United States Copyright Office
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July 7, 2004

Anthony J. Biller
Coats & Bennett
1400 Crescent Green, Suite 300
Cary, NC 27511

RE: MAPS FOR APPRAISERSdotCOM and APPRAISERSdotCOM
Control No. 61-206-4900(C)

Dear Mr. Biller:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated April 30, 2003 on behalf of Sean Pecor d/b/a Digital Spinner and William Darden, requesting reconsideration of the refusal to register the works entitled "MAPS FOR APPRAISERSdotCOM" and "APPRAISERSdotCOM." The Board has carefully examined the applications, the deposits, and all correspondence in this case concerning these applications and affirms the denials of registration.

ADMINISTRATIVE RECORD

Initial Submission

On May 17, 2002, the Copyright Office received two Form VA applications and deposits from you on behalf of your client, Sean Pecor d/b/a Digital Spinner, for the works entitled MAPS FOR APPRAISERSdotCOM and APPRAISERSdotCOM. You also requested special handling of these applications. In a letter dated May 30, 2002, Senior Visual Arts Section Examiner Wayne E. Crist refused registration of these works. MAPS FOR APPRAISERSdotCOM was refused registration because it lacked the authorship necessary to support a copyright claim for a "Map," and APPRAISERSdotCOM was refused because the claim in a "Technical drawing" was not supported by the deposit.

Mr. Crist stated that application for MAPS FOR APPRAISERSdotCOM[1] indicated that the basic outline of the maps was preexisting and that the claim of new authorship was "font and color selection; visual effects such as relief, shadowing and shading; labeling; [and] call-outs." Letter from Crist to Biller of 5/30/2002, at 1. Mr. Crist explained that the "visual effects" and the "labeling" claimed are standard and that the deposit does not appear to contain any copyrightable authorship. *Id.*

In reference to the application for APPRAISERSdotCOM and the claim for new authorship in "graphics," Mr. Crist explained that copyright does not protect simple format, layout, or page design.[2] He stated that the deposit did not appear to contain any other copyrightable graphics. The claim for "arrangement" was not clear – while the deposit may display some compilation authorship in the creation of original text and selection and arrangement of preexisting materials, the claim for a "technical drawing," "graphics,"or "colors"obscures such a claim. He advised you that if a claim of authorship in the text or in a compilation was intended, the application should be amended accordingly or a new application should be submitted. Letter from Crist to Biller of 5/30/2002, at 2.

Finally, Mr. Crist requested clarification that the work deposited includes only authorship that was first published on December 1, 1999, the publication date provided in the application. *Id.*

First Request for Reconsideration

On July 29, 2002, you wrote to Mr. Crist requesting reconsideration of the applications and providing additional and revised information. Letter from Biller to Crist of 7/29/2002, at 1-3. On August 21, 2002, you requested reconsideration of the denial of registration pursuant to Copyright Office appeal procedures. Addressing the refusal of MAPS FOR APPRAISERSdotCOM, you argued that the requisite level of creativity is low *citing*, Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340 (1991). You also argued that the Copyright Office must look to the design of the maps as a whole *citing*, Mason v. Montgomery Data, Inc., 967 F.2d 135 (5th Cir. 1992); Knitwaves, Inc.v. Lollytogs Ltd., 71 F.3d 996 (2d. Cir 1995); and Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977). Letter from Biller to Examining Division of 8/21/2002, at 2.

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[1] *See* Appendix A, B and C for representative examples of these works.

[2] *See* Appendix D for a representative page of this work

You also stated that several recent cases have dealt with the question of merger in relation to maps and that these courts have cautioned against applying this doctrine when the idea is capable of various modes of expression *citing*, Streetwise Maps, Inc. v. Vandam, Inc., 159 F.3d 739 (2d Cir. 1998); Mason v. Montgomery Data, Inc., 967 F.2d 135 (5th Cir. 1992); and Sparaco v. Lawler, Matusky, Skelly Engineers LLP, 60 F. Supp. 2d 247 (S.D.N.Y.1999), *vacated,* 303 F.3d 460 (2d Cir. 2002). *Id.*

You explained that a sworn declaration of Sean Pecor was also attached to the request for reconsideration to further clarify "the original and creative contributions he made to the maps." *Id.* at 2. While admitting that Mr. Pecor did use the outline maps from the U.S. Census, you stated that Mr. Pecor had to "resize the maps and redraw many of the anti-aliased lines." He also "manually created a three-dimensional effect by repeating each outline several times" and chose the map colors, fonts, labeling and call-outs. *Id.* at 2-3. You contend that the maps "possess sufficient creativity in both the selection, coordination, and arrangement of the facts that they depict, and as [sic] in the pictorial, graphic nature of the way they do so...." *Id.* at 3, *citing* Mason at 142.

