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May 6, 1997

RE: JEFF HO DESIGN
Control No. 60-501-7864(C)

Dear Mr. Cislo:

This is in response to your letter dated November 6, 1996, addressed to the Copyright Office Board of Appeals on behalf of your client, Allan Jeffrey Ho, appealing the Office's refusal to register the "Jeff Ho Design," originally submitted for registration on August 7, 1995.

The Copyright Office Board of Appeals has examined the claim and considered all correspondence from your firm regarding this claim. Because the work consists of familiar symbols and designs, and basic geometric shapes, in an arrangement that does not rise beyond the level of de minimis authorship, the Board of Appeals affirms the Examining Division's decision to refuse to register this claim.

Administrative Record

The Copyright Office received the application for registration of this work on August 7, 1995. The two-dimensional work consists of a quarter moon shape over three rectangular figures with curved tops connecting lines of unequal length on the left and right rectangles. The registration application described the work as "2-Dimensional artwork." On the registration application, and in your original correspondence dated August 4, 1995, the work was titled and referred to as "Jeff Ho Logo."

In a letter dated October 5, 1995, Visual Arts Section Examiner John A. Ashley notified you that the Copyright Office could not register the work because it lacks the artistic or sculptural authorship necessary to support a copyright claim. The letter stated that copyright does not protect familiar symbols and designs, or minor variations of basic geometric shapes.

On November 3, 1995, you appealed the refusal to register "Jeff Ho Logo." In that letter, for the first time, you entitled the work "Jeff Ho Design." You asserted that the work was "a unique graphic image preceding the words 'JEFF HO,'" and that the artistic nature of the design "far exceeds any threshold required for copyrightable originality and creativity." Your letter cited, among other precedent, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), for the principle that any distinguishable variation of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts and is more than merely trivial.

On July 10, 1996, Visual Arts Section Attorney David Levy issued the Office's second refusal to register "Jeff Ho Design," after a reexamination of the work. The letter by Mr. Levy noted that, while uniqueness may be applicable to patent protection, the fact that a work may be unique, one of a kind or unusual, cannot be considered in determining registrability. The letter also noted that the determination of whether a work is copyrightable has to do, not with aesthetic or commercial value, but with whether there is sufficient original and creative authorship. Simple variations of standard designs and their simple arrangement do not furnish a basis on which to support a copyright claim, noted Mr. Levy. To support this principle, he cited Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (label containing the words "Forstmann 100 % Virgin Wool" interwoven with three fleurs de lis not copyrightable); Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two flaps which, when folded back, enabled it to stand for display was not copyrightable work of art); and Copyright Office regulation 37 C.F.R. 202.1.

On November 6, 1996, you wrote to the Copyright Office with a second request for reconsideration, addressing your letter to the Board of Appeals. In your letter, you asserted that "Jeff Ho" meets "the very slight, minimal or modest level of creativity necessary for copyrightability." You argued that the three rectangles of the design "differ from conventional rectangles or trapezoids, in that the top sides are rounded to varying extents." You said that these three shapes, which have "no particular well-known name," are "arranged beneath a crescent, such that the rounded top surfaces nest within the concave side of the crescent." You argued that the resulting work is entitled to copyright protection. In support of the principle that even a slight amount of creativity will suffice for copyrightability, you cited Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340 (1991). You also cited OddzOn Products, Inc. v. Oman, 16 U.S.P.Q. 2d 1225 (D.D.C. 1989); Atari Games Corp. v. Oman, 888 F.2d 878 (D.D.C. 1989); In Design v.

Lynch Knitting Mills, Inc., 689 F. Supp. 176 (S.D.N.Y.), aff'd without op., 863 F.2d 45 (2d Cir. 1988); Hukafit Sportwear, Inc. v. Banff Ltd., Inc., 228 U.S.P.Q. 249 (S.D.N.Y. 1985); Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092 (2d Cir. 1974); Concord Fabrics, Inc. v. Marcus Brothers Textile Corp., 409 F.2d 1315 (2d Cir. 1969); H.M. Kolbe Company, Inc. v. Armgus Textile Company, Inc., 137 U.S.P.Q. 9 (2d Cir. 1963); and John Muller and Company v. New York Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986).

