United States Copyright Office
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June 21, 2004

Mark W. Hendricksen, Esq.
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601 West First Avenue, Suite 1300
Spokane, Washington 99201-3828

Re: Newly created symbolic characters for new language
Control # 60-617-7006 [W]

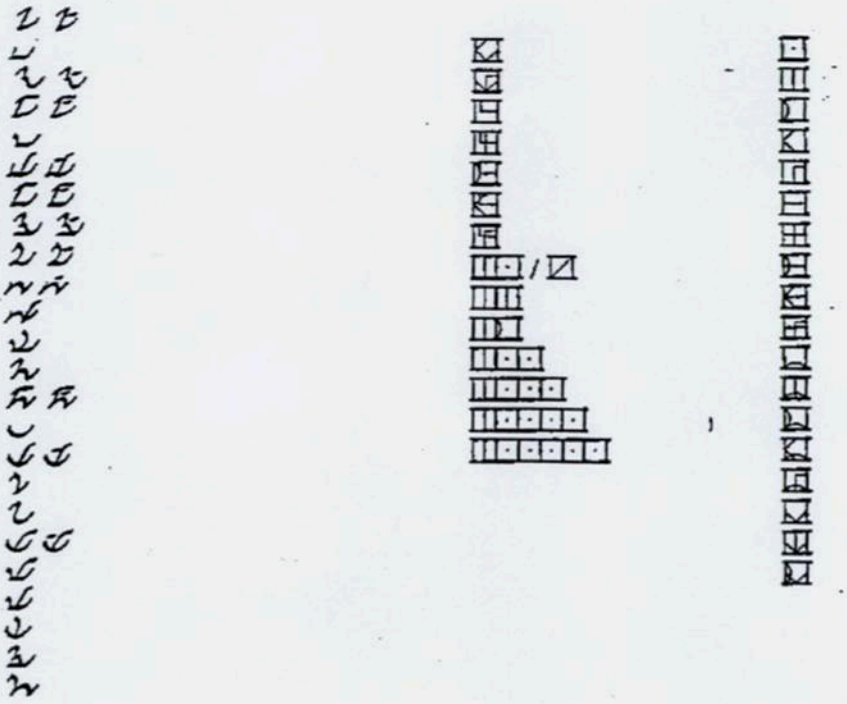
Dear Mr. Hendricksen:

The Copyright Office Board of Appeals has reviewed your request, on behalf of your client, Cyan, Inc., for reconsideration of the Office's refusal to register "Newly created symbolic characters for new language." The Board has carefully reviewed the application, the deposit materials and all correspondence with you regarding the work and has concluded that "Newly created symbolic characters for new language"cannot be registered.

I. Administrative Record

On August 19, 1998, you submitted an application for registration of "Newly created symbolic characters for new language" (hereinafter SYMBOLIC CHARACTERS). The application states that the nature of authorship is "2-dimensional artwork." In space 5, relating to preexisting material, the application states, "Part of the work is contained in book entitled 'MYST, The Book of Tiana.'" In space 6, relating to material added to the work, the

application states, "Copyright sought on symbolic characters." The deposit consisted of two pages, on which the following images appeared:



Although neither the application nor the deposit offers any further explanation, it appears from subsequent correspondence and from information available on Cyan's website [www.cyan.com] that the first group of symbols on the left represents an alphabet used in connection with the novel "MYST" and related works of fiction, and the second group of symbols on the right represents a system of numbers used in those fictional works.

A. First Office refusal to register

In a letter dated August 25, 1998, Examiner Geoffrey Henderson of the Visual Arts Section of the Examining Division advised you of a refusal to register SYMBOLIC CHARACTERS. Letter from Geoffrey Henderson to Mark Hendricksen of 8/25/98. Mr. Henderson explained that the work in question lacked the necessary artistic authorship to sustain a claim, including the individual characters. Further, he explain that the characters, in combination, are a system of communication and, as such, do not support a registration. Id.

B. First request for reconsideration [first appeal]

In a reply dated December 15, 1998, you requested reconsideration of the refusal to register [first appeal]. You stated that your client, Cyan, Inc., was not attempting to claim a

copyright in a method of communication; rather, the claim was in a specific artistic expression of the characters. Letter from Hendricksen to the Examining Division of 12/15/98 at 1-2. You pointed out that a "unique and newly created set of characters is not an idea, is not a method of communication, and does not take something from the public domain." You further explained that the characters in question may be used individually or in various combinations. Id. at 2. You stressed that Cyan, Inc., means to claim copyright in the artistic character shapes and not in any method of communicating with the shapes. You did, however, somewhat inconsistently also assert that the characters are expressions "which can be used to communicate and which can also be used individually in an artistic or symbolic way." Id.

