United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

November 21, 2006

Bryan P. Sugar
Schwartz Cooper, Greenberger & Kraus
180 N La Salle Street, Suite 2700
Chicago, Illinois 60601

RE: MD TRADER ANIMATION
CONTROL NO: 81-329-5608(W)

Dear Mr. Sugar:

I am writing on behalf of the Copyright Office Review Board[1] in response to your second request for reconsideration, dated May 15, 2005, on behalf of Trading Technologies, Inc. After reviewing the application, the deposit material, and the arguments you presented on Applicant's behalf, the Board has decided again to refuse registration of Applicant's audiovisual work, titled MD Trader Animation.

I. ADMINISTRATIVE RECORD

A. Initial submission and refusal to register

On July 12, 2004, the Copyright Office received an application from Trading Technologies, Inc. to register an audiovisual work, entitled MD Trader Animation.[2] On July 26, 2004, Examiner Stephen B. Oswald refused to register this work on the basis that it lacks sufficient authorship to be copyrightable. Examiner Oswald, in explaining why the work was being refused registration, cited the case of Baker v. Selden, 101 U.S. 99 (1880), in which the Court held that a particular method of arrangement of lines / spaces / blanks to be used for accounting purposes was not copyrightable. The examiner compared the work at issue here with a blank form which, in itself, is not copyrightable. Letter from Oswald to Sugar of 7/26/2004 at 1. This prohibition is codified at 37 C.F.R. §202.1(c)(2005). It is based on the statutory provision barring copyright protection for ideas, systems, concepts or discoveries. 17 U.S.C. § 102(b) (1990).

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[1] You submitted your second request for reconsideration to the Board of Appeals. However, on January 27, 2005, that body became known as the Review Board. 69 Fed. Reg. 77636 (December 28, 2004).

[2] The Copyright Office received two applications for the same work. One was received on July 12, 2004 and the other on July 19, 2004.

B. First request for reconsideration and Office reply

In a letter dated August 27, 2004, you submitted a first request for reconsideration on behalf of Applicant in which you argued that MD Trader Animation is copyrightable. You stated that the work does not satisfy the regulatory definition for a blank form because it conveys information. Letter from Sugar of 8/27/2004 at 1-2. You discussed forms that courts ruled are copyrightable, arguing that Applicant's work has a comparable level of creativity. You argued that MD Trader is copyrightable because it is independently created and has sufficient creativity. You said the work is being copied by others, which some courts have determined is evidence of a work's copyrightability. You argued that MD Trader Animation satisfies the minimum level of creativity required to be copyrightable. You asserted that artistic merit is irrelevant. *Id.* at 3-4.

Describing the manner in which MD Trader Animation works and how it differs from other screens used for stock trading, you explained why you believe the author's selection and arrangement justifies copyrightability when compared to other copyrightable works. You refuted Mr. Oswald's basis for refusal, reasoning that it is irrelevant that the work's expression, its direction, movement and selection of pictorial elements, is predetermined by a computer program and that market data generates the movement. As support, you pointed out that courts have found video games to be copyrightable expression. *Id.*

In a letter dated February 17, 2005, Attorney Advisor Virginia Giroux responded to the first request for reconsideration by stating that MD Trader Animation is not copyrightable for the same reasons identified by Mr. Oswald. Letter from Giroux to Sugar of 2/17/2005. She also stated that the placement and arrangement of columns and spaces represents layout or format and is not copyrightable subject matter. She distinguished the works at issue in the cases you cited as support for the argument that MD Trader Animation has sufficient creativity. She argued that the movement of numbers on the screen is not copyrightable because it is the result of a computer program mechanically processing data and not the result of an author's creative choice about the movement or placement of the numbers. *Id.* at 3-4.

