

DEVICE

## MINORITY MEMORANDUM

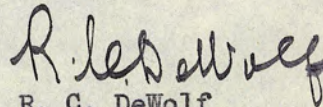
August 6, 1940

Remitter: Insurance Research & Review Service (Trust)--Class A.

Title: "The Measure-Master"

Questions: Device.

This is still another device, this time more complicated. It is arguable that in this case there is the intention to secure copyright on the mechanical features of the article. The notice at the bottom of the metal container reads--"Fully Copyrighted 1940 by Ralph P. Ross. U.S. Patent Applied For." This might be construed as indicating that copyright is claimed on everything connected with the article, or on the other hand, that the text and figures are the subject of copyright, while the mechanical features are to be the subject of a patent if it can be obtained. Mr. DeWolf would register a thing like this upon an application clearly specifying that no copyright is claimed on the mechanical features of the work, but it is again emphasized that it is desired to submit a variety of cases for the sake of getting a clearly formulated rule.



R. C. DeWolf

Acting Chairman, Revisory Board

Reject by order of Colonel Bouvé. See his memorandum of August 13.

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(Nov., 1938—2,000)

## MEMORANDUM

REFERRING TO copyrightability of devicesDATE August 13, 1940

The occasion for this memorandum is the fact of there having been submitted, on a division of the Revisory Board, certain cases in which application has been made for the registration as "book" of material which plainly appears to my mind, as it did to the majority of the Board, to constitute devices rather than books. The form in which such material generally comes to this Office is largely a cardboard production involving manipulation in order to get facts or mathematical results with respect to conditions indicated perhaps by arrows on the face of the material--which itself often has openings through which the figures on the revolving part of the apparatus applicable to some given point or indication on the face are visible. The Office is so familiar with this type of material that it is felt that this brief and somewhat inadequate description may meet the purposes of this memorandum.

It seems to be fairly well established in copyright jurisprudence that devices as such are not copyrightable. By the term "device," as I use it here, is meant some kind of mechanism no matter how elementary--some form of apparatus which requires manipulation for the purpose of obtaining the desired results. It may have, and often has, writing on it. Sometimes this writing may even take the form of instructions as to how to use it; and it is for this reason that the applicant characterizes it as a book and sends it in on an AI application. Most of these devices are based on some fundamental patentable principle already patented and are consequently not themselves patented. Nevertheless, the applicant seeks to obtain a monopoly on them, and for that purpose comes to the Copyright Office with an application for registration.

It does not matter, in my opinion, that such objects have pictures or writings on them. They are basically utilitarian in purpose, and objects basically utilitarian in purpose are not subjects of the Copyright Act. On this point the District Court for the Eastern District of New York on May 26, 1937, spoke in no uncertain terms in the case of Dixie-Vortex Co. v. Lily Tulip Cup Corp. In that case the court held that this Office had no right to register a print or pictorial illustration which consisted of an Arctic scene with a polar bear in the foreground, the material bearing the picture not being used for any purpose other than for a paper cup which the court pointed out was a commercial article. Application for copyright

of this print had been made to the Copyright Office and registration made. But for the reasons given the court stated that it "must conclude \* \* \* that the registration is invalid."

The truth is that as to the illustrations or wording which such devices may bear, there is often very little that is copyrightable; although where mathematical rows of figures are involved it is well known that such material is, generally speaking, copyrightable. But the trouble with the situation from the standpoint of registration lies in this: First, that what is sought to be copyrighted is, in nine cases out of ten, really an article of merchandise; and, second, that the real purpose of the copyright notice would seem to be to protect the device as such and thereby obtain a monopoly which cannot be granted by the Copyright Office because what is involved is really an invention (more or less), or by the Patent Office because the basic principle has long since been patented. To call such material a book or to register it on an A1 application as a book seems to me to go counter to both the words and spirit of the Copyright Act.

Of course, if material is submitted for registration with respect to which a real doubt may be entertained as to whether it really is a device--as to whether it is a commercial article--then the doubt should be decided in favor of the applicant in case copyrightable elements appear. It must be borne in mind that the presence of the word "copyright" on an object not copyrighted really amounts to an abuse of the public interest in that it wrongfully announces the existence of a monopoly for which the law offers no justification.

#### Register of Copyrights

cc to Mr. Howell  
Mr. DeWolf  
Mr. Wise  
Mr. Smith  
Mr. McLane  
Mr. Pierce  
Mrs. Brady  
Miss Jones  
Mrs. Rafter

MP-522

DEVICE

MINORITY MEMORANDUM

August 7, 1940

Remitter: Julius Lipow (No Fee)--Class A (?)--no application.