You requested reconsideration of the application for registration of APPRAISERSdotCOM. You explained that the application had been corrected and revised to, *inter alia*, provide "a more complete explanation of the material added to the work under Section 6(b)" of the application and to include the "maps" under Section 2(a) of the application. *Id.* at 3. You argue that the "compilation and arrangement of the maps, text, graphics and data constitutes an original work of authorship." *Id.* at 4.

You further argued that the authors of the work "independently compiled, formatted, and arranged the text, maps, graphics, and listing data that comprise the deposit material." You also stated that the authors do not claim protection for the "content of the data listings," but rather, only seek protection on the "format of such listing and how such listings are arranged or compiled in relation to the graphics, text, and maps." *Id.* at 4. While admitting that the content of the data listings of the deposit material is not the same as what was first published in December 1999, you stated that since the claim is not for such "content," you do not believe that it is necessary to recover the exact data listings as originally published in 1999. *Id.* at 4.

On November 29, 2002, Ms. Giroux responded on behalf of the Examining Division to your first request for reconsideration. Ms. Giroux explained that with the

exception of "some text and compilation data in the work entitled APPRAISERSdotCOM," these works do not contain any other authorship that is copyrightable. Letter from Giroux to Biller of 11/29/2002, at 1. Ms. Giroux explained that in Feist, the Court held that the "sweat of the brow" theory was not an appropriate basis for copyrightability. Rather, the Court stressed that a compilation is eligible for protection if it contains original selection and arrangement of material. She stated that the Copyright Act's definition of "compilation" refers to the original ordering and grouping of items, not to general format or layout of text or pictorial matter. *Id.* at 2.

In the case of MAPS FOR APPRAISERSdotCOM, since these maps are based on preexisting maps, copyright protection extends only to the additions or changes appearing in the work for the first time. Where the new material "consists solely of uncopyrightable elements such as a change of layout, format, size, spacing or coloring, registration is not possible." *Id.* at 1-2, *citing* Compendium of Copyright Office Practices II, § 305.06 and § 305.07 (1984) (hereinafter, Compendium II).

While maps fall within the classification of "pictorial, graphic, or sculptural works" and are eligible for copyright protection, a map, like any other work, must contain at least a minimal level of original, creative expression. *Id.* at 2, *citing* 17 U.S.C. § 102 and Feist. Ms. Giroux stated that there is no originality where the elements added to a map "amount to little more than layout or format, a minor variation in coloring, or elements predetermined by functional considerations. She stated that the new additions to these maps, e.g., call-outs, labeling, outlines of states, counties and regions, shadowing do not contain sufficient authorship to sustain a copyright for either the individual elements or for the compilation of these minor variations. *Id.* at 3.

Ms. Giroux distinguished the maps in this application from those found to be copyrightable in the Mason, Streetwise, and Sparaco cases. Each of those cases focused on "the overall manner in which the expressive elements in each map were selected, coordinated, and arranged, and concluded that each map contained sufficient creativity" for both the compilation of the facts they depicted and for the pictorial and graphic nature of the way in which those facts were expressed. *Id.* at 4. Ms. Giroux explained that the Examining Division did not find this to be the case with the simple outline maps contained in the present two works. *Id.* She stated that with the exception of the "text and compilation of data" in the APPRAISERSdotCOM application, the claims "amount to little more than layout and format of preexisting county lines and a small number of city name placements and de minimis graphic authorship. Similarly, the "labeling and call-outs... lack the

creative and original authorship necessary to support a copyrightable compilation. In the absence of such original authorship, the applications must be refused."

Ms. Giroux added that a new registration could be submitted to the Copyright Office for a claim of "text and compilation of data" in the APPRAISERSdotCOM work.

