

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ABR Benefits Services, Inc. : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
: :  
NCO Group d/b/a The Sentry Group : NO. 99-499

**MEMORANDUM**

**Padova, J.**

September , 1999

Plaintiff ABR Benefits Services, Inc. (“ABR”) alleges unauthorized reproduction of Plaintiff’s copyrighted works by Defendant NCO Group d/b/a The Sentry Group (Sentry) in violation of the Copyright Act of 1976, as amended, 17 U.S.C.A. § 101 et seq. Plaintiff brings this action for injunctive relief as well as for damages.

Before the Court is a Motion for Summary Judgment filed by Defendant. Because the question of whether Plaintiff’s works are deserving of copyright protection is a mixed question of law and fact about which genuine issues of material fact remain, the Court will deny the Motion.

I. **FACTUAL BACKGROUND**

Plaintiff ABR provides services to clients seeking to comply with the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, 29 U.S.C.A. § 1001, et seq. (“COBRA”). ABR contracts directly with insurance companies throughout the country to provide COBRA compliance related services. The insurance companies in turn use ABR as a

third party to process and adjudicate COBRA claims for the employer groups to which the insurance company provides insurance services.

The keystone of ABR's COBRA system is the COBRA Notification Form, a multi-paged, multi-purpose document, which was developed by ABR through its many years' experience in the COBRA compliance field. The form bears a copyright mark and is registered at the United States Copyright Office. The language on the form is unique to ABR and does not constitute a mere repetition of the COBRA statute; rather, it describes ABR's system of COBRA compliance.

Defendant NCO d/b/a/ The Sentry Group has recently begun providing COBRA related services to insurance carriers, including ABR's clients. In doing so, Sentry uses a notification form that is similar to ABR's Notification Form. ABR says that Defendant's form is an unauthorized reproduction of its form, and that Sentry reproduced much of the text directly from ABR's form.

## **II. LEGAL STANDARD**

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id. A party seeking summary judgment

always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

### III. DISCUSSION

Defendant seeks summary judgment on the ground that ABR is not entitled to copyright protection for its forms and therefore cannot establish a *prima facie* case of copyright infringement. In support of this contention, defendant argues: (1) the ABR forms are "blank forms" that do not merit protection under Baker v. Selden, 101 U.S. 99 (1879); (2) ABR seeks copyright protection for unprotectable "ideas" rather than for the expression of ideas; and (3) the standard used to determine whether a defendant has copied a protected work is more stringent than usual when business forms are the subject of the litigation, and Plaintiff's and Defendant's forms are not sufficiently similar to meet this standard. Defendant contends that there are no genuine issues of material fact regarding any of these arguments and therefore summary judgment should be entered in favor of Defendant. The Court will address each of Defendant's

arguments in turn.

A. Blank Form Rule

Defendant relies heavily on Baker v. Selden, 101 U.S. 99 (1879), which has come to stand for the “Blank Form Rule.” In Baker, Plaintiff held a copyright on a book describing a bookkeeping system. The book included multiple blank bookkeeping forms. The Baker Court concluded that these blank forms were not themselves an appropriate subject of a copyright. In the instant case, Defendant argues that the ABR forms are blank forms and therefore merit no protection under Baker.

Plaintiff counters by citing Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1252 (1983), to show that Baker is interpreted very narrowly by the United States Court of Appeals for the Third Circuit (“Third Circuit”). In Apple Computer, the Third Circuit rejected the notion that business forms were undeserving of protection solely because of their “utilitarian” purpose. Id. Under the interpretation of Baker followed by the Third Circuit, even blank business forms are protectable if they are sufficiently innovative:

In our circuit, Baker v. Selden does not impose a per se rule against the copyright of any blank forms. Instead, ‘this circuit, like the majority of courts that have considered the issue, has rejected this position and instead have [sic] held that blank forms may be copyrighted if they are sufficiently innovative that their arrangement of information is itself informative.’

Safeguard Business Systems, Inc. v. The Reynolds and Reynolds Co., No. 88-1426, 1990 WL 39259, at \*3 (E.D. Pa. Mar. 30, 1990) (Shapiro, J.) (citing Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1242-43 (3d Cir. 1986)). The Safeguard court found that while medical accounting sheets used for recording patient payments were not

sufficiently original and informative to be protected by copyright, this did not mean that other blank forms could not be sufficiently innovative to be warrant protection. Id. Furthermore, the court opined that “whether a form conveys information is a fact-bound determination.” Id. Thus Plaintiff argues that whether its COBRA form “conveys information” cannot be made on summary judgment.

