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September 30, 1999

Gary D. Fields, Esq.
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One Northwest Center
1700 Lincoln Street, Suite 3030
Denver, CO 80203

Re: **Three player chess board**
Control No. 60-508-5401(F)

Dear Mr. Fields:

The Copyright Office Board of Appeals has reviewed your request for reconsideration of the Office's refusal to register your client's 2-dimensional representation of a three player chess board. Upon reviewing the claim and the arguments outlined in your letters, the Board of Appeals has determined that the work is made up of a combination of common elements, which, alone or in combination, lack sufficient creativity on which to base a copyright registration.

Administrative Record

On November 26, 1996, you submitted an application for registration, deposit and the requisite filing fee on behalf of your client, William C. Woodward. The application was rejected by letter from Visual Arts Section Examiner John Ashley dated April 15, 1997, because the work "lacked the artistic or sculptural authorship necessary to support a copyright claim." The letter further explained that copyright does not protect basic geometric shapes or mere variations in coloring, such as those demonstrated in the submitted work.

In a brief letter dated August 4, 1997, you requested a reconsideration of the examiner's decision to reject the application on the basis that the work was "the artistic expression of the idea of a three player chess board." The Examining Division responded in a letter from Attorney-Advisor Virginia Giroux dated March 17, 1998), again rejecting the application and finding that the work was a mere "variation on the standard black and white checkerboard design, which has long been in the public domain, and therefore not copyrightable." In addition, she noted that neither geometric shapes nor layout and format are copyrightable elements.

You responded to this second refusal to register the work with the current request for reconsideration, set forth in an April 10, 1998 letter to Ms Giroux. In this request, you have accepted the Office's position that a simple variation on a standard design does not contain sufficient creativity to support a copyright claim, but you have asserted that the submitted work is something more complex than a simple variation on a geometric pattern. In support of this position, you have provided a vivid description of the work, noting the three-dimensional effect that comes from the interplay and layout of the trapezoids (or squares) on the board, the unique shape of the perimeter, and the creation of a six-pointed star where the trapezoids join in the center.

You have asserted a number of legal principles in support of your claim that the submitted work contains at least the modicum of creativity necessary to support a copyright. First, you cite the landmark Supreme Court case, Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340 (1991), for the proposition that the amount of creativity to sustain a copyright is extremely low. Second, you argue that a variation on a design within the public domain may merit copyright protection, citing Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); Thomas Wilson & Co. v. Irving J. Dorfman Co., 433 F.2d 409 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971). Finally, you argue that a creative arrangement or layout of common elements, which individually are not capable of supporting a copyright, may be entitled to copyright protection, citing Stillman v. Leo Burnett Co., 720 F.Supp. 1353 (N.D. Ill. 1989); Roth Greeting Card v. United Card Co.,429 F.2d 1106 (9th Cir. 1970); North Coast Indus. v. Jason Maxwell, Inc., 972 F.2d 1031 (9th Cir. 1992); Runstadler Studios, Inc. v. MCM Ltd. Partnership, 768 F. Supp. 1292 (N. Ill. 1991).

Discussion

The Board agrees with the three broad propositions set forth in your request for reconsideration. However, the Board does not agree that these copyright principles support registration of the submitted work.

It is true that the required level of authorship is modest. *See* Feist Publications. However, some works fail to meet that standard. The Court held in Feist that the originality required for copyright protection consists of "independent creation plus a modicum of creativity." 499 U.S. at 346. The Court observed 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," *id.* at 363, and that 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. The Court also recognized that some works, such as a "garden-variety white pages directory devoid of even the slightest trace of creativity," are not copyrightable. *Id.* at 362.

It is also true that the courts have long held that a copyright owner can build upon a work in the public domain and create a new work with sufficient originality and creativity to support a copyright. Alfred Bell & Co.. In that case, the court held that the author was entitled to a copyright for his mezzotints because they possessed sufficient variations from the public domain paintings upon which they were based. The court reached this conclusion because the author contributed an appreciable amount of creative skill and judgment in creating the new versions of the "Old Masters'" works, resulting in "substantial departures" from the originals. Similarly, in Thomas Wilson & Co., the court held that a pansy design in a lace pattern was sufficiently creative to support a copyright. In making this determination, the court noted that "the configuration of the design, including such details as petals and leaves, required an appreciable amount of creative skill and judgment." *Id.* at 411.

Feist Publications, Alfred Bell & Co. and Thomas Wilson & Co. all recognize that the degree of creativity required for copyright protection is not high, but they do not dispense with the requirement. The question before the Board is whether the three-dimensional checkerboard — and, specifically, the author's contributions beyond what is found in an ordinary checkerboard— embody sufficient creativity to warrant copyright registration.

The three player chess board is a combination of geometric shapes — 96 squares* arranged in the same standard 8x8 array used in creating the two-player checkerboard design. The arrangement of alternating dark and light squares is neither original nor creative; it is merely the repetition of the same alternating pattern of light and dark squares which make up the common checkerboard pattern. The only difference lies in the expansion and reorientation of the board, including the addition of a number of squares in the direction of a third player, to accommodate three persons instead of two. But as indicated in the earlier letters denying registration, copyright protection is not available for common geometric figures or shapes, even when the design brings together two or three standard forms or shapes with minor linear or spatial variations. *See* Compendium of Copyright Office Practices, Compendium II, §503.02(a) (1984). The only conceivable authorship in the three-player chess board consists of minor linear and spatial variations from the standard checkerboard, adjusted to accommodate an additional player.

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* In your April 10, 1998 letter, you describe each element as a "trapezoid" rather than a square. In fact, the geometric figures appear to be representations of squares (albeit many of them are literally trapezoids due to the perspective from which the board is seen), but if in fact there are trapezoids rather than squares, the distinction would not matter.

Of course, some combinations of common or standard forms contain sufficient creativity to support a copyright. But where the courts have examined this question, they have considered whether the layout and interplay of the common elements required the author to choose from a variety of potential options when creating the design. For example, in North Coast Indus., the court determined that a geometric clothing design consisting of colored rectangular blocks banded in heavy lines, based upon but not identical to a Mondrian painting comprised of rectangles, may be copyrightable. The creativity in the design, however, lay in the interplay arising from the author's choice of varying sizes, proportions and placement of the rectangles. None of these choices were dictated by the design. Indeed, it is apparent that the creator of the clothing design, while creating a design evocative of a Mondrian painting, made different choices from Mondrian's with respect to size, proportion and placement of rectangles. See 972 F.2d at 1036-37. Similarly, in Runstadler Studios, 768 F. Supp. at 1295-96 (which relied heavily on the presumption of validity arising out of the Copyright Office's registration of the work), the court upheld a copyright registration in a three dimensional glass sculpture consisting of glass rectangles overlapping each other to form a spiral because "the choice of location, orientation and dimensions of the glass panes, and the degree of arc of the spiral, show far more than a trivial amount of intellectual labor and artistic expression." In