Second Request for Reconsideration

On April 30, 2003, you submitted a second request for reconsideration to the Board of Appeals.[3] You state that the application for MAPS FOR APPRAISERSdotCOM is for a claim on maps and the application for APPRAISERSdotCOM is for a claim on the text, maps, and formatting of an Internet web page.

You argue again that the requisite level of authorship is extremely low and that the Copyright Office must look to the design of the maps as a whole. Letter from Biller to Board of Appeals of 4/30/2003, at 2, *citing*, Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340 (1991); Mason v. Montgomery Data, Inc., 967 F.2d 135 (5th Cir. 1992); Knitwaves, Inc.v. Lollytogs Ltd., 71 F.3d 996 (2d. Cir 1995); and Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977). You also note that the co-author, Mr. Darden, is not seeking protection on one particular design element of the maps in question, nor is he asking for protection of "simple combinations" of elements such as "familiar shapes, symbols, and designs; mere variations of typographic ornamentation, lettering, fonts or coloring." Rather, he seeks protection of "the overall pictorial expressions of his maps." *Id.* at 2.

You reiterate your argument that several recent cases have found maps copyrightable and state that courts seldom "automatically" apply the merger doctrine and instead focus on whether the idea is capable of various modes of expression. *Id.* You restate the process by which Mr. Pecor manually authored and drafted the maps. Further you claim that a review of the deposit material illustrates the author's choices in the manner in which the names of the states and counties were expressed. You state that "this selection and identification of counties can only be described as

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[3] On March 14, 2003, you requested, and were granted, a thirty day extension of time in order to file a second appeal for each of the refused applications.

unique and original." In support of this statement, you cite the example of the call-out of fifteen counties in the State of Alaska, placing them with yellow-green dots and black call-out boxes. *Id.* at 3. You also claim originality in Mr. Pecor's section of "unique and original map colors and fonts" and note that collectively, all of the additions to the map "appreciably altered the maps from their original form." *Id.*

In support of your claim, you note that third parties "recognize and corroborate the unique and original attributes of Applicant's maps." *Id.* at 4. You reference Mr. Darden's declaration which states that parties have sought to license the use of these maps and that the copying of these maps by some websites has led to confusion in the marketplace. You state that while recognizing that every element of the map will not be protected by copyright, the Applicant claims rights in components of the map that are original to Applicant. *Id.*

You also disagree with the Copyright Office's reliance on Mason and Streetwise, stating that unlike Mr. Pecor, Mason contributed no artistic expression to the maps but simply compiled pre-existing facts. *Id.* You state: "Applicant authored creative and artistic expression for each map," and the holding in Mason "strongly supports a finding of sufficient authorship in the maps presently before the Office." *Id.* at 4-5. Similarly, you state that the Second Circuit in Streetwise specifically held that "color was one of the expressive elements" and that this holding "specifically undercuts the Copyright Office's refusal to acknowledge color selection as an expressive element. *Id.* at 5. For all of these reasons, you believe that the registrations for both works should issue.

DISCUSSION

The Board of Appeals has carefully considered all of the material presented in support of your argument that these claims were entitled to copyright registration and finds that rejection of the claims presented was the correct result.

This request for reconsideration involves two separate claims. First, as stated in the second request for reconsideration, the claim for APPRAISERSdotCOM was revised in the application to include the compilation and arrangement of maps, text, graphics, and data. Your request for reconsideration rephrases this claim as one for the "text, maps, and formatting of an Internet web page." Letter from Biller to Board of Appeals of 4/30/2003, at 1. The second claim is for MAPS FOR APPRAISERSdotCOM. Simply put, this application is a claim for the maps that are contained within the APPRAISERSdotCOM claim, and thus are a subset of that

claim. Accordingly, the Board will first address this more limited claim on the maps themselves.