Title: "Speedy Calculator"

Question: Device.

This is another device. It is desired to get a clear picture of the variety of things of this kind, and how they are to be treated. Mr. DeWolf would register where the mechanical feature is as here a mere convenience in reading the copyrightable data, and is not itself the subject of the copyright claim.

*R. C. DeWolf*

R. C. DeWolf  
Acting Chairman, Revisory Board

Reject by order of Colonel Bouvé. See his memorandum of August 13.

## MINORITY MEMORANDUM

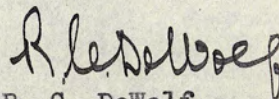
August 7, 1940

Remitter: Harrison &amp; Smith Co. (48399)--Class A.

Title: "Estimated F.H.A. Loan Payments"

Question: Device.

Mr. DeWolf recommends entry for reasons stated in his memorandum on "Breeder Chart," i.e., copyrightable matter is present. The mechanical feature of the article--a card sliding within a container--is of trifling importance.



R. C. DeWolf  
Acting Chairman, Revisory Board

Rejected by order of Colonel Bouvé. See his Memorandum of August 13.

MINORITY MEMORANDUM

August 6, 1940

Remitter: Landsheft and Warman, Inc. (No Fee)--Class A.

Title: Breeder Chart.

Question: Device.

The copies are sent as samples to ascertain what is the correct form to use in applying for them. The copies show a considerable amount of text matter with ornamental design and coloring with some pictorial matter. The "Breeder Chart" consists of matter on the face of the card read in conjunction with matter printed on the disk which revolves from the back of the card and shows in portions through apertures in the card. The Examiner rejected this as not subject matter of copyright, being a "device". Mrs. Brady and Mr. Smith agree with this rejection, which they state is in accordance with Office policy.

Mr. DeWolf, in part, with the purpose of obtaining a clear statement as to the rule in such cases, recommends entry.

The copyright law nowhere mentions "devices". It is assumed that the term as used in the Examiner's recommendation means a mechanical contrivance of some sort. The view of Mr. DeWolf is, where copy-rightable matter is present in sufficient quantity the additional presence of a simple mechanical element, such as a disk made to revolve upon the surface of a card, does not prevent the article from being subject matter of copyright. The mechanical feature is of very slight importance, and it would seem to make little difference whether the data was read by moving a disk or by turning the pages of a book. In both cases there is a kind of manipulation required, but this seems to be of minor importance.

*R. C. DeWolf*  
R. C. DeWolf  
Acting Chairman, Revisory Board

Reject by order of Colonel Bouvé. See his memorandum of August 13.

MP-522

DEVICE

MAJORITY MEMORANDUM

August 9, 1940

Remitter: Julius Lipow (No Fee)--Class A (?)--no application. MP-522  
Title: "Speedy Calculator"

Remitter: Insurance Research & Review Service (Trust)--Class A. MP-522  
Title: "The Measure-Master"

Remitter: Harrison & Smith Co. (48399)--Class A. - MP-522  
Title: "Estimated F.H.A. Loan Payments"

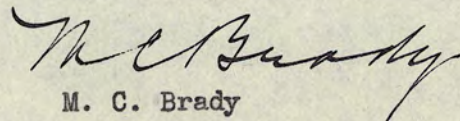
Remitter: Landsheft and Warman, Inc. (No Fee)--Class A. MP-522  
Title: Breeder Chart

Question: Device

The deposits, grouped as devices and rejected as such by Mr. Smith and Mrs. Brady, contain variable information which is available only by the manipulation of dials, discs or tabs. There have been a number of such deposits, in Classes A and I, presented to the Revisory Board from time to time, and they have been the cause of considerable discussion and difference of opinion amongst the members of the Board, until the Board was instructed by Mr. Wise early in the present year, to reject all such material, i.e., all deposits containing variable information ascertained by the manipulation of a device. Mr. Smith and Mrs. Brady recall this order, but do not remember the case under consideration at that time. They do not remember either whether the order came from the Register of Copyrights or the Assistant Register.

However, in view of the number and variety of these deposits, and the differences of opinion expressed in the discussions which arise when they are presented to the Board, it would be helpful to have a recapitulation of the decisions, and a clarification of procedure to be followed in the future.

I am attaching to this memo the UB envelope containing the Heyer Products Co., Inc. correspondence. This is a typical device case, containing most of the difficulties and arguments found in such instances.

  
M. C. Brady

Reject by order of Colonel Bouvé. See his memorandum of August 13.

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#### Register of Copyrights

cc to Mr. Howell  
Mr. DeWolf  
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