



June 2004

- **Does copyright protection extend to questionnaires and forms developed as the result of research activities?**

Under the “blank forms doctrine” copyright protection is not available if a questionnaire or form is designed for recording information, but does not in itself convey information.

Discussion

The “blank forms” doctrine is a copyright principle that came into existence following the Supreme Court case Baker v. Selden.¹ It is now codified in 37 C.F.R. 202.1(c), which explains that “blank forms such as time cards, graph paper, account books, diaries, blank checks, scorecards, address books, report forms, order forms and the like, *which are designed for recording information and do not in themselves convey information,*” are never the subject of copyright. In the Supreme Court case, Selden, the plaintiff, had created a system that simplified bookkeeping, and had copyrighted the books that explained his method. He sued Baker, who had created a similar system, for copyright infringement.² The court concluded that there was “a clear distinction between the book, as such, and the art which it intended to illustrate.” It found that only the books, being a description of the system, were copyrightable, and not the system of accounting itself, because allowing for the exclusive right to use a system would invade the domain of patents. The holding is now codified in 37 C.F.R. 202.1(b), which expresses that “ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing” are not copyrightable.

The “blank forms” doctrine did not emerge from the main holding of the case, but from a short phrase the Court made in passing: “blank account-books are not the subject

¹ 101 U.S 99 (1879)

² *Id.* At 100

of copyright.”³ This principle has since then been applied regularly to strike down copyrights for various types of documents, including billing forms, medical history forms and questionnaires. The Federal Courts consider that these forms need not be blank, contrary to what their name suggests: they may contain actual sentences, and still be denied copyright as long as they, in essence, *request information, without conveying information*. Despite the Supreme Court’s seemingly plain reasoning, however, it may be difficult to determine what the doctrine really covers, and which forms “convey no information.” Courts struggle in their application of the principle, and disagree on the scope and legitimacy of the doctrine.

The Seventh Circuit is reluctant to find a form “blank,” and “indicates a dislike for the blank forms rule, asserting that the rule ‘has been strongly criticized and would appear to be without foundation.’”⁴ That circuit, for example, held in 1997 that taxonomies were copyrightable because “section 102(b) [of the copyright Act] does not permit [the defendant] to copy the Code itself, or make and distribute a derivative work based on the Code, any more than Baker could copy Selden’s book.”⁵ A Federal District Court in Illinois summarized the Seventh Circuit’s view on the issue by stating “the pertinent inquiry is whether the information *sought* by the form is unique and whether the arrangement of headings and categories display sufficient creativity to warrant copyright protection.”⁶ Thus, the 7th circuit, when confronted with a blank form, will not deny copyright automatically: it will first inquire whether such form meets the originality requirement of a “compilation of facts.” If the court finds that the arrangement of headings and selection of sentences meet the originality requirement, the form will be copyrightable.

The Second Circuit, reflecting a tendency to uphold copyright protections, held that test answer sheets were copyrightable, in Harcourt Brace & World, Inc. v. Graphic Controls Corp., 329 F.Supp. 517 (SDNY 1971). The court found that the sheets provided information in the sense of 37 C.F.R. 202(c) regulation. The court likely had to be

³ Id. At 107. See Advanz Behavioral, at 1184. (“that Delphic dictum, rather than the holding of baker, gave rise to what has come to be known as the ‘blank forms rule’”)

⁴ Bibbero, at 1107, quoting

⁵ American Dent. Assn. v. Delta Den. Plans Assn., 126 F.3d 977, ??? last page of opinion (7th Cir. 1997)

⁶ Hollister, Inc. v. Uarco, Inc., 39 U.S.P.Q.2d (BNA) 1542 (N.D. Ill. 1996), quoted in Recent Copyright Law Developments, by Jeff McDaniel, available at <http://www.utexas.edu/law/journals/tiplj/volumes/vol5iss2/mcdaniel.html>

extremely creative in reaching such conclusion, and reflects as well a dislike for the doctrine's intrusion in the domain of copyrights.

However, not all circuits agree, and some have applied the rule expansively, striking down copyrighted forms: the 11th circuit seems to follow the 9th circuit position that blank forms will not be copyrightable, and will not be salvaged by inquiring whether the form is an original compilation of facts: once forms are blank, by their nature, they are not copyrightable.⁷ For those circuits, arrangement, decision as to what to include, and the like do not qualify as "information within the meaning of 37 CFR 202.1(c)." Thus, a questionnaire, held copyrightable in the 2d circuit, would likely be struck down in the 9th.

The ninth circuit self-proclaims itself as applying the rule broadly, thus finding forms "blank" where other circuits would not. In Bibbero, a 1990 case, the court was directly concerned with the scope of 37 C.F.R. 202.1(c) and decided that billing forms were not copyrightable, following which they could be reproduced by any other company for their billing system.⁸ It held that "until the superbill is filled out, it conveys no information...doctors do not look to Bibbero's superbill in diagnosing or treating patients. The superbill is simply a blank form which gives doctors a convenient method for recording services performed. The plaintiff supported his contention that his billing forms were copyrightable by citing Illinois and New York cases. The court agreed that the Illinois case, Norton Printing Co. v. Augustana Hospital⁹, could not be distinguished from the case at hand, but affirmed that "it should be disapproved [because it] indicate[d] a dislike for the blank form rule."¹⁰

However, the Ninth Circuit opinion on the "blank forms rule" seems to have come under scrutiny since 1990: in 1998, in Advanz Behavioral Management Resources, Inc. v. Mirafior, a California Lower Court directly attacked the Ninth Circuit interpretation. Despite finding itself bound by precedent created by Bibbero, the court dedicated the majority of its opinion to criticizing the way the doctrine had come to disturb the copyright system. The copyright infringement claim involved "forms designed for recording information about

⁷ Bibbero, at 1107.

