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September 17, 2001

William F. Vobach
8899 E. Prentice Avenue
#5307
Greenwood Village, CO 80111

Dear Mr. Vobach:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated September 17, 2000 in which you requested that the Copyright Office reconsider its refusal to register eight drawings of a design that is commonly known as a "happy face" or a "smiley face," with the following titles:

1. "Internet Smile Right Parentheses"
2. "Internet Smile-Left Parentheses"
3. "Internet Smile-Right Parentheses-Background Coloring"
4. "Internet Smile-Left Parentheses-Colored Background"
5. "Internet Smile-Right Parentheses-Nose"
6. "Internet Smile-Left Parentheses-Nose"
7. "Internet Smile-Right Parentheses-Nose-Background Coloring"
8. "Internet Smile-Left Parentheses-Nose-Background Coloring"

The Copyright Office Board of Appeals affirms the Examining Division's refusal to register.

ADMINISTRATIVE RECORD

On November 2, 1998, the Copyright Office received a Form VA application from you to register a drawing of a happy face design entitled "Internet Smile Right Parentheses." In a letter dated March 23, 1999 from Visual Arts Section Examiner, William R. Briganti, the Examining Division refused to register that work. Registration was denied because the work is a drawing of a familiar design that is a minor variation of basic geometric shapes which lacks the minimum amount of creativity to be entitled to copyright protection.

After submitting that first application in November, you submitted additional drawings of happy face designs on seven Form VA applications which the Copyright Office received on January 4, 1999. Those seven drawings are also happy face designs that have the following titles:

1. "Internet Smile-Left Parentheses"
2. "Internet Smile-Right Parentheses-Background Coloring"
3. "Internet Smile-Left Parentheses-Colored Background"
4. "Internet Smile-Right Parentheses-Nose"
5. "Internet Smile-Left Parentheses-Nose"
6. "Internet Smile-Right Parentheses-Nose-Background Coloring"
7. "Internet Smile-Left Parentheses-Nose-Background Coloring"

In a letter dated June 3, 1999 from Visual Arts Section Examiner, John M. Martin, the Examining Division also refused registration on the same basis as the first denial.

In a letter dated July 18, 1999, you requested that the Copyright Office reconsider its refusal to register the eight drawings. In your letter, you stated that the works are entitled to be registered because they possess the minimum amount of artistic authorship that is necessary to be copyrightable. As evidence of that creativity, you stated that the drawings of smiling faces communicate both the idea of smiling and the idea of the Internet. As evidence of the originality of your work, you submitted examples of drawings of smiling faces by other artists, which you found on the Internet. Quoting Nimmer on Copyright, you stated that the Copyright Office should not refuse to register a work on the basis of lack of originality. Finally, you argued that the examiner wrongly applied the standard set forth in 37 C.F.R. §202.1 because that regulation does not explicitly state that "simple combinations" of familiar symbols and designs or minor variations of geometric shapes, lettering or typography may not be registered.

In a letter dated October 19, 1999 from Attorney Advisor Virginia Giroux, the Examining Division again refused to register your drawings. Ms. Giroux stated that the standard of review for copyright registration is whether a work has sufficient creative, as well as, original expression. A very low level of original authorship will suffice. Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340 (1991). A work should be reviewed in its entirety, not by judging its individual elements separately. Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989). Ms. Giroux clarified the standard of review based on 37 C.F.R. §202.1 stating that "familiar symbols, designs, or shapes, and mere variations of typographic ornamentation, lettering, and coloring are not copyrightable." Ms. Giroux again denied registration for your drawings because the combination of the individual elements, taken as a whole, lack the creative artistic expression required for copyright registration. She said, "It is not the possibility of choices that determines copyrightability but whether the particular resulting expression contains copyrightable authorship."

In a second letter of appeal, dated September 17, 2000, you again requested that the Copyright Office reconsider its refusal to register the eight drawings. In this second letter, you reviewed and amplified the same arguments that were presented in your first letter. You also questioned whether the Copyright Office has authority to deny registration based on lack of originality.

DECISION

The Board has considered your arguments pertaining to originality and creativity. The Board has concluded that your eight drawings of smiling face designs do not satisfy the minimum threshold requirement for creative authorship required for copyright protection.

Quoting from Nimmer on Copyright, you questioned whether the Copyright Office has authority to deny registration based on the originality requirement. We point out that the Office does have such authority to examine works for originality because of the general requirement in copyright law that the Register of Copyrights examine claims for copyright registration to determine whether they satisfy the legal requirements for copyright protection, including the statutory mandate that the Register determine whether the works deposited for registration constitute copyrightable subject matter. 17 U.S.C. §410. One of the statutory legal requirements is that copyright protection is only available 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. at 346. 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.")