Minimum Amount of Authorship Not Met

The "Jeff Ho logo" or "design" submitted on behalf of your client lacks the minimum degree of creativity needed for copyright registration. Of all the cases cited in your letter, the John Muller decision dealt with a two-dimensional design which is most similar to the JeffHo design at issue. There, the court upheld the Registers' refusal to register a logo consisting of four angled lines forming an arrow, with the word "Arrows" below. The Register had determined that the logo did not meet the minimum degree of creativity needed for copyright registration. The court noted that to register the logo as a "work of art" or "pictorial, graphic or sculptural work, the work must contain some creative authorship in its delineation or form." Id. at 990 (citing 37 C.F.R. §202.10(a)(1985)). We note that a logo is sometimes registrable as a trademark. Information on federal trademarks can be obtained by contacting the U.S. Patent and Trademark Office in Crystal City, Virginia.

The "Jeff Ho design" does not satisfy the admittedly low threshold of copyrightable authorship required under Feist. Several cases support this assessment. In a pre-Feist case, Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F.Supp. 769 (W.D. Pa. 1986). for example, it was held that envelopes with black lines and words such as "gift check" and "priority message" did not contain the minimal degree of creativity necessary for copyright protection. In OddzOn Products, Inc. v. Oman, 924 F.2d 346 (D.C. Cir. 1991), the court upheld the Register's decision to deny registration as a sculptural work to the KOOSH ball. The Register determined in that case that the KOOSH ball, a spherical ball made up of spiny, wiggly filaments projecting from a core, embodied a familiar symbol or design that did not contain enough creativity to warrant copyright. Id. at 347-49.

The mere differentiation here in length between the left and right sides of two of the rectangles in "Jeff Ho design" does not lift these familiar geometric shapes from the public domain. An example of this principle can be found in Norma

Ribbon & Trimming, Inc. v. Little, 51 F.3d 45 (5th Cir. 1995), a post-Feist case, where it was argued that the ribbon flowers there bore a copyrightable distinction from the public domain version in that they had a greater quality, symmetry, and uniformity, and a "different height and petal shape." Id. at 47-48. The court, however, found that in order to achieve a "distinguishable variation" from a public domain work, the variation must be substantial. Id. Another case you cite, Atari Games Corp. v. Oman, concerned an audiovisual work, the video game "Breakout," that involved substantially more authorship than the logo or design here. In Atari, the game consisted of a rectangular-shaped representation of a "paddle," that was used to "hit" a "ball" against a colored rectangular wall of "bricks"; it also included audio sounds when the ball came in contact with the paddle or wall. The court considered the game as a whole, including its full "series of related images." Atari, 888 F.2d at 883 (quoting 17 U.S.C. §101 (definition of "audiovisual works")).

You letter cites three other cases involving copyrighted fabric designs that did not directly concern or analyze the copyrightability of those designs. Nevertheless, all three designs appear to have been more complex than "Jeff Ho." You quote the reference from Soptra Fabrics Corp., supra, to "modest but sufficient originality so as to support the copyright," but the Soptra court was referring to the requisite authorship in an *art reproduction*. The defendant had argued that the fabric design was an exact copy of the uncopyrighted painting-design, and thus lacked the requisite originality. 490 F.2d at 1094. The court there was citing Peter Pan Fabrics v. Dan River Mills, 295 F. Supp. 1366 (S.D.N.Y.), aff'd, 415 F.2d 1007 (1969), for the rule that the expansion of an "unmistakably original" textile design, in repeat, so as to "cover a bolt of cloth, together with beginning the pattern in a particular way so as to avoid showing an unsightly joint when the pattern is printed on textiles on a continual basis, constitutes modest but sufficient originality so as to support the copyright." 490 F.2d at 1094. In Soptra, the court said that the underlying painting-design itself, which had not been registered for copyright, could have been registered as a "work of art" under 17 U.S.C. § 5(g), and that its filing under 17 U.S.C. § 5(h) as a reproduction of a work of art was at most an error in classification which did not invalidate the textile design's copyright protection. Id. The design consisted of a strip of crescents, with scalloping or ribbons between that strip, and then rows of semicircles. Id. at 1093. In Hukafit Sportswear, Inc., supra, the court merely noted that the ribbon design was accepted for registration by the U.S. Copyright Office and a valid certificate of registration was issued, establishing on a prima facie basis that the design was copyrightable. The court noted the defendants' assertions that it was unusual for a ribbon design appearing on a knitted garment to be copyrighted, but, without analyzing or describing the design, said that the defendants had failed to rebut