MAPS FOR APPRAISERSdotCOM

The maps are blue-colored representations of the United States and individual states. Sample representations of these maps are appended to this decision. *See*, Appendix A, B, and C. The outlines of these maps are based on preexisting United States census maps. Letter from Biller to Examining Division of 8/21/2002, at 2. The first map is a representation of the entire United States, with representations of Alaska and Hawaii placed below the continental United States. *See*, Appendix A. The map is divided into states with either white lettered postal abbreviations centered on the applicable state or, for the smaller states where this procedure is impossible without altering the regular font size, black call-outs with white lettered postal abbreviations point to white circles in nine of the smaller northeastern states and an additional call-out points to a circle in the main island of Hawaii. Each of the remaining maps are representations of each of the states, in the same contour as the first map, enlarged with subdivisions for each of the counties within that state. *See, e.g.*, Appendix B and C. The full county names are centered in each county in white letters with initial caps, in some cases hyphenated to accommodate the space, or in other cases where the county is too small, by call-outs identical to the first map described. There is slight shading apparent on the borders of the overall representations as well as in the boundaries or the states or counties, as the case may be.

While you explain that the requisite level for originality is low, the Feist decision makes clear that there is a requisite level, and some works simply do not reach it. These maps do not evidence the creativity necessary to sustain a claim for copyright. They are representations of the preexisting census maps "in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Feist at 359. Using the color blue in connection with a map is not creative, nor is the shading created on the boundaries of the regions. Compendium II at § 503.02 (a).The lettering and placement of the names is "garden variety" and generally centered within each region. The fact that call-outs are used appears to be dictated by necessity and functionality rather than by creativity, but regardless of the reason for the call-outs, they are standard shapes and features that are uncopyrightable. 37 C.F.R. 202.1(a). None of these individual features display the requisite level of creativity to support a copyright claim. While it is not questioned that Mr. Pecor manually labored over each map individually, such "sweat of the brow" is not a relevant consideration for copyrightability. Feist at 359.

As you correctly point out, however, copyright protection in maps, as in any work, must be considered by looking at the work as a whole. *See, e.g.*, Atari Games Corp. v. Oman, 888 F.2d 878, 883 (DC Cir. 1989). The Copyright Office agrees with the courts that the overall work must be considered. *Accord*, Mason v. Montgomery Data, Inc., 967 F.2d 135 (5th Cir. 1992); Knitwaves, Inc.v. Lollytogs Ltd., 71 F.3d 996 (2d. Cir 1995); and Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977).

The Copyright Office must examine whether the deposited copy of the work reveals the requisite level of creativity as a whole, and, where preexisting materials have been incorporated into the work, whether the elements of the work are "selected, coordinated, or arranged *in such a way that* the resulting work as a whole constitutes an original work of authorship." Feist at 356. "The standard of originality is low, but it does exist." Feist at 362.

There is also no creativity in the "selection" in these maps, since it includes *all* of the states in the country and *all* of the counties within each state. Similarly, the selection of the color blue in combination with all of the maps lacks the requisite modicum of creativity necessary to transform mere selection into copyrightable expression. *See,* 37 C.F.R § 202.1(a).

There is also nothing about the coordination or arrangement of the facts that evinces creativity. The arrangement of the names, call-outs, shading, and color is "entirely typical" and does not establish a basis for establishing the requisite level of creative authorship necessary to sustain a copyright in a map or any other work. Feist at 362. Not all selections and arrangements of material are copyrightable and the Board of Appeals affirms that these maps lack the quantum of creative authorship necessary for registration.

You also cite a number of cases in regard to the copyrightability of maps and the necessary caution that should be employed before assuming that the merger doctrine applies. The Board finds discussion of these cases to be unnecessary, since the Copyright Office did not deny registration in this case on the basis of merger, but rather on the insufficiency of creative authorship to support a claim of copyright. In addition, the cases cited to buttress your argument of sufficient authorship, namely, Mason, Streetwise, and Sparaco, are all distinguishable from the current situation. In each of those cases, not only did the Copyright Office register the works in question, but the respective courts concluded that each map contained sufficient creativity for both the compilation of the facts they depicted and for the pictorial and graphic nature of the way in which those facts were expressed. Letter from Biller to Board of

Appeals of 4/30/2003, at 2 and 4-5. Those cases, therefore, do not affect the Copyright Office's interpretation of the minimal level of creativity necessary to support a registration. In this case there is insufficient pictorial or graphic authorship to support registration and the selection, coordination and arrangement of the elements is de minimis.