The Court is persuaded by Plaintiff’s arguments. The restrained interpretation of the Blank Form Rule followed by the Third Circuit mandates that the relevant inquiry is whether Plaintiff ABR’s forms are sufficiently innovative and informative such that the Blank Form Rule does not apply. Plaintiff supports its contention that its forms convey sufficient information with Rule 56 submissions of depositions of Defendant’s employees. These depositions state that Defendant specifically set out to copy the ABR forms because of their clear advantages over other available forms, advantages that were well known to companies seeking help complying with COBRA statutes. Viewing these submissions in the manner most favorable to Plaintiff as nonmoving party, clearly a genuine issue of material fact exists on the question of the informativeness of ABR’s forms. Therefore, Defendant’s Motion for Summary Judgment on the ground that ABR’s forms cannot be copyrighted because of the Blank Form Rule must be denied.

B. Ideas or Expressions of Ideas?

Defendant cites the incontrovertible principle of copyright law that “protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself.” National Risk Management, Inc. v. Bramwell, 819 F. Supp. 417, 427 (E.D. Pa. 1993). Moreover, Defendant states that when there is only one way of expressing a particular idea, the

expression is considered to have merged into the idea and the expression therefore cannot be copyrighted. Educational Testing Services v. Katzman, 793 F.2d 533, 539 (3d Cir. 1986). Defendant argues that ABR is attempting to copyright a “system” (i.e. idea) for administering COBRA through the use of its copyrighted forms. Defendant further claims that there are extremely limited variations in how the ideas in the ABR forms can be expressed, and therefore the principle of merger should apply. Thus, Defendant contends the ABR forms cannot be copyrighted.

ABR counters that its forms contain protectable “expressions of ideas,” and that ABR is not merely attempting to copyright ideas themselves. Moreover, ABR claims that under Apple Computer, the relevant inquiry in the Third Circuit is the originality of the material sought to be copyrighted, and whether additional means of expressing the underlying subject matter exist. Apple Computer, 714 F.2d at 1253. Indeed, the Apple Computer Court acknowledged the difficulty in drawing the line between an idea and an expression of an idea, and focused instead on the originality of the material and on whether the idea is capable of various modes of expression. Id.

ABR claims that its forms embody its own interpretation of the COBRA statute and therefore contain the requisite originality. As previously noted, depositions of Defendant’s employees support a jury finding that ABR’s forms contain such originality. ABR provides as Rule 56 submissions samples of other companies’ COBRA reporting forms to show that multiple ways of presenting information related to COBRA notification exist. Therefore, the Court will not grant Defendant’s Motion for Summary Judgment on the ground that ABR seeks to protect ideas alone.

C. The Standard for Proving Copyright Infringement

The usual standard to determine whether a defendant has copied a protected work is whether “the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectable expression by taking material of substance and value.” National Risk Management, Inc. v. Bramwell, 819 F.Supp. 417, 427 (E.D. Pa. 1993) (citing Educational Testing Services, 793 F.2d at 541). However, Defendant insists that the National Risk Management Court held that a more stringent standard is applicable regarding copying of business documents, namely whether the appropriation is “in the exact form or substantially so of the copyrighted material.” Id. Defendant proceeds to compare the ABR and Sentry forms in an effort to prove that the Sentry form is not an exact duplicate of ABR’s. Therefore, Defendant concludes that the stringent standard for copyright infringement is not met.

Plaintiff points out that Third Circuit courts differ in how stringent a standard for copying is utilized for business documents. However, even the most stringent National Risk Management standard does not mandate that the infringing document must be an exact duplicate of the original -- rather, it must merely be “substantially” in the form of the copyrighted material. Id. Plaintiff contends that the similarities between the ABR and Sentry documents are sufficient to pass this test.

Regardless of the test that is used, both Third Circuit case law as well as scholarly authority hold that the extent of the similarity between copyrighted and alleged infringing material is a question for the finder of fact. Whelan, 797 F.2d at 1232; 4 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 13.01[B] (1999). Plaintiff illustrates the similarity

between its form and that of Defendant by comparing these forms to forms of other companies such as Deloitte Consulting, Prudential, and earlier forms used by Defendant. Plaintiff contends this comparison shows the striking similarity between Plaintiff's and Defendant's current forms, in contrast with the substantial differences seen when comparing ABR's form with those of other competitors. In addition, Plaintiff submits the deposition of Defendant's Vice President to show that Defendant was asked by a client to produce a form "just like" ABR's, and that Defendant promised to provide such a form. Thus, Plaintiff's Rule 56 submissions raise genuine issues of material fact about the degree of similarity between the competing forms. Defendant's Motion for Summary Judgment based on insufficient similarity between ABR's and Sentry's forms therefore must fail.

An appropriate Order follows.

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**O R D E R**

**AND NOW**, this day of September, 1999, upon consideration of Defendant NCO Group, Inc.'s Motion for Summary Judgment and the arguments made in support thereof, and having reviewed and considered Plaintiff ABR Benefits Services, Inc.'s Response thereto, **IT IS HEREBY ORDERED** that Defendant NCO Group, Inc.'s Motion for Summary Judgment (Doc. No. 13) is **DENIED**.

BY THE COURT:

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John R. Padova, J.