the presumption of copyrightability attendant upon the registration, and that such sweater designs had been registered before. 228 U.S.P.Q. at 250. Concord Fabrics, Inc., supra, was an infringement action, and the court there also did not analyze the copyrightability of the fabric design. Sufficient information is provided, however, to suggest that the design was more complex than a simple geometric shape or two; the court said that the design consisted of "a circle within a square within a square," with "colors," and "designs within the circles, between the squares, and around the outer square," as well as "figures" or "frames around the border" running in one direction and "figures around the outer part of the circle." 409 F. 2d at 1316.

You cite In Design v. Lynch Knitting Mills, Inc., 689 F. Supp. 176 (S.D.N.Y.), aff'd without op., 863 F.2d 45 (2d Cir. 1988), as a case involving a copyrightable rhomboid pattern. However, this case concerned what the court termed a "relatively intricate" sweater fabric design, id. at 180, which the court described as follows:

> The "Aperture" sweater has an abstract, geometric design. The background consists of horizontal rows of large rhomboids, all of the same size and all oriented in the same direction. These diamond-like shapes are in two colors -- red, and a black and white blend creating a mottled gray look -- and those in each row are of the same color. They do not intersect, and those of the same color do not touch each other but are connected by small black diamonds. Superimposed onto this back-ground are the heavy black outlines of a third set of diamond-like rhomboids, of the same size and orientation, which meet in the middles of the red and gray-blend ones. The meetings of these black outlines form diamond shapes of roughly the same size as those linking the background parallelograms. Unlike those diamonds, however, these are not solid black, but have a blended gray interior identical to

> that of the gray background parallelograms.

Id. at 177-78. There is little question that such a fabric design could satisfy the standard established in 1991 in Feist.

Like the fabric design in Soptra, the textile design in H.M. Kolbe Co., Inc., supra, was registered as a "reproduction of a work of art." The design consisted of "clusters of purple roses, each cluster enclosed and separated from the next cluster by a square border of leaves and petals. By an inversion of the rose clusters in alternate eight-inch squares, a checkerboard pattern is achieved which runs the length and width of the fabric." 137 U.S.P.Q. at 10. The court found no error in the determination that such a work was copyrightable, notwithstanding the fact that "a checkerboard configuration, *considered apart from the original component squares here present,* does not possess even the modest originality that the copyright laws require." Id. (emphasis added).

Clearly, the presence in an overall copyrightable design of a public domain element does not inhibit the copyrightability of that overall design. Unlike H.M. Kolbe Co., Inc., however, the simple geometric logo here lacks the creative pictorial or sculptural authorship, either in its individual or composite elements, necessary to support a copyright claim. As noted in our previous correspondence to you, under Copyright Office regulations, familiar designs and symbols such as rectangles, arrows and circles, and short phrases, are not copyrightable. 37 C.F.R. §202.1 (1996). The simple combination of such elements here contains insufficient authorship to be copyrightable. As stated in the manual of Copyright Office practices, for expression to support copyright, it must consist of something more than the bringing together of two or three standard forms or shapes with minor linear or spatial variations. U.S. Copyright Office, Compendium of Copyright Office Practices, Compendium, II § 503.02 (b) (1984). The combination of public domain elements in "Jeff Ho design" contains insufficient authorship as revealed by cases such as Forstmann and Bailie.

Because the Board of Appeals concludes that the work "Jeff Ho Design" consists of familiar symbols and designs, and basic geometric shapes, in an arrangement that does not rise beyond the level of de minimis authorship, the Board of Appeals hereby affirms the Examining Division's decision to refuse to register this claim.

This letter constitutes final agency action.

Sincerely,

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