⁸ Id., at ???

⁹ 155 U.S.P.Q. 133 (N.D.Ill.1967). the case dealt with the copyrightability of medical laboratory test forms

¹⁰ Bibbero, at 1107

medical patients.”¹¹ The Lower Court of California resented the doctrine because it found it “at odds with the purpose of copyright”¹² and because it created uncertainty: “blank forms ... may be uncopyrightable because of their essential nature of repositories for the recording of information even when they do [not lack that originality requirement].”¹³ In the opinion of the court, the copyright Act just required originality and did not provide for the uncopyrightability of that type of writing just because of their nature.

The court thought that “a so-called ‘blank form’ may be very valuable, and encouragement of its creation may be a worthy object of the copyright laws.”¹⁴ It finally hinted that “there is room for doubt about whether the regulatory per se version of the blank form rule still exists.”¹⁵ Thus, even though the Ninth Circuit has not spoken yet, it might decide to revise its position soon and align itself on circuits that are more protective of copyrights.

Even though the Ninth Circuit will generally strike down a form which does not convey information in the sense of 37 CFR 202.1(c), it still allows for several exceptions. In Bibbero, the Court of Appeals explained in dicta that “although blank forms are generally not copyrightable, there is a well-established exception where text is integrated with blank forms. Where a work consists of text integrated with blank forms, the forms have explanatory force because of the accompanying copyrightable textual material.”¹⁶ This exception was created in Edwin K Williams, where the copyrightability of an account book, containing several pages of instructions, was at stake. These instructions explained how to fill in the forms and how to operate the business.¹⁷ The court found that “the plaintiff’s copyrights were valid because the books conveyed information...as ‘the instructions and the blank forms constituted an integrated work entitled to copyright

¹¹ Advanz Behavioral Mgmt Res. V Miraflor, 21 F.Supp.2d 1179 (1998)

¹² Id. At 1184

¹³ Id.

¹⁴ Id. At 1185.

¹⁵ Id.

¹⁶ Bibbero. at 1106-1107.

¹⁷ Miraflor at 1186-1187, referring to Edwin K. Williams & Co., Inc. v Edwin K Williams & Co.-East, 542 F.2d 1053 (9th Cir. 1976)

protection."¹⁸ However, the forms are still granted copyrightability only in the context of the whole product. Individually, each form being blank would not benefit from any protection.

In addition, the 9th circuit in *Bibbero* mentioned that "a collection of common property and blank forms, although not individually copyrightable, may be selected, coordinated or arranged in such a way that they are copyrightable as a compilation."¹⁹ *Bibbero* was referring to *Harper House*²⁰, a 1989 case. There, the court had to determine whether an organizer was copyrightable. It determined that it was, because the organizer consisted in a collection of blank forms, and that "as copyrightable compilations, the organizer's selection, coordination, and arrangement are protectible. The text of the instruction is also protectible. Nevertheless, the blank forms and common property contained within the organizers are excluded from protection."²¹ Again, the forms would not have been worthy of copyright by themselves.

Thus, the 9th circuit, by opposition to circuits more protective of copyrights, will not recognize a form as being a compilation of "facts" and will find it by nature uncopyrightable. However, once such form is part of a bigger work, such as an organizer, it will be copyrightable, but only as a piece of a bigger assembly of forms and instructions – single out, the form loses its protection.

The copyright office itself explained that they "commonly register contracts, insurance policies, and other textual documents, as well as blank checks with pictorial or artistic authorship and the like, even though such works are designed, in part, to record information...[the Office] form regulation does not preclude registration of any genre of work per se; [the Copyright Office] examine[s] 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."²² However, the Office also expressed that "there is no way to secure copyright protection for the idea or principle behind a blank form...[but] an original literary

¹⁸ *Miraflor* at 1187, quoting *Williams*, 542 F.2d at 1061

¹⁹ *Bibbero*, at 1108.

²⁰ *Harper House, Inc. v Thomas Nelson, Inc.*, 889 F.2d 197 (9th Cir. 1989)

²¹ *Harper House*, 889 F.2d at 205, quoted in *Miraflor*, at 1188.

²² *Bibbero*, at 1186, quoting 45 Fed.Reg. 63299-63300 (September 24, 1980)

work...is subject to copyright registration even though it is published in conjunction with a blank form...not protected by copyright.”²³ Such reasoning seems to be consistent with the 9th Circuit view on the issue.

In conclusion, there is one main difference in the way the federal circuits interpret the “blank forms doctrine.” The ones that disapprove the rule avoid its application by finding that the form is by itself a compilation of facts, and is thus protectible as long as it meets the originality requirement. The other circuits strike down the copyrights of blank forms, just because they are blank by nature, but will recognize an exception to the exclusion when the form is part of a broader work. Such courts, of which the 9th circuit is part, seem to be more aligned to the Copyright Office interpretation of the Rule.

²³ Circular 32, available at www.copyright.gov (rev. Feb 1999)