In support of your argument, you cited Lotus Development Corp. v. Borland International, Inc., 831 F.Supp. 223 (D.Mass 1993), stating that the fact that a work may be capable of being part of a method of communication does not mean that it is unprotectible per se. Just as a book is a method of communicating ideas, but is nevertheless copyrightable as an expression of those ideas, SYMBOLIC CHARACTERS are used to express ideas – "to communicate in some unique combination." Letter from Hendricksen of 12/15/98 at 2. You also relied on Toro Company v. R & R Products Co., 787 F.2d 1208 (8th Cir. 1986), in stating that a "system that uses symbols in some sort of meaningful pattern, something by which one could distinguish effort or content, would be an original work." Letter from Hendricksen of 12/15/98 at 3, citing Toro, 787 F.2d at 1213. From Toro you concluded that even if a system is present with respect to a given work, the work can nevertheless be original– in the copyright sense– and be a work which reflects "something by which to distinguish effort or content." Letter from Hendricksen of 12/15/98 at 3. Finally, you analogized SYMBOLIC CHARACTERS to a new computer programming language which you state (without citation to authority) the Copyright Office and courts recognize as being copyrightable. You make the reference to computer programs because you argue that programs involve methods and procedures and "certain code or characters mean certain things." Having stated this, you concluded that the underlying code itself is copyrightable. Id.

C. Second Office refusal to register

Melissa Dadant, then Special Assistant to the Chief of the Examining Division, replied to your first request for reconsideration in a letter dated April 14, 1999. She described the deposit copy for the work as being two sheets of paper containing two sets of characters, "one a box-shaped set where boxes contain dots, lines and curves, and the other more like script, with curved shapes." Letter from Melissa Dadant to Mark Hendricksen of 4/14/99 at 1. Ms. Dadant explained that the shapes of the characters were not "complex pictographs containing pictorial content not essential to the purpose of the character." She further stated that each character "consists of but a few strokes that create the basic shape of the character." Id. In explaining the standard of copyrightability, Ms. Dadant cited the Office's regulations at 37 C.F.R. 202.1[a] and further explained a number of registration principles: that authorship must constitute something more than a merely trivial variation of public domain elements; that the Office does not make aesthetic judgments concerning works submitted for registration; that

commercial success is not a relevant factor in determining copyrightability; and, that the Copyright Office does not compare works submitted for registration. Letter from Dadant of 4/14/99 at 1 - 2. Further, Ms. Dadant reaffirmed that the Office will not register a claim in lettering, typefont, calligraphy or numbering or "other sets of letters used in written communication." She also pointed out that pictorial elements that are separate and distinct from lettering may be registered but the lettering itself may not. Id.

In her April 14, 1999 letter, Ms. Dadant cited the House Report to the 1976 Copyright Act in stating that Congress did not intend to offer protection to "existing alphabetic or numbering systems" and that the same principle would apply to a new alphabet or numbering system, even one used in writing a new language. Letter from Dadant of 4/14/99 at 2. Ms. Dadant briefly addressed the two court decisions you cited in your December 15, 1998 letter in support of your arguments that the work at issue here is copyrightable. Regarding Toro Company v. R & R Products, Co, 787 F.2d 1208, 1213 (8th Cir. 1986), she explained that any literary or artistic expression found within a work which might be classified as a "system" would, nevertheless, be copyrightable but the "conceptual basis of the system" would not be. Letter from Dadant of 4/14/99 at 2. She continued that the characters in the work in question here are examples of parts of a system but they do not individually exhibit protectible authorship. In her words, "the composite of the characters is the system." Id. She also noted that any "juxtaposition of symbols would be as letters in a word or sentence" and, thus, the symbolic characters at issue here are not copyrightable pictorial authorship, either alone or in their combination as indicating words or concepts. Finally, regarding Lotus Development Corp. v. Borland International, Inc., 831 F. Supp. 223 (D. Mass. 1993), Ms. Dadant wrote that you seem to suggest [Hendricksen Letter of 12/15/98 at 2] that Cyan's system of characters should be copyrightable because the characters are used to communicate; you noted the district court's statement in Lotus that a book is capable of communicating ideas but is not considered an uncopyrightable system. Ms. Dadant asserted that the characters at issue here are also not similar to a computer program's authorship: the symbols, which Ms. Dadant referred to as a "character system," are not in themselves sufficiently original to be protected as a work of authorship and, thus, the expression of the symbols cannot be registered. Letter from Dadant of 4/14/99 at 3.