C. Second request for reconsideration

In a letter dated May 15, 2005, you submitted a second request for reconsideration to the Board of Appeals on behalf of Applicant in which you again argued that MD Trader Animation is copyrightable. You refuted Ms. Giroux's arguments by denying that the work's animation is predetermined by market data rather than the author. You stated that the author controls the selection, arrangement and movement. Letter from Sugar of 5/15/2005 at 3-5. You drew an analogy between the author's relationship to the work and the director of a play. *Id.* at 4. You criticized Ms. Giroux's analysis as picking and choosing from the work's elements in order to describe the screen as a fixed framework, ignoring its animation features with its sequence of images, thereby not considering the work as a whole. You emphasized that Applicant is registering the work as an audiovisual work. *Id.* at 2; 7-9.

You challenged the assertion that the work is a blank form, arguing that it conveys information rather than recording it. *Id.* at 3; 14. You characterized it as an animated movie of images and colors. You provided a detailed description of the work and explained its functions in order to persuade the Board that the work is not predetermined by the data but is authorial expression and choices. You cited several court opinions in support of your argument that computerized animation is copyrightable authorship. You emphasized that Applicant designed the software to compile, select, coordinate and arrange the elements to create the work's animation, as with video games. *Id.* at 7-12.

You presented arguments that MD Trader Animation has sufficient minimum creativity to be copyrightable. You stated that, even ignoring the animation of the work, it is sufficiently original and distinguishable from prior works to be copyrightable. Even though the fixed screen is made up of simple shapes, it is sufficiently creative, as a whole, to be copyrightable. You repeated your arguments in order to refute the assertion that the work is a blank form. *Id.* at 11-14.

II. DECISION

After reviewing the application and your arguments, the Review Board upholds the Examining Division's refusal to register MD Trader Animation. The series of images constituting the audiovisual work MD Trader Animation are not, in themselves, when viewed as an audiovisual whole, or when considered as separate images or in coordination with each other as static screen images, sufficiently creative to be copyrightable.

A. Audiovisual works

Applicant seeks to register MD Trader Animation as an audiovisual work. Audiovisual works:

> ...consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

17 U.S.C. 101 (Definitions)

You have argued that, similar to the audiovisual work at issue in *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992), Applicant's work is copyrightable based on the series of related screens in which the author directs the selection and coordination of the data analogous to the way the director of a movie manages actors by means of a script. You have also argued that the static screen image is copyrightable. Letter from Sugar of 5/15/2005 at 3-4; 7-9.

In analyzing the copyrightability of audiovisual works, the Copyright Office in its examining practices follows the principles set forth in the 1992 *Atari* decision which you have cited to us. The *Atari* court stated that the copyright creativity analysis should take into consideration selection and arrangement for both the graphic elements in individual screens and the sequence of those screens within the audiovisual work in its entirety. *Atari* at 245-246, ("Register may concentrate initially on discrete parts so long as he ultimately bases his decision on 'the total sequence of images displayed as the game is played.'"). The Copyright Office evaluates audiovisual works for copyrightability on the basis of both factors: the authorship of individual screens / images, including any selection and coordination of graphic elements within individual screens and the authorship which consists of selection and coordination of the sequencing, i.e., the flow and interrelatedness, of the individual screens / images which make up the audiovisual work.

1. A comment on the human authorship in MD Trader Animation

Before proceeding further, we address your objections to the statements previously made by Ms. Giroux that Applicant's work lacks human authorship. Letter from Sugar of 5/15/2005 at 10. Arguing that courts have found works related to, i.e., using input from or resulting in output in, computerized or mechanized factors to contain copyrightable authorship, you cite *Atari Games*, 979 F.2d at 245, *Digital Communications Assocs., Inc. v. Softklone Distrib. Corp.*, 659 F.Supp. 449, 463 (N.D. Ga. 1987), *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982), *Nintendo of America, Inc. v. Elcon Indus., Inc.*, 564 F.Supp. 937, 943 (E.D. Mich. 1982) and *Midway Mfg. Co. v. Bandai-America, Inc.*, 546 F.Supp. 125, 147 (D.N.J. 1982).

