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

June 19, 2013

Joseph S. Makuch
1030 S.W. Morrison Street
Portland, OR 97205

Re: GAPS DIAGRAM
SR 1-236992404
SR 1-350430594
SR 1-158626082

Dear Mr. Makuch:

The Review Board of the United States Copyright Office is in receipt of your second request for reconsideration of the Registration and Recordation Program's refusal to register a copyright claim in a form entitled "GAPS DIAGRAM.." You have submitted this claim for your client, Brad Fishel. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures and budgetary restrictions, the Register of Copyrights has appointed a new Review Board and we are proceeding with second appeals as expeditiously as possible.

The Board has carefully examined the application, the deposit copy, and all the correspondence in this case. After careful consideration of the arguments in your letter, the Board affirms the denial of registration of this copyright claim because the work is a blank form lacking in textual or pictorial authorship on which to base copyright registration. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

I. DESCRIPTION OF THE WORK

GAPS DIAGRAM is a blank form that is used to record information. The form is divided into three segments. The top segment contains the word "WHY?" framed by a black arrow pointing upwards, and the word describe to the left of two rectangles side by side with the words "STATUS" and "GOAL" within black-shaded rectangles in the upper left corners of the boxes, respectively. The middle portion contains the words "HELPING" and "HINDERING" with small arrows pointing to the center of the form, followed by two sets of 7 identical rectangular irregular pentagons. The center of the middle portion contains a rectangular box with the word "ANALYSIS" within a black-shaded rectangle. The bottom segment of the form contains 7 identical elongated rectangular irregular pentagons, with the word "PLANS" within a black-shaded rectangle in the left corner of the topmost rectangular irregular pentagon. For each of the these segments, a corresponding word appears on the left side of the form: "DESCRIBE," "ANALYZE," and "PLAN," respectively.

Attached as an appendix to this letter is the image of GAPS DIAGRAM taken from the deposit copy.

II. THE ADMINISTRATIVE RECORD

On February 7, 2009, the Copyright Office received a deposit to accompany an outline submission to register GAPS DIAGRAM. This submission was made on behalf of your client, Brad Fishel. In a letter dated August 28, 2009, Registration Specialist Beth Garner refused registration of this work because it contained no original authorship. Letter from Garner to Makuch of 8/28/2009 at 1. In a letter dated August 25, 2009, you requested reconsideration of the Office's refusal to register the work. After reviewing your first request for reconsideration, Attorney Advisor Virginia Giroux-Rollow responded in a letter dated December 1, 2009. She upheld the refusal to register the work on the grounds that the work was a blank form which did not contain any authorship that could support a copyright registration. Letter from Giroux-Rollow to Makuch, of 12/1/09 at 1.

In a letter dated February 26, 2010, you requested that the Office reconsider for a second time its refusal to register GAPS DIAGRAM. Letter of Makuch to Copyright R&P Division of 2/26/2020. You state that the Registration and Recordation Program misapplied the law to the facts of GAPS DIAGRAM by not recognizing that the design of the work produces a distinctive arrangement and layout of otherwise unprotectable elements, citing *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989); *Atari Games Corp. v. Oman*, 979 F. 2d 242 (D.C. Cir. 1992); and *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 812 F.2d 800 (D.C. Cir. 1987). You do not, however, discuss or address the case law dealing with the copyrightability of blank forms.

III. DECISION

A. The Legal Framework

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. §102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *Feist Publications, Inc. v. Rural Telephone Service Co.* 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. Second, the work must possess sufficient creativity. While only a modicum of creativity is necessary to establish such creativity, the Supreme Court has ruled that some works (such as a telephone directory at issue in the case) fail to meet the standard. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimus* quantum of creativity." *Id.* at 363. There can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be nonexistent." *Id.* at 359; *see,*

also 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form.").

The principle that blank forms which are intended to record information are not copyrightable is rooted in the landmark Supreme Court case of *Baker v. Seldon*, 101 U.S. 99 (1879). In this case it was held that Seldon's copyright on a book explaining a bookkeeping system that included blank forms with ruled lines and headings did not preclude another from publishing a book containing similar forms to achieve that same result. The court reasoned that:

> * * * To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and fraud upon the public. That is the province of letters-patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government. 101 U.S. at 102.
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> * * * * * * * *
>
> This conclusion to which we have come is that blank account-books are not the subject of copyright; and that the mere copyright of Seldon's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book. 101 U.S. at 107

The copyright law and the regulations of the Copyright Office clearly state the policy that blank forms are not subject to copyright. Section 102(b) of the Copyright Act states: "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. §102(b). The Office's regulations specify that "[b]lank 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" are not copyrightable. 37 C.F.R. § 202.1©.