Additionally, any confusion that may have resulted in the marketplace regarding the use of these maps by others, or requests to license these maps by other commercial entities, may be relevant to some areas of the law, e.g., trademark or unfair competition law, but, this evidence does not affect the question of copyrightability established in the copies of the work deposited with the application to the Copyright Office. *Id. See also*, Compendium II at § 503.02(a) (copyrightability is not based on commercial appeal).

Accordingly, the Board of Appeals affirms the denial of registration of the claim for the maps due to a lack of sufficient creative authorship.

APPRAISERSdotCOM

Turning to the request for reconsideration on the claim for APPRAISERSdotCOM, the Board affirms rejection of the claim due to the expansive scope of the claim. There is no doubt that there are copyrightable elements in the deposit for the work entitled APPRAISERSdotCOM. Yet as indicated in the refusal of the first request for reconsideration, the scope of the claim as indicated in line 2(a) of the application, namely "the compilation and arrangement of maps, text, graphics, and data," and your re-characterization of this claim in your second request for reconsideration, "text, maps, and formatting of an Internet web page," must be rejected as too broad. *See*, Form VA of July 30, 2002 and August 8, 2002, and letter from Biller to Board of Appeals of 4/30/2003, at 1.

For the reasons already stated, the maps themselves are not copyrightable. For the same reasons, the arrangement of the maps on the page are also not copyrightable. The maps are located in a similar manner, prominently displayed as the focal point of every page in which a map is present. This arrangement on the page is not even minimally creative.

The formatting graphics on the pages as well as the short phrases and their arrangement on the page are also uncopyrightable. As your characterization to the Board of Appeals clarifies, the claim for standard graphics and text is largely a claim for the "formatting of an Internet web page." Letter from Biller to Board of Appeals,

at 1. Copyright does not protect short phrases or familiar symbols and designs. 37 C.F.R. § 202.1(a). As Ms. Giroux previously explained, copyright also does not protect format or layout. Compendium II at § 305.06. While certain selection, coordination, and arrangement of elements may be copyrightable, protection for the overall format of a web page is inconsistent with copyrightability.

As Ms. Giroux observed, the layout and format of an Internet web page is analogous to the layout and format of book covers and pages. While a page of a book generally contains copyrightable expression, e.g., text, pictures and/or illustration, the copyright protection does not extend to the format or layout of pages themselves. The Copyright Office published a proposed rulemaking proceeding to determine whether book design was appropriate copyrightable subject matter, *see*, 44 Fed. Reg. 47555 (August 14, 1979). After reviewing the 28 comments received, the Office terminated the proposed rulemaking concluding "We believe that the arrangement, spacing, or juxtaposition of text matter which is involved in book design falls within the realm of uncopyrightable ideas or concepts." 46 Fed. Reg. 30651, 30653 (June 10, 1981).

The same principle is applicable to the protection of the design, format and layout of web pages. While a web page generally contains copyrightable expression–whether literary, pictorial, graphic, or other copyrightable expression–the formatting, arrangement, spacing and layout is a finite system of expression. Providing protection of such format and layout itself would unacceptably constrain the means of expression on web pages. This is not to say that compilation authorship is unavailable to web pages. The selection, coordination, and arrangement of material, whether preexisting or original, is protectible if it is accomplished *in such a way that* the resulting work as a whole constitutes an original work of authorship. 17 U.S.C. § 101 (definition of a "compilation") (emphasis added). The layout and formatting of a web page, itself, does not constitute "such a way" that is original. The compilation authorship that is available on a web page is limited to the original selection, coordination and arrangement of particular works, elements, information or data.

As Learned Hand long ago explained,

> [u]pon any work... a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the

> play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1931).

While some selection, coordination and arrangement of elements are protectible, by the express statutory language, not all are capable of protection. Feist at 358. As the Court stated in Feist, facts are never original. Id. Similarly, § 102(b) precludes protection for other forms of unprotectible subject matter. The longstanding practice of the Copyright Office is to deny registration of the arrangement of elements on the basis of physical or directional layout in a given space, whether that space is a sheet of paper or a screen of space meant for information displayed digitally. 17 U.S.C. § 102(b). The formatting and layout of pages, whether in books or on the Internet, fall within the purview of such uncopyrightable ideas, concepts, or systems. Such formatting and layout alone is not copyrightable.

