December 19, 2003

Marsha G. Gentner
Jacobson Holman, PLLC
400 Seventh Street, N.W.
Washington, D.C. 20004-2218

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CONGRESS

RE: PARTS PRICE LIST
Control Number: 70-920-6742(J)

COPYRIGHT
OFFICE

Dear Ms. Gentner:

This is in response to your letter dated March 18, 2003, requesting reconsideration of the U.S. Copyright Office's refusal to register a claim to copyright in text work in PARTS PRICE LIST - August 15, 1989. Upon careful reexamination of the work and analysis of the statutory and case law you have presented in support of registration, the Board of Appeals refuses registration of the PARTS PRICE LIST - August 15, 1989.

101 Independence
Avenue, S.E.

Administrative Record

Washington, D.C.
20559-6000

In a letter dated April 27, 2001, Jacobson Price Holman & Stern, PLLC, submitted eight applications for TX (textual) works on behalf of Inter-American Vanguard Corporation. Deposit copies and fees were included in the submission, and you requested special handling regarding each work due to related pending litigation.

Senior Examiner Thomas B. Simpson wrote to you regarding PARTS PRICE LIST - August 15, 1989, explaining that registration could not be made for this work because it lacked sufficient original authorship on which to base a claim. Letter from Thomas B. Simpson, Senior Examiner, U.S. Copyright Office, to Marsha G. Gentner, Jacobson Price Holman & Stern PLLC (May 2, 2001) (on file with the U.S. Copyright Office).

You requested reconsideration of the initial rejections. Letter from Marsha G. Gentner, Jacobson Holman PLLC, to Thomas B. Simpson, Senior Examiner, U.S. Copyright Office (July 18, 2001) (on file with the U.S. Copyright Office) (hereinafter Gentner 7/18/01 letter). You argued that rejection of PARTS PRICE LIST - August 15, 1989, based on lack of copyrightable text was contrary to statutory and case law. Relying on what you contend are standards of copyrightability articulated in *American Dental Association v. Delta Dental Plans Assn.*, 126 F.3d 977 (7th Cir. 1998) and in *CCC Information Services v. Maclean Hunter Market Reports*,, 44 F.3d 61 (2d Cir.

1994), you maintained that your client's work possesses sufficient original authorship to warrant copyright protection. Gentner 7/18/01 letter at 1-3.

Attorney Advisor Virginia Giroux responded to your request in a letter sent following review of the work "in light of the points raised in your letter." Letter from Virginia Giroux, Attorney Advisor, Examining Division, U.S. Copyright Office, to Marsha G. Gentner, Jacobson Holman PLLC (Nov. 16, 2001) (on file with the U.S. Copyright Office) (hereinafter Giroux 11/16/01 letter) at 1. She noted that although the requirement for original authorship in a work requires a modest amount of creative expression, the text in the work at issue did not contain a sufficient amount of expression for registration. She cited specific cases in which courts have supported the proposition that a numbering system or a short phrase may not comprise sufficient authorship or text to receive copyright protection. Giroux 11/16/01 letter at 2. She also distinguished the two cases you cited in your letter of July 18, 2001, to show that copyright registration in the works involved was based on sufficient original text (*American Dental Association*) or on "compilation" authorship as opposed to textual authorship (*CCC Information Services*). *Id.*

You requested a second reconsideration of the Office's refusal to register PARTS PRICE LIST - August 15, 1989, based on arguments presented in your first appeal. Letter from Marsha G. Gentner, Jacobson Holman PLLC to Virginia Giroux, Attorney Advisor, Examining Division, U.S. Copyright Office (March 18, 2002). Again you based your argument on the assertion that the work involved here embodies copyrightable textual material. You asserted that the combination of elements, being numerical codes, short descriptions, and pricing information, constituted original work that could be registered for copyright protection. *Id.*

Discussion

Material Not Subject to Copyright Protection

The content shown in the deposit you submitted consists of three columns of information identifying parts and associated prices. The first column shows part numbers, the second consists of names of parts, and the third is the suggested price for each part listed. The very brief textual description constitutes labeling, not description that would support a copyright registration. Section 202.1(a) of the Code of Federal Regulations states that among other items, words and short phrases such as titles are not copyrightable. 37 C.F.R. 202.1(a). Methods and systems are also precluded from registration. 37 C.F.R. 202.1(b).

Although the claimant made a decision about how to arrange the facts in this parts list, there is insufficient copyrightable authorship in the list to support registration based

on a claim in text. "Literary works" are defined in the 1976 Copyright Act as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects...in which they are embodied." 17 U.S.C. 101. To be registered for copyright protection, there must be either more than *de minimis* expression embodied in the work, or, as in this case, selection or arrangement which embodies original creative authorship that can be copyrighted. Lists may not be registered for simple content, although, as discussed below, selection and arrangement of facts may be registrable in certain cases. The information you assert to be registrable text does not embody copyrightable authorship.