In response, the Board would like to clarify that only those elements of a work that can be attributed to an author's discretionary choices and selection may be copyrightable. Authorship which is "standard, stock, or common to a particular subject matter or medium" is not protectible under copyright. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). *See also Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 347 (1991) (no one may claim copyright in facts; "[t]his is because facts do not owe their origin to an act of authorship.") The Copyright Office does not take the position that a work of authorship related to computers or to automated results should be considered per se not copyrightable. With the 1976 general revision of the copyright law, Congress explicitly recognized literary authorship as including "computer programs;" and, in 1980, defined the term. 17 U.S.C. 101 (definition). H.R. Rep. No. 1476, 94th Cong., 2d Sess. 54 (1976, amended 1980). The 1980 amendment adopted the majority's conclusions in the recommendations reported by the Commission on New Technological Uses (CONTU), *see* H.R. Rep. No. 1307, 96th Cong., 2d Sess. 23 (1980).

The work, MD Trader Animation, for which your client is seeking registration is not, however, a computer program. It is an audiovisual work which, we assume, is related to a computer program which program may provide some/all of the functionality for which the audiovisual work may be valued. You have stated that the work at issue here is similar to videogames in that the "animation" is "generated through computer software." You go on to explain further that "computer software written by humans directs external information to arrive

at a creative animated expression." Letter from Sugar of 5/15/2005 at 9, fn. 2. Your explanation is informative and confirms the Board's assumption. We refer to *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) in which the court described works such as MD Trader Animation as authorship which "represent products of computer programs, rather than the programs themselves, and fall under the rubric of audiovisual works." *Id.* at 703.

Ms. Giroux's reference to a "lack of human authorship" [Letter from Giroux of 2/17/2005 at 4] was centered on the movement of certain screen elements as a response to the receipt of data from an external source. It is obvious, and you do not argue the point, that the market data, received from an external source, but with which the rest of the authorship in the audiovisual work MD Trader Animation interacts, are not the authorship of the Applicant. As we have just noted, no one can claim copyright in facts. *Feist* at 347. Ms. Giroux's further statement that the "direction and movement of certain screen elements is predetermined by computer code" should be qualified. Letter from Giroux of 2/17/2005 at 4. Your client is not claiming copyright in any computer program associated with this audiovisual work [this unified series of screen images] although your client may own the rights in the code. The Board agrees with Ms. Giroux that the movement of certain elements appearing on the screens may be generated by computer code but, the Board adds, as a claim is being put forward only in the totality of the screen images constituting an audiovisual work, the Office must examine the audiovisual work in its essential characteristics in order to determine whether any of the actual images or related series of images constitute copyrightable authorship.[3]

Before we address the series of images constituting the audiovisual work at issue here, we add a second comment on "human" authorship. We are familiar with the Ninth Circuit case, *Urantia Foundation v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997). There the court noted that, although the copyright law does not "expressly require 'human' authorship, copyright law protects "some element of human creativity" that must have occurred in order for a work to be copyrightable. 114 F.3d at 958. Although there was an assertion by the plaintiff in *Urantia* of authorship by celestial beings, the court held the work in question copyrightable because it viewed the authorship content as having been *at least* organized and compiled by certain human beings and such compilation authorship to be copyrightable under the *Feist* standard. In the work at issue here, the Board accepts that the series of images is attributable to the author/claimant, Trading Technologies International, Inc. even though the Board also recognizes what Ms. Giroux stated in her February 17, 2005 letter, i.e., that the data comes from an external source not attributable to Trading Technologies and that certain movements on the screen with respect to the columns, the changing colors, and the direction of movements of the data indicators are the result of the authorship of a computer program interacting with data which are external to the program and

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[3] We point out, again, that Applicant does not select and coordinate the specific, real-time market data that appears in MD Trader Animation. That data is predetermined by securities markets. The market data is not copyrightable because it is purely factual and not the result of an author's choices, selection, coordination or arrangement. However, the data represents an constituent element within the screens, or totality of the images, of the audiovisual work and, as such, the Board addresses it, *above at 6 - 9*.

which data, in themselves, are not the subject of the copyright claim in this request for reconsideration.