D. Second request for reconsideration [second appeal]

In a letter dated August 10, 1999, you presented a second request for reconsideration [second appeal] of the Examining Division's refusal to register SYMBOLIC CHARACTERS. In this request, you set out the following points with which you argue the Office to be in agreement with your client:

1. The shapes of the characters constituting the work SYMBOLIC CHARACTERS are new to the applicant and did not previously exist.

2.- 3. The examiner admitted that Congress, in the House Report to the 1976 Act, was referring to the non-protection for existing alphabetic or numbering systems and not to original, newly-created characters. You therefore argue that Congress was seeking to prevent someone from claiming that which is in the public domain, not to newly-created and proprietary characters. You contend that it would require an extension of the current law in order to exclude the subject matter of new, original characters such as SYMBOLIC CHARACTERS.

4. The individual characters at issue here may be used by themselves or in combination with other characters or with other designs. You further note that third-parties have copied the characters because, you conjecture, of their originality and unique look. Letter from Hendricksen to the Board of Appeals of 8/10/99 at 1 - 3.

Your August 10, 1999 letter goes on to itemize the points about which you state your client and the Office disagree:

1.- 2., and 4. You contend that the examiner went beyond case law / legal authority in stating that the characters at issue here are "not complex pictographs containing pictorial content not essential to the purpose of the character." You argue that this position is inconsistent with case law which sets out the minimum threshold required for authorship to be copyrightable and that the characters at issue here are original and new and meet the threshold of creativity required by the case law. Your contention is that the characters at issue here contain "more originality and artistic expression than most of the other works which are copyrighted daily."

3. You state that the "language which can be written using these characters is not a public domain language" and that the claimant intends to prevent the occurrence of such. Letter from Hendricksen of 8/10/99 at 3.

You conclude that the individual characters and the combination of the characters are the original authorship of the claimant and that each represents copyrightable expression. Id.

E. Further correspondence

When the Board of Appeals originally reviewed this work, including the application and all deposit and supporting materials, the members of the Board did not make an immediate decision as to whether or not to register the work. The Copyright Office's General Counsel, David O. Carson, wrote to you on April 4, 2000, asking further questions to elicit information about the nature of the work. You responded on May 15, 2000. We set out the Office's questions and your responses.

Mr. Carson first asked whether SYMBOLIC CHARACTERS may constitute, or be part of, a new alphabetic or numbering system, assuming that the characters are not part of the

public domain. You responded in the affirmative that the characters may be used as part of a new alphabetic or numbering system. You further stated that the characters at issue here a part of a "newly developed set of symbolic characters which may be used independently or which may be combined in a fictitious language which was developed for use in the applicant's products." Letter from Hendricksen of 5/15/00 at 1.

The next question which the Office asked was whether any of the characters have a symbolic or phonetic meaning. You answered in the affirmative that some or all of the characters have such a meaning, explaining that "each character has a specific phonetic sound which when combined with other letters creates specific combinations of sounds." You added that "the combination of letters may represent specific words" which, when combined into sentences, can be used to "communicate funtionally." Id. at 1 - 2.

In answer to the Office's question as to whether any or all of the characters function as letters of an alphabet which may be understood by a person or group, you answered that there are persons who understand the meaning of some or all of the characters and their combinations. You explained that these persons are those who have used some of the symbolic characters in products produced by the claimant, Cyan, Inc. Id. at 2.

Finally, the Office asked whether any language, including a language which you assert is not in the public domain, may be written using these characters. In answer to this, you asserted that the characters at issue here are "a language which is not in the public domain and the symbols of which are intended to be combined to form words and other combinations to communicate to others and to express ideas." Id.

Mr. Carson concluded his April 4, 2000 letter by stating that it was not clear to the Board of Appeals whether the characters at issue here are purely imaginary and fictional or whether they are actually used as a means of communication. He acknowledged that the characters are used in works of fiction but again stated the Board's uncertainty whether they are a literary device within certain works or whether the characters function as an alphabet or system of writing. Letter from Carson of 4/4/00 at 2. You responded to this by stating that your client is not attempting to register a claim in a system; rather, your client is seeking to register "a plurality of new symbolic characters which are used singularly and in combination in a new language or for their symbolic value." Letter from Hendricksen of 5/15/00 at 2.

II. Decision: the non-protection of alphabet systems

After thorough examination of the application, deposit materials, and all correspondence regarding SYMBOLIC CHARACTERS, the Board of Appeals now affirms the Examining Division's refusal to register this work.

The application for this work describes the authorship on which copyright is being claimed as "2-dimensional artwork." Space 6 of the application form indicates that part of the work is contained in the book MYST, BOOK OF TIANA, and that the new matter forming the basis of the copyright claim is "symbolic characters." The deposit materials submitted with this claim are two photocopied sheets listing the symbolic, or graphic, characters; the application form also indicates that the work was created in 1996 and published on October 15, 1996.

Although we have some question concerning the deposit, specifically, whether this deposit, the two photocopied sheets of paper, represents the published, best-edition version of the work as required under 17 U.S.C. 408[b] and whether the work consisting of the set of symbolic characters was, indeed, published as a set or collection of symbols, we need not inquire into these facts. Further, although we also have some hesitancy concerning the copyrightability of the symbolic characters as works of graphic authorship under the Feist standard [Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), straightforwardly articulated the principle that only a modest level of creativity is needed to sustain copyright protection], we need not address that issue, either, for the reason that we are again refusing registration because these characters are part of / constitute a system of alphabetic, phonetic or concept-meaning characters which are meant to be used for communication. As we explain below, such symbols or characters are not the subject matter of copyright.

You have stated that the characters which are at issue here may be used as part of a new alphabetic or numbering system; that some or all of the characters have a symbolic or phonetic meaning; and that the language which can be written using the characters in question here is not a public domain language. Letters from Hendricksen of 5/15/00 at 1 and of 8/10/99 at 3. Although you initially argued that SYMBOLIC CHARACTERS is not a method of communication [Letter from Hendricksen of 12/15/98 at 1], you subsequently described SYMBOLIC CHARACTERS as "a language which is not in the public domain and the symbols of which are intended to be combined to form words and other combinations to communicate to others and express ideas." Letter from Hendricksen of 5/15/00 at 2.

It is a fundamental principle of copyright law that ideas, concepts, systems and methods are not protected. 17 U.S.C. 102 [b]. That general principle has a number of corollaries. In early precedent, Baker v. Selden, 101 U.S. 99, 102 (1879), the Supreme Court explained that a claim in a bookkeeping system including blank forms with ruled lines and text headings did not preclude another from publishing a book containing similar forms to achieve the same result. The Court held that blank account forms are not the subject of copyright. A system of keeping accounts was held unprotectible even though the "system" was manifested in what could be categorized as the *expression* of the various textual headings and the specifically placed graphic lines meant for accounting purposes. Selden's accounting forms themselves, including the forms' expressed heading categories and placement of graphic lines, constituted a

system or procedure and were not in themselves protectible. Many years later, the Second Circuit, in commenting on the fundamental reasoning in Baker v. Selden, explained that protecting the pages of the accounting ledgers [containing, we again point out, their headings and layout lines] "would have afforded copyright protection to the underlying system itself." Arica Institute, Inc. v. Palmer, 970 F.2d 1067, 1076 (2d Cir. 1992).

This same principle that ideas, concepts, systems and methods are not copyrightable underlies the fact that Congress did not consider the design of typeface to be copyrightable pictorial, graphic or sculptural authorship. Indeed, in its considerations of the provisions of the 1976 Act, Congress took the time to define what it meant by typeface: "a set of letters, numbers or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system and are intended to be embodied in articles whose intrinsic utilitarian function is for use in composing text or other cognizable combinations of characters." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976). Although you have not indicated that the work at issue here, SYMBOLIC CHARACTERS, is to be embodied in utilitarian articles for the composing and printing of text, this work is, nevertheless, a set of characters, both letter-like and number-like [Letter from Hendricksen of 5/15/00 at 1], which are related by repeating design elements and whose use lies, as you have stated, in being "part of a new alphabetic or numbering system." Id. at 1. Such a set, or body, of characters, used for communicating through an alphabet structure and/or a numbering structure, is essentially a non-protectible system.

The dictionary defines an alphabet as "any particular set of characters with which one or more languages are written, whether these characters are letters, the signs of a syllabary, or other basic units of writing." Webster's Third New International Dictionary, G. & C. Merriam Co., 1961. Alphabets are the elementary components and tools of languages. Although a novel written in one of the Slavic languages, for example, may be copyrightable, the Cyrillic alphabet used to write the Slavic tongue, in which the words of the novel are constructed, is not; the alphabet is a public domain element, free for anyone's use. You have stated that the characters at issue here are not in the public domain; rather, you argue that SYMBOLIC CHARACTERS are "newly created and proprietary." Letter from Hendricksen of 8/10/99 at 2. The fact that you have identified SYMBOLIC CHARACTERS as part of a new alphabetic or numbering system means that such characters, used for the purposes of communicating, e.g., writing a novel using this notation, cannot enjoy copyright, just as the individual characters or letters of the Cyrillic alphabet cannot be protected in themselves. The Office's regulations at 37 C.F.R. 202.1 [a] specify that lettering per se is not copyrightable. Lettering, i.e., the symbols which represent sounds, as well as numeric indicia, are necessary for communicating in all languages; the individual sets of symbols referred to as alphabets lie in the public domain because of the necessity that all be able freely to use such alphabets. We make reference to a recent case from the Second Circuit where that court, citing its own precedent, commented that certain authorship is in the public domain and is therefore unprotectible; it explained that this means that such authorship "is free for the taking and cannot be appropriated by a single author even though it is included in a copyrighted work."

Boisson v. Banian, Ltd., 273 F.3d 262, 268-269 (2d Cir. 2001), citing Computer Associates International, Inc. v. Altai, Inc., 982 F.2d 693, 710 (2d Cir. 1992). Boisson went on to explicitly state that "the alphabet is in the public domain." 273 F.3d at 269. We point out that, even if SYMBOLIC CHARACTERS is a fictitious alphabet or one which only those who are initiates in it can use and understand, it nevertheless does not change the fact that the symbols serve a function and that function is to provide the basis for communication via a particular language, even if that language, in your opinion, does not lie in the public domain. As such, SYMBOLIC CHARACTERS is, in its essence, a method or system for communication and is not protected by copyright.

The Board did not find your reference to Toro Company v. R & R Products, Co., 787 F.2d 1208 (8th Cir. 1986) helpful to your client. The Eighth Circuit, in holding a parts numbering system to be unprotectible, also stated that a numbering system might find protection if it embodied a "meaningful pattern, something by which one could distinguish effort or content." 787 F.2d at 1213. We point out that we consider the statement to be dictum and that it does not negate the court's understanding that there is a distinction between an uncopyrightable system with its underlying idea and the "particular expression of that idea." Id. at 1212. *See also* Southco, Inc. v. Kanebridge Corp., 258 F.3d 148,153 (3d Cr. 2001) (finding reliance on Toro unfounded, in part because it was a case which "invoked the 'sweat of the brow' theory"subsequently rejected in Feist). The Toro court further noted that what may be called a system may be sufficiently particularized such that the "complexity and composition" of the fixed information supplies the basis for copyright protection. 787 F.2d at 1212. For the reasons we have explained, we do not find the work SYMBOLIC CHARACTERS to constitute similar, particularized expression.

We also comment on the appellate decision in Lotus Development Corp. v. Borland International, Inc., 49 F.3d 807 (1st Cir 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996). You have cited to us the trial court decision in Lotus v. Borland, 831 F. Supp. 223 (D. Mass. 1993) for the proposition that, if an idea is capable of being expressed in several ways, the particular expression is itself copyrightable. Letter from Hendricksen of 12/15/98 at 2. Although this statement may be generally true, it omits the possibility that an idea may be expressed in one of several ways which are all, upon analysis in terms of statutory and settled case law, in themselves systems or methods. In a much-debated decision, the First Circuit in Lotus v. Borland reversed the district court's grant of summary judgment and held that the plaintiff's menu command hierarchy was uncopyrightable because it was a method of operation. In its decision, the First Circuit made reference to Baker v. Selden in stating that "Lotus wrote its menu command hierarchy so that people could learn it and use it. Accordingly, it falls squarely within the prohibition on copyright protection established in Baker v. Selden and codified by Congress in section 102[b]." 49 F.3d at 817. We believe that SYMBOLIC CHARACTERS were developed for the possible learning and use of those interested in the products of your client and, thus, the characters as alphabet, *or* as meaningful symbols, both used in communication, fall within section 102[b]'s prohibition. We further note that the First Circuit, in Lotus v. Borland, commenting on Feist, stated that Feist's

statement that "copyright assures authors the right to their original expression" [499 U.S. at 349-350] does not mean that *all* expression is copyrightable: "Courts must still inquire whether original expression falls within one of the categories foreclosed from copyright by section 102[b], such as being a 'method of operation.'" 49 F.3d at 818. We need not endorse the result in the First Circuit's decision in order to conclude that when a system of communication necessarily relies on a particular set of symbols for their communicative function [even though these symbols might communicate nothing outside the context of that system], those symbols are ineligible for protection under the principles codified in section 102[b] of the copyright statute. We believe that SYMBOLIC CHARACTERS falls within the statutory category of a system or method of communication, whether preexisting or new, which cannot be the subject of copyright registration.

For the reasons stated in this letter, the Copyright Office Board of Appeals affirms the Examining Division's refusal to register the work SYMBOLIC CHARACTERS. This decision constitutes final agency action in this matter.

Sincerely,

/S/

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