The Copyright Office examines applications to ensure that those two elements are both satisfied, independent creation and a minimum level of creativity. The Board agrees with Nimmer that independent creation is an issue of fact. Therefore, the Copyright Office does not inquire into the matter of independent creation unless evidence is presented during the process of examining the information provided by an applicant that raises doubt about whether a work was independently created. If the facts indicate that a work has not been independently created, then registration will be denied. The examination policy states that the Copyright Office does not ordinarily make findings of fact with respect to things done outside the Copyright Office, although the Office does reserve the right to request explanations of statements made by applicants. Compendium of Office Practices, Compendium II, §108.05, (1984). The Office also takes notice of matters of general knowledge as a basis for questioning information in an application that appears to be inaccurate or erroneous. *Id.* For example, some question is reasonably raised regarding the issue of the independent creation of your eight drawings, given your statement that you are an Internet user coupled with the widely-known fact that Internet users sometimes use these standard punctuation marks in the same manner as your drawings to communicate a smiling face. However, the Office has not come to any conclusion regarding the originality of your drawings, i.e., the Office is accepting as fact that you are the independent author of these drawings; rather, the Office is denying

registration on the second aspect of the originality requirement– the creativity requirement.

Considerations regarding questions of fact raised by Nimmer do not apply to evaluating whether works satisfy the creativity prong of the originality requirement. The determination of whether a work contains the requisite minimum amount of creativity, i.e., is copyrightable, is mandated by section 410[a] of the copyright statute and such determination is based, of necessity, on the appearance of the work itself as represented in the material submitted for deposit with the application. The eight happy face drawings do not have more than a *de minimis* level of creativity.

The requisite level of creativity required for copyright 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). With respect to pictorial, graphic and sculptural works, the class to which these drawings belong, Compendium II states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, §503.02(a), (1984). 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) of Compendium II 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."

Although the Board agrees with you that it is possible for the selection and combination of elements in a work to rise to the level of copyrightability even though each individual element, alone, would not be copyrightable, the eight drawings, each considered **in its entirety,** do not "possess more than a *de minimis* quantum of creativity." Feist at 363. What creativity may be found in the eight drawings of happy face designs appears to be so trivial as to be virtually nonexistent. The drawings are minor variations on a simple design. A "happy face" or "smiley face" is a commonplace design or pattern the same as a fleur-de-lys design or the design of a cross. The eight drawings each consist of minor variations of a few simple shapes or symbols arranged in a common design.

The two or three individual elements of each drawing that represent the eyes, nose and smile are common punctuation marks which highlights their simplicity. It is obvious to combine a colon for two simple dots to represent eyes, a hyphen for a simple short straight line to represent a nose and a left or right parentheses for a simple arc to represent a smile. It is common among people communicating through the Internet to use the same punctuation symbols as short hand or code to express the idea of a smiling face, like these two examples that are the same as your drawings, **(-:** and **:-)** . The lack of creativity in the eight drawings is emphasized by the fact that they are comprised of very few punctuation marks commonly found on all keyboard.

These eight drawings are unoriginal because the arrangement of the constituent elements is commonplace. Using a left or right parentheses, which are basically simple arcs, for a smile or using a colon, which is simply two dots, to represent eyes results in a *de minimis* graphic. To place a circle around a pattern that matches the pattern of a human face is so obvious that it lacks the creative spark required for copyright protection. The overall pattern of a face, smiling or not, falls within the category of generic patterns that are in the public domain, like a fleer-de-L.S. design or a chevron pattern. The minor variations on the common design of a human face in the eight drawings does not satisfy the low level of creativity needed for copyright. As evidence, you submitted a variety of drawings of happy face designs. The Board will only comment that some of the examples appear to have the minimum level of creativity and some do not. Each example must be judged individually, on its own merits.

The Board finds substantial support for its conclusion in case law. 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 these works, consisting of uncopyrightable elements– as those elements have been combined in your works– are expression containing too few, too simple components to result in overall works that rise to the level of copyrightable authorship. The quantum of creativity in the selection and arrangement required to reach a level that supports copyright is not satisfied by your happy face drawings. Like the alphabetical arrangement in Feist, the symmetrical arrangement of the geometric shapes or punctuation marks that are not copyrightable in themselves into a happy face expression falls within the category of simple, minimal authorship which Feist referred to as "entirely typical"or "garden variety" authorship. 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. The Board is unable to recognize in your drawings any contribution that is "more than merely trivial."

In conclusion, registration is denied because the authorship in your drawings is *de minimis*. Each work consists merely of a few common shapes or symbols arranged in the common design of a smiling face which does not have the modicum of creativity required by Feist.

For the reasons stated in this letter, the Copyright Office Board of Appeals affirms the refusal to register the claim. This decision constitutes final agency action on this matter.

Sincerely

N. Petruzzelli

Nanette Petruzzelli
Chief, Examining Division
for the Board of Appeals
United States Copyright Office