2. The audiovisual work present as MD Trader Animation

We examine *de novo* the work at issue here in order to determine whether it exhibits the necessary creative elements required under *Feist*. As we have stated, the audiovisual work, MD Trader Animation, related to computer program authorship, is a series of screen displays or images which show lines and rectangular cells or boxes, numerical data, and movement of some of these elements. We again cite *Altai* in stating that "if a computer audiovisual display is copyrighted separately as an audiovisual work, apart from the literary work that generates it (i.e., the program), the displays may be protectable regardless of the underlying program's copyright status." 982 F.2d at 703. The *Altai* court then cited *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 855 (2d Cir. 1982), in explaining that copyright protection for an audiovisual work, rather than for an underlying computer program, "extended greater protection to the sights and sounds generated by a computer video game because the same audiovisual display could be generated by different programs." *Altai*, 982 F.2d at 703. The *Altai* court immediately cautioned that this is the case only insofar as the expression of the displays is protectable. *Id.*

We also raise the issue of fixation of the audiovisual work but only to point out what you have already discussed in your second request for reconsideration. You cited *Stern Electronics* and *Midway Mfg. Co. v. Arctic International, Inc.*, 704 F.2d 1009 (7th Cir. 1983) for authority that videogame audiovisual works are not lacking in human authorship. Letter from Sugar of 5/15/2005 at 10. We cite the same authority in our comment on the need for fixation in order for a work to be protected by copyright. A work is considered to be fixed in a tangible form of expression, when it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (Definition of "fixed.").

In the case of the audiovisual work at issue here, the images of individual screens change as the market data changes, rises and falls. Although we understand that the underlying program arranges for / instructs the computer to place different types of data in particular fields in individual images and screens, the subsequent selection and order of the series of screens, showing values rising or falling and changing color codes to denote the nature of those changes, is based on data received. Thus, the changing market data determines the appearance and structure of individual screens as they are part of any series that is displayed. This raises the fixation issue: there is an inconsistency with respect to the overall series of images as well as individual images because the audiovisual work images change frequently, i.e., may not exist beyond a period of transitory duration, as the externally-supplied market data changes; thus, the question of whether the images of MD Trader Animation are sufficiently fixed arises.

Although there is a constant change in the images within this audiovisual work, for purposes of this appeal we consider the fixation requirement to be met. For our authority

supporting our view on this point, we again cite to *Stern Electronics*. At issue in that case was a videogame where the player of the game, by his choices, varies the image of the screen displays and the outcome of the game. In the words of the Second Circuit:

> "We agree with the District Court that the player's participation does not withdraw the audiovisual works from copyright eligibility. No doubt the entire sequence of all the sights and sounds of the game are different each time the game is played, depending upon the route and speed the player selects for his spaceship and the timing and accuracy of his release of his craft's bombs and lasers. Nevertheless, many aspects of the sights and the sequence of their appearance remain constant during the play of the game. ...**The repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection as an audiovisual work**.

669 F.2d at 856 (Emphasis added)

The repetitive sequence of the geometric shapes of the columns and the individual cells holding discrete pieces of data/prices as well as the change in colors, representing a "graphical indicator of market movement" [Letter from Sugar of 5/15/2005 at 7] is sufficient, in the Board's opinion, to consider MD Trader Animation to be sufficiently fixed as a work of authorship. We consider it analogous to a videogame which can be described as you have described MD Trader Animation as "an animation of dynamically changing geometric shapes and colors," *id.*, yet meeting the necessity of evidencing a substantial portion of the images repeating themselves in sequence. *See also Williams Electronics, Inc. v. Arctic International, Inc.*, 685 F.2d 870 (3d Cir. 1982); *Midway Mfg. Co. v. Arctic International, Inc.*, 704 F.2d 1009 (7th Cir. 1983).

B. The standard for creativity

Copyright protection is available only for "original works of authorship." 17 U.S.C. §102. In *Feist*, the Supreme Court stated that originality consists of two elements, "independent creation plus a modicum of creativity." *Feist Publications, Inc. v. Rural Tel. Service Co*, 499 U.S. 340, 346 (1991). *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary.") *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (The court defined "author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conceptions of the author.")

Consistent with those precedents, the Copyright Office examines works and their applications to ensure that the works satisfy the requirements for both independent creation and a minimum level of creativity. While the Board is satisfied that Applicant's claim in the audiovisual work at issue here meets the requirement for independent creation, it has determined that the work does not have sufficient creative authorship to be copyrightable.

As you agree, the requisite level of creativity is very low. The Supreme Court stated that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity" Feist at 363. There can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. A work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Id.* at 362-363. An example would be alphabetical listings in the white pages of telephone books which the Supreme Court characterized as "garden variety...devoid of even the slightest trace of creativity." *Id.* at 362.

Even prior to *Feist*, Copyright Office registration practices, following settled precedent, recognized that works with only a *de minimis* amount of authorship are not copyrightable. *See Compendium of Copyright Office Practices, Compendium II,* §202.02(a) (1984). *Compendium II* also states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.* at §503.02(a). *Compendium II* recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability. *Id.* Section 503.02(a) states that:

> [R]egistration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. ... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations."

Consistent with your arguments, the Copyright Office follows the principle established in *Atari* that works should be considered as a whole. Therefore, the Board agrees with you that it is possible for the selection and combination of commonplace elements or simple designs to rise to the level of copyrightability, even though individual elements in a work, each alone, would not be copyrightable. Works based on public domain elements may be copyrightable if there is some distinguishable aspect in their selection, arrangement or modification that reflects choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist* at 359. *See also* 17 U.S.C. 101– definitions of "compilation" and "derivative work." Nevertheless, Applicant's work, MD Trader Animation, considered in its entirety as an audiovisual work, does not "possess more than a *de minimis* quantum of creativity." *Feist* at 363.

You have stated that MD Trader Animation's selection, arrangement and movement of colored geometric shapes is sufficiently creative to be copyrightable. Letter from Cook and Sugar of 8/27/2004 at 9. The Review Board disagrees. MD Trader Animation is essentially a single

screen or grid that functions very much like a form which captures market data as the data continually change. Except for the changing market data, which are not copyrightable because they are facts, the screens exhibit an identity. The authorship exception in the appearance of the individual screen and the sequence of the screen images is the minor variation which occurs because of the color changes. The colors in a particular column (or cell) are limited to a few monochromatic colors– red, green, blue or white–against a neutral background. The combination of a simple form composed of squares and rectangles, organized into grids and columns to display numerical data derived from an external source, is commonplace. The addition of several colors generated by the change in market data receipt is a minor variation on the vertical grid in which the data are placed.

Taking the animation as a whole, there is minimal creative selection in the coordination and arrangement of the screen images, which show the vertical grid that, in itself, has the appearance of a ledger or form in which numeric values appear to change. As discussed above, the changing numerical values are not the result of the author's choices. However, in order to assess the animation in its entirety, the Board has considered the changing image of the data along with the changing colors as they exist within the overall form and as the image of that form changes over time. The Board concludes, in its assessment of the audiovisual entirety of the work, that the copyrightable elements constituting the changing images are limited and, thus, the images themselves and their coordination as part of the audiovisual work are limited. Again, the images are made up of the unchanging trade screen and a limited range of color variations within any particular column or individual data field. For example, the colors that appear in the data field for the last column on the right are green, red or blue. The only selection or arrangement that varies between screens are the color changes. These are minor variations on a form that has the commonplace appearance of vertical columns and horizontal rows for data entry.

You analogized Applicant's work to Breakout, the work at issue in *Atari*. However, the videogame in that case, Breakout, displayed more creative authorship. There was a greater variety in the series of screens to show Breakout ball's path as it bounced, the changes to the paddle and the wall as each brick in the eight rows disappeared. [Breakout also had an audio component.]

C. The screen as a form to record and display information

The elements of any individual screen image or screen that may appear in a series of images are selected and coordinated by the author. Each individual screen consists of rows and columns of rectangles and squares. The rows and columns vary in monochromatic colors of blue, green, red and white that correspond to changes in the values and quantities of asking and selling prices. As part of its analysis, the Board also considered whether the static aspect of each screen is copyrightable.

The Review Board has determined that each screen contains the image of what is essentially a blank form with a few colors that appear in different columns as the externally supplied data flows into the cells / columns in the audiovisual aspects of this work. The Board

agrees with the previous refusals to register Applicant's work on the basis that copyright protection is not available for blank forms that do not contain the *Feist*/minimum level of authorship. The Board has determined that MD Trader Animation falls within Copyright Office regulations that identify works that may not receive copyright protection that include:

> Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information

37 C.F.R. § 202.1(c)(2005)

You have stated that MD Trader Animation does not fall within this category of non-registrable works because it conveys information about the market. Letter from Sugar of 5/15/2005 at 12-14: "The rapidly moving animation conveys changes in data in a graphical expression that is easy to comprehend. ...[E]ven a static screen of the Work (MD Trader Animation) conveys information." In assessing the static screen images, although the data appear in each screen but change constantly, thus changing, to some degree, the appearance of the individual screen, the Review Board was willing to consider the static aspects of the work at issue here as including the changing data as an element of the appearance of the screen in order to assure that the Board gave the screen configuration the broadest possible content to consider. Having approached the analysis of the screen in itself, however, we note that the presence of the data input is significant for the fact that it is evidence of the purpose of the screen as a blank form for recording data. The static MD Trader Animation screen, itself, does not convey information. Therefore, the Board finds that the static image of Applicant's work is a blank form.

The individual elements within the static screen include squares and rectangles that appear in rows and columns and are symmetrically placed. Trading screens for securities markets display typical information about asking and selling prices and quantities, among other traditional items. You have stated that, even if the work at issue here were "stripped of part of its essence–it's animation–the Work still meets the low threshold for original authorship." Letter from Sugar of 5/15/2005 at 12. As the Board inspects the screens, however, only three data entry points are labeled. Otherwise, there are no labels identifying the nature of the information that appears in particular rows or columns. Further, arranging numerical data in a table that is either more vertical than horizontal or more horizontal than vertical is predictable and commonplace and does not lend weight to a judgment of copyrightability. Monochromatic colors– green, white, blue and red–appearing in some of the columns and rectangular data entry points also do not add to the level of creativity needed to sustain a registration for MD Trader Animation.

As a static image, MD Trader Animation is a blank form that conveys little information and, in its authorship content and configuration as an audiovisual image, lacks the necessary quantum of authorship needed under *Feist*. We point out that the baseball pitching form in *Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991), was copyrightable because of the selection, out

of many possible ones, of the several categories that are listed on it. Concerning the answer sheet in *Harcourt v. Graphic Controls Corp.*, 329 F.Supp. 517 (S.D.N.Y. 1971), we do not consider *Harcourt* strong support for the registration of the work in question here. Under *Feist*, the definitive guideline for determining copyrightability, the level of creative authorship in the *Harcourt* answer sheet / blank form is questionable. *See, e.g., Bibbero Systems, Inc. v. Colwell Systems, Inc.*, 893 F.2d 1104, 1107 (9th Cir. 1990). Taken as a whole, MD Trader Animation is a blank form for which copyright protection is not available. Its simply structured vertical and horizontal lines, cells, change of elementary coloring as the externally supplied data moves into the form, does not convey information but, rather, is a tool for recording data. Its individual components, the columns and rows of squares or rectangles, are commonplace and garden variety shapes or symbols.

The Board finds substantial support for its conclusion concerning both the pictorial images in the individual screens as well as the changing images within the audiovisual work sequence in case law addressing pictorial and graphic works. In John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), the court upheld a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form." *See also*, Magic Marketing v. Mailing Services of Pittsburgh, 634 F.Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F.Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100% Virgin Wool" interwoven with three fleer-de-L.S. held not copyrightable); Homer Laughlin China Co. v. Oman, 22 USPQ2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); Jon Woods Fashions v. Curran, 8 USPQ2d 1870 (S.D.N.Y. 1988) (upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright).

The Board finds that Applicant's work, consisting of uncopyrightable elements– as those elements have been combined in this work as well as the manner in which the elements change throughout the audiovisual sequence– is expression containing too few as well as too simple components to result in the overall work's rise to the level of copyrightable authorship. The quantum of creativity in the selection and arrangement of individual graphic elements and audiovisual related elements which is required to reach a level that supports copyright is not satisfied by Applicant's work. While a "simple arrangement" may contain enough authorship to meet the creativity standard, as *Feist* holds, some selections and arrangements fall short of the mark. *Feist* at 359. The Board is unable to recognize in this work any contribution that is "more than merely trivial."

Finally, you have argued that its commercial success and the fact that others are copying MD Trader Animation is evidence of its copyrightability. Letter from Sugar of 5/15/2005 at 7. On the contrary, Copyright Office examination procedures do not evaluate the aesthetic or the commercial merits of works. *Compendium II*, § 503.02(a), instructs examiners that the aesthetic, commercial or symbolic merit of a work is not relevant to an examination for originality. A work may be highly valued for its aesthetic appeal or for its artistic merit and, yet, not be copyrightable, and *vice versa*.

For the reasons stated in this letter, the Copyright Office Review Board affirms the Examining Division's refusal to register the claim in MD Trader Animation. This decision constitutes final agency action in this matter.

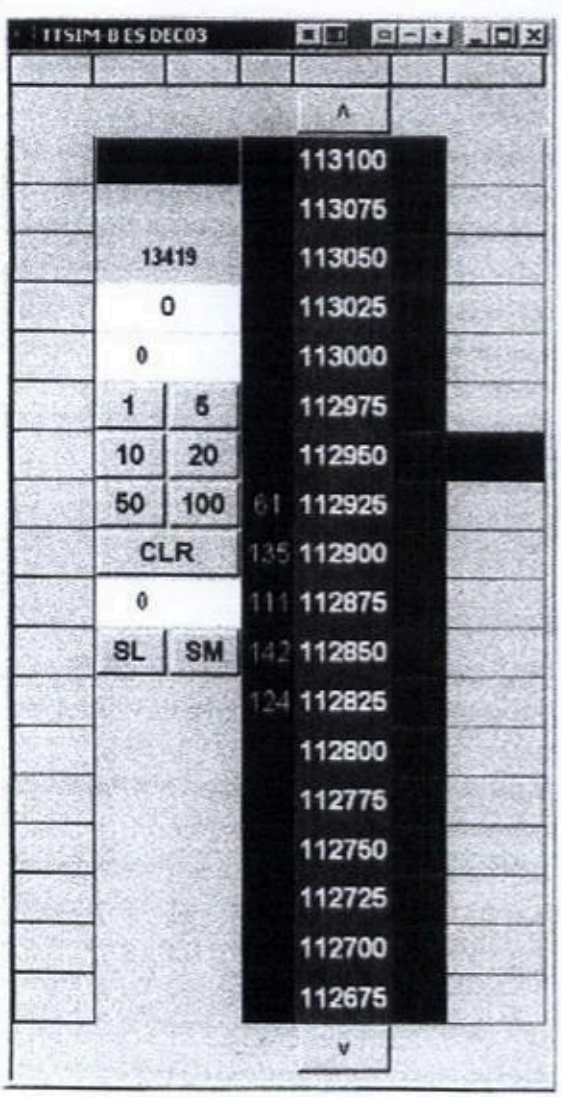
Sincerely,

Nanette Petruzzelli /me

Nanette Petruzzelli
Special Legal Advisor for Reengineering
for the Review Board
United States Copyright Office

APPENDIX: Sample Images of MD Trader Animation

Time 1



Time 2

