"

[4] Error; line should read:
"of such original, creative"

is strongly supported by case law precedent. *Brown Instrument Co. v. Warner,* 161 F. 2d 910 (D.C. Cir. 1947) (graphic temperature-pressure charts properly refused registration); *Taylor Instrument Co. v. Fawley-Brost Co.,* 139 F. 2d 98 (7th Cir. 1943), *cert. denied,* 321 U.S. 785 (1944) (temperature chart not copyrightable); *Time-Saver Check, Inc. v. Deluxe Printers, Inc.* 178 U.S.P.Q. 510 (N.D. Tex. 1973) (blank checks and attached carbon forms lack sufficient creative authorship to be copyrightable); *Aldrich v. Remington Rand, Inc.,* 52 F. Supp. 732 (N.D. Tex. 1942) (losseleaf tax record forms held not subject to copyright).

Neither the instant comment letters nor our review of case law has revealed any contrary case authority. Moreover, the most recent decision on point, firmly upholds the validity of the blank form regulation.

John H. Harland Co. v. Clarke Checks, Inc., Civ. No. C 79–1025 A (N.D. Ga., Mar. 25, 1980), involved checks that were registered by the Copyright Office on the basis of original pictorial designs. However, the Harland Company argued that the copyright also protected its Memory Stub products. These consist of a perforated stub placed between the permanent checkbook stub and the check in a manner that allows the user to remove the stub from the checkbook and record the check transaction on it.

The court found that the defendant copied only the Harland Memory Stub system; it did not copy the original pictorial material on which registration was premised. The court granted defendant's motion for partial summary judgment and denied plaintiff's cross-motion based, in part, upon its conclusion that plaintiff's Memory Stub products are not subject to copyright protection. In so doing, the Court expressly reaffirmed the validity of Copyright Office regulation 37 CFR, § 202.1(c) covering the noncopyrightability of blank forms such as bank checks which are designed for recording information and do not in themselves convey information.

The court found that Harland's Memory Stub, like the accounting forms in *Baker v. Selden,* is a new system for recording check book entries and is not subject to copyright protection because it does not convey any additional information beyond that conveyed in an ordinary bank check.

> This court has concluded that the reasoning expressed in Baker v. Selden controls in the case at bar. What the plaintiff's Memory Stub product actually represents is a new system for recording checkbook entries. As such, it is not subject to copyright protection.
>
> * * * * *
>
> In the case at bar, the plaintiff's Memory Stub check does not convey any additional information other than that which is contained in an ordinary bank check, which neither party contends is copyrightable. I [5] contains no instructions other than specifying "Pay To" and "For" lines, as well as indicating spaces for the date and dollar amount. It is apparent that the plaintiff is attempting to assert copyright protection for the concept of the removable stub itelf; and the court cannot say that granting the plaintiff what is in effect monopoly rights over this concept "cannot hamper the business world in its use of bank checks". [Civ. No. C 79–1025 A, at 4–5. (Citations omitted)]

Comment letters submitted in response to the Copyright Office notice of inquiry on blank forms presented no persuasive arguments against the validity of regulation 37 CFR 202.1(c). Most respondents argued that much time and effort is expended in creating or designing forms, and that this effort per se is worthy of copyright protection. Several averred that the arrangement of lines, heading, and spaces on a form represents a creative effort that should be entitled to protection. The John Harland Company, plaintiff in the aforementioned case, argued that the regulation is not warranted by *Baker v. Selden. (John H. Harland Co. v. Clarke Checks, Inc. supra,* has been decided since the comment letters were submitted. The court found *Baker v. Selden* controlled its decision.) Others, including Brownstein, Zeidman and Schomar law offices, attested to the usefulness of forms in facilitating business operations. Some responses suggested that the regulation be amended to state simply the criterion of conveying information, without listing examples of non-protectible formats.

The comment from counsel for defendant in *Harcourt, Brace & World, Inc. v. Graphic Controls Corporation,* 329 F. Supp. 517 (S.D.N.Y. 1971) argued that the regulation should be strengthened and supplemented by a procedure requiring the applicant to specify exactly which portion of the work is original and expressly disclaim copyright in the portion that contains common information and/or does not convey information. The Examiner would be obligated to insist that this disclaimer be made, consistent with a regulation that would continue to deny registration for mere blank forms.

The Copyright Office has concluded that its practice accurately reflects the principles of statutory and case law. We make subject matter determinations of registrability solely on the basis of the original, creative expression (if any) embodied in the works submitted for registration. The ideas, however original, which may be embodied in the work, are not copyrightable. Therefore, the Office has decided to terminate its notice of inquiry and to follow its long-standing practice with respect to blank forms.

In a later proceeding we will deal with noncopyrightable subject matter in general. The comments received in connection with Docket Rm79–6 will be considered again to the extent they suggest ways to clarify the regulation without changing its basic principle.

(17 U.S.C. 702, 410)

Dated: September 12, 1980.

David Ladd,

Register of Copyrights.

Approved.

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 80–29549 Filed 9–23–80; 8:45 am]

BILLING CODE 1410–03–M

[5] Error; line should read:
"neither party contends is copyrightable. It"

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