Although the arrangement itself may not be protected, the original arrangement of specific material may be protected, e.g., the arrangement of data or information into categories. This being the case, the Board of Appeals agrees with the Examining Division that specific textual, and perhaps also, graphic or pictorial matter within the web pages may have been selected, coordinated and arranged in such a way that a claim of copyright may be sustained for such a compilation, but this would entail submission of a new application limiting the scope of the claim accordingly. In addition, it appears to be fatal to such a claim that the deposit submitted to the Copyright Office did not contain expression as the work existed on its publication date. *See*, Letter from Biller to the Examining Division of 8/21/2002, at 4. Since the claim is necessarily limited to the specific material selected and arranged, the failure to provide the data as published is a material defect in the application. Your repeated assertions that "no claim is made to the content of the data" and that "[a]pplicant does not seek copyright protection for the content of the data listings," but rather that the applicant "only seeks protection for the format of such listing and how such listings are arranged," indicates that your intended claim was limited to the format and layout of the web page rather than the actual material selected and arranged. *Id.* As indicated above, such a claim is unfounded. Therefore, in addition to resubmitting an application pursuant to the suggestion by the

Examining Division, the Board of Appeals finds that an acceptable deposit would also be required for consideration of a new claim.

For the reasons stated above the Copyright Office Board of Appeals affirms the refusal to register the submitted claims. This decision constitutes final agency action on this matter.

Sincerely,

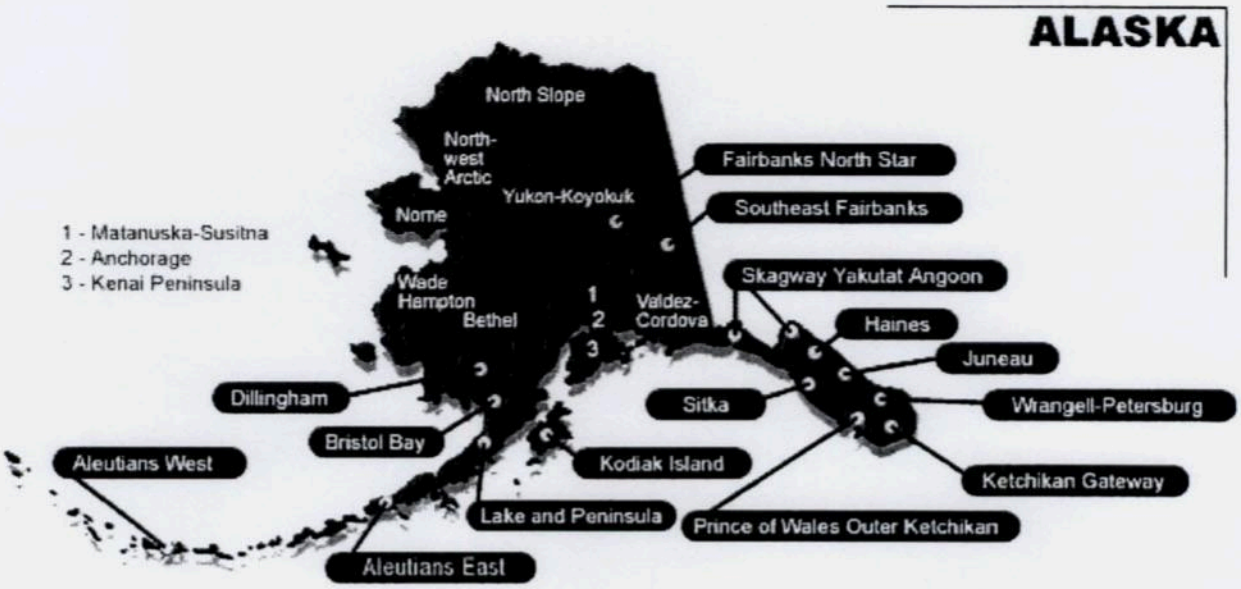
/S/

Marilyn J. Kretsinger,
Associate General Counsel
for the Appeals Board
U.S. Copyright Office