The Copyright Office practice of denying registration for forms that lack a sufficient quantity of creative authorship is strongly supported by case law precedent. *Brown Instrument Co. v. Warner*, 161 F.2d 910 (D.C. Cir. 1947)(graphic temperature-pressure charts properly refused registration); *Taylor Instrument Co. v. Fawley-Brost Co.*, 139 F.2d 98 (7th Cir. 1943), *cert. denied*, 321 U.S. 785 (1944)(temperature chart not copyrightable); *Time-Saver Check, Inc.*,

v. Deluxe Printers, Inc., 178 U.S.P.Q. 510 (N.D. Tex. 1973)(blank checks and attached carbon forms lack sufficient creative authorship to be copyrightable); *Aldrich v. Remington Rand, Inc.*, 52 F.Supp. 732 (N.D. Tex. 1942)(looseleaf tax record forms held not subject to copyright); *M.M. Business Forms, Corp. v. Uarco, Inc.*, 472 F.2d 1137 (6th Cir. 1973)(guarantee, storage fee and chattel mortgage provisions in form lacked the requisite originality); *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966 (11th Cir. 1983)(desk-style checkbooks); and *Bibbero Systems, Inc. v. Colwell, Systems, Inc.*, 893 F.2d 1104 (9th Cir. 1990)(billing forms known as "superbills" which doctors used to obtain reimbursement from patient's insurers).

B. Analysis of the work GAPS DIAGRAM

After carefully examining the work GAPS DIAGRAM and applying the legal standard discussed above, the Review Board determines that GAPS DIAGRAM fails to satisfy the requirement of creative authorship. The work is a blank form that permits the user to record information but does not, due to its relative simplicity, convey a sufficient amount of information to warrant registration.

The Board notes that in your letter for second reconsideration, there is no discussion or citation to cases dealing specifically with blank forms. Rather, you argue that GAPS DIAGRAM contains a sufficient selection and arrangement of otherwise uncopyrightable shapes and words that supports a claim to registration, citing the two *Atari Games* decisions and *Reader's Digest* identified above. While it is true that sufficiently creative selections and arrangements of common or otherwise unprotectible elements can render a work copyrightable, it is the view of the Board that virtually all of the selection and arrangement of GAPS DIAGRAM is tied directly to the utilitarian function of recording information. The GAPS DIAGRAM form may be unique, but novelty is not a consideration under the copyright law.

Furthermore, none of the cases that you cite deal with blank forms. A case that is on point is *Utopia Provider Systems v. Pro-Med Clinical Sys.*, 596 F.3d 1313 (11th Cir. 2010), which involved a hospital emergency room form. The Court stated:

> Utopia argues that the Supreme Court's decision in *Feist* modified the Eleventh Circuit standard as announced in *Clarke Checks* [a blank form case]. Utopia argues it did so by specifying that compilations need only minimal creativity to be copyrightable; they are copyrightable "so long as (choices as to selection and arrangement) are made independently by the compiler and entail a minimal degree of creativity." ... Utopia ignores, however, that *Feist* dealt with how to resolve the tension between *facts* generally not being copyrightable and *factual compilations* being copyrightable. *Feist* held that a factual compilation may be copyrightable "if it features an original

> selection or arrangement of *facts* but the copyright is limited to the particular selection or arrangement." ... *Feist* did not imply in any way that the rule concerning the creativity in selection of facts was a standard that applied to anything but factual compilations or impacted the blank form rule. While we note that the creativity in the selection of terms on the ED Maximus forms bears on whether the forms convey information, the "convey information" standard - not a creativity in selection or arrangement standard - still governs blank forms and was not altered by the *Feist* decision concerning factual compilations. Utopia's argument that the selection and arrangement of terms in ED Maximus templates show "extraordinary degree of creativity and originality," therefore, is relevant only to the extent that it shows the forms convey information.

596 F. 3d at 1321 (bracket information added)(citations omitted).

GAPS DIAGRAM, as a form, conveys very little information. It is only one page long, divided into the three segments. The rectangles and five side figures you cite as bearing on the copyrightability of the form are present to merely facilitate the recording of information. Therefore, besides the fact that basic geometric shapes are uncopyrightable, in this particular instance the shapes are to primarily serve a utilitarian purpose, rather than an artistic purpose. The three sections appear devoted to stating a problem, analyzing factors bearing on the problem, and developing a plan to address the problem. The form appears far simpler than the emergency room admittance form found uncopyrightable in *Utopia.*

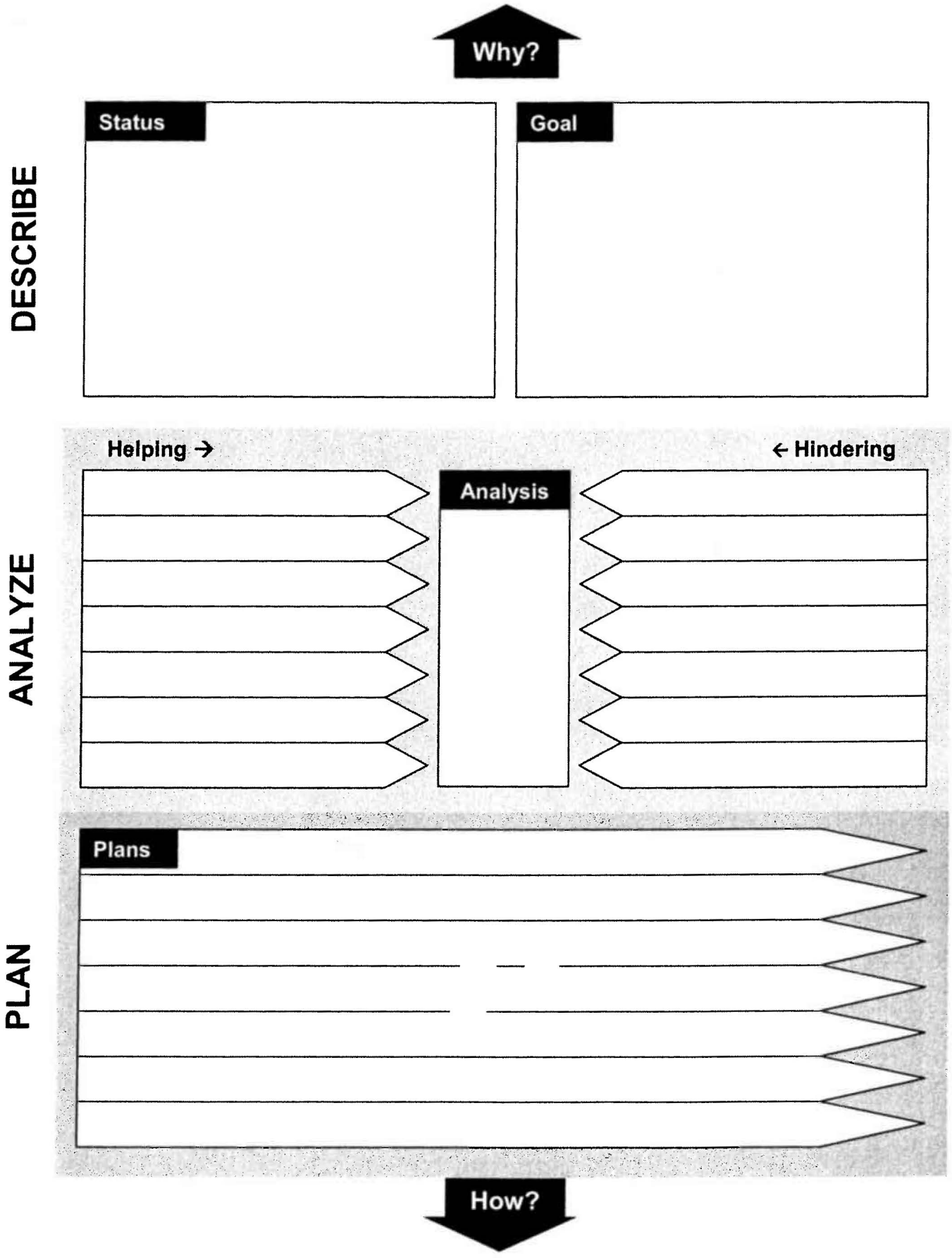
IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the work entitled GAPS DIAGRAM. This determination constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board

GAPS Diagram



GAPS Diagram ©2008, All Rights Reserved Planned Change Consulting / Brad Fishel, Ph.D.