As Attorney Advisor Virginia Giroux explained to you, the level of authorship required for registration is slight, but there are cases where "authorship" is at such a minimum that works may not be registered. Letter from Virginia Giroux, Attorney Advisor, Examining Division, U.S. Copyright Office, to Marsha G. Gentner, Jacobson Holman PLLC at 1, 2 (Nov. 16, 2001) (on file with the U.S. Copyright Office) (hereinafter Giroux 11/26/01 letter). She appropriately cites *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541 (2d Cir. 1959) to note that courts recognize that there are cases where authorship is insufficient to support copyright protection. Giroux 11/26/01 letter at 1, 2.

In addition, under *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991), the level of authorship necessary to support registration is slight, however, some works fail to embody even a minimal level of creativity required for protection. *See* 499 U.S. at 346. PARTS PRICE LIST - AUGUST 15, 1989, submitted for registration as a textual work, does not display authorship that can be registered as a literary work. Rather, it displays a system or procedure for listing inventory and prices of parts. Such a process cannot be registered under 17 U.S.C. 102(b). *See also Warren Publishing., Inc. v. Microdos Data Corp.*, 115 F.3d 1509 (11th Cir. 1997) (selection listing items must show more than representation of a simple system and must embody originality); *Toro Co. v. R&R Products Co.*, 787 F.2d 1208 (8th Cir. 1986) (parts numbering system for replacement parts of lawn mowers lacked sufficient originality for registration); *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F.Supp. 769 (W.D. Pa. 1986) (protection not available for advertising phrases on an envelope).

You rely on two cases to support your argument that PARTS PRICE LIST - AUGUST 15, 1989 should be registered. The first is *American Dental Assn. v. Delta Dental Plans Assn.*, 126 F.3d 977 (7th Cir. 1997), and the second is *CCC Information Services v. Maclean Hunter Market Reports*, 44 F.3d 61 (2d Cir. 1994).

In your letter of July 18, 2001 you observe, correctly, that in the *ADA* case the Seventh Circuit states that "all three elements of the Code – numbers, short descriptions, and long descriptions, are copyrightable subject matter under 17 U.S.C. §

102(a)." We note, however, that *ADA* involved copying of most of the plaintiff's taxonomy of dental procedures, and that the court stated expressly that "Section 102(b) precludes the ADA from suing, for copyright infringement, a dentist whose office files record treatments using the Code's nomenclature." 126 F.3d at 981. If protection truly inhered in each individual element of the ADA's taxonomy, the dentist's unauthorized use would be infringing. In view of its actual holding, *ADA* is best viewed as a compilation case (notwithstanding a contrary statement in the opinion that apparently was based on the erroneous assumption that a work constitutes a compilation "only if its elements existed independently." *Id.* at 980). Its statements concerning individual elements of the ADA's taxonomy are dicta that the Copyright Office declines to follow.

Moreover, even if the Office were to follow the Seventh Circuit dicta, the taxonomy of dental procedures at issue in *ADA* is readily distinguishable from PARTS PRICE LIST - August 15, 1989. There is a world of difference between the "short descriptions" of dental procedures that the Seventh Circuit described as creative, and the descriptions in PARTS PRICE LIST - August 15, 1989. Descriptions of parts, such as "Head," "Pipe," "Pipe Assembly," and "Hydraulic Cylinder," do not exhibit any creativity, nor is there any potential for variation (which the court found in *ADA*). The Seventh Circuit also stated that the ADA made creative choices regarding the assignment of numerical codes to particular procedures – in essence, describing the creative organization of the ADA's taxonomy. *Id.* There is nothing in the administrative record to suggest that the assignment of part numbers in PARTS PRICE LIST - August 15, 1989, entails any creativity – indeed, that it results from anything more than the mechanical application of a set of rules that would, itself, constitute an uncopyrightable system under 17 U.S.C. § 102(b).

CCC Information Services, like *ADA*, is a compilation case. The Second Circuit held that "the selection and arrangement of data in the Red Book displayed amply sufficient originality to pass the low threshold requirement to earn copyright protection." 44 F.3d at 67. Since the case involved "wholesale copying of a compilation," *id.* at 72 n.26, and the selection and arrangement of the compilation was original, the court's discussion of the copyrightability of the individual valuations was not necessary to the resolution of the case; in a word, it is dicta.

Even if the Office were to follow the dicta in *CCC Information Services* it would not assist you. In stating that the used car valuations in Maclean Hunter's Red Book were entitled to protection, the Second Circuit emphasized that Maclean's valuations "were neither reports of historical prices nor mechanical derivations of historical prices or other data. Rather they represented predictions by the Red Book editors of future prices estimated to cover specified geographic regions." *Id.* By contrast, the prices found in PARTS PRICE LIST - August 15, 1989 are not opinions, judgments or predictions. They are facts. While it is quite correct to observe, as you do at page 2 of

your July 18, 2001 letter, that representing creative expression in the form of numbers does not deprive it of copyright protection, it is equally true that representing a fact in numeric form does not render the fact copyrightable.

The Copyright Office Board of Appeals finds that there is not sufficient original textual authorship in this work to support registration. Thus, the work may not be registered as a literary work. However, the Board agrees with the Examining Division's recommendation that registration may be sought as a claim in "compilation." Such a registration would be based on the selection and arrangement of fact, not the textual material included in the work. Please contact the Office if you wish to pursue this avenue.

Sincerely,

Jesse M. Feder
Policy Planning Advisor
for the Appeals Board
United States Copyright Office