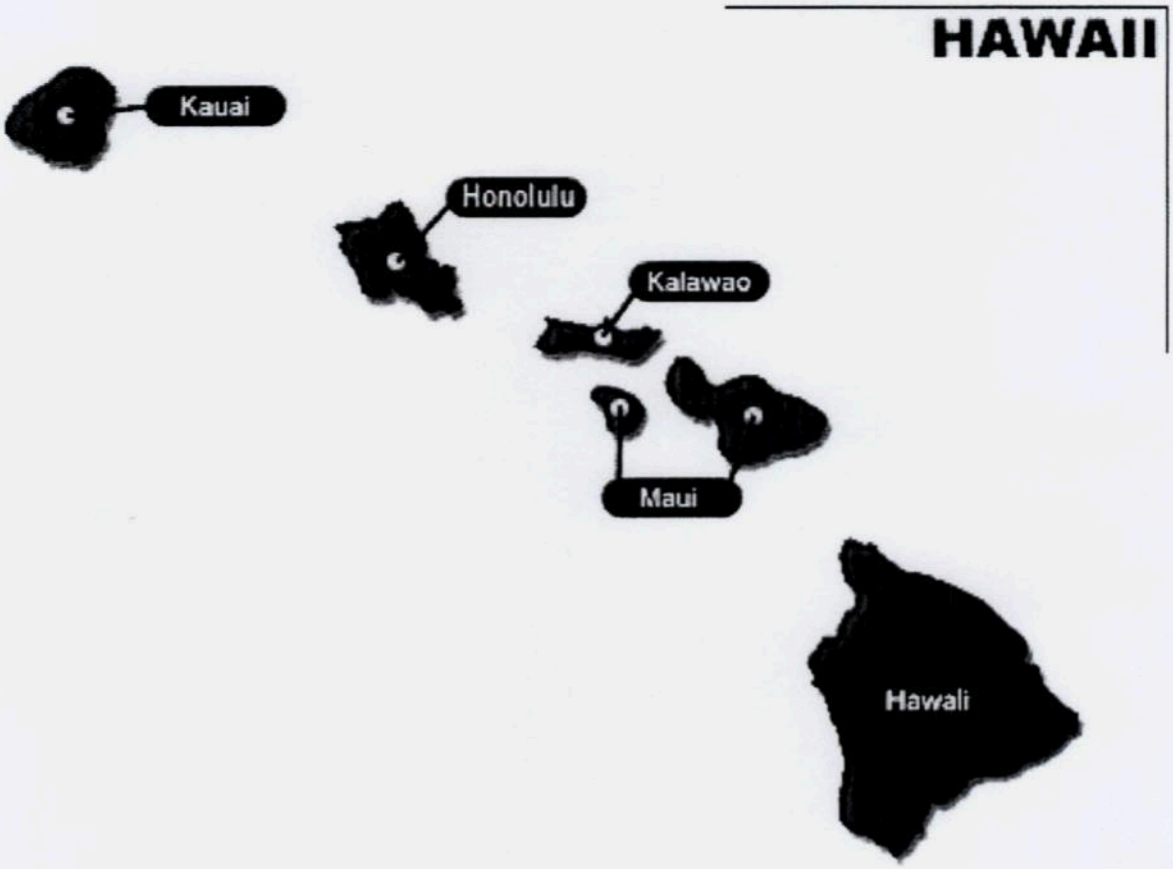
APPENDIX A


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APPENDIX B


ALASKA
North Slope
North-west Arctic
Yukon-Koyokuk
Nome
Wade Hampton
Bethel
1
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Valdez-Cordova
1 - Matanuska-Susitna
2 - Anchorage
3 - Kenai Peninsula
Fairbanks North Star
Southeast Fairbanks
Skagway Yakutat Angoon
Haines
Juneau
Wrangell-Petersburg
Ketchikan Gateway
Prince of Wales Outer Ketchikan
Sitka
Kodiak Island
Dillingham
Bristol Bay
Aleutians West
Lake and Peninsula
Aleutians East

APPENDIX C



APPRAISERS dot COM

NATIONAL REAL ESTATE APPRAISER REFERRAL SERVICE

APPENDIX D



Select State [-] Go

Enter 5 Digit Zip [ ] Go



To locate an Appraiser in any area, **Enter the property's 5 Digit Zip Code** (in the box above), **Click on Your State** on the Map or **Select your State** (from the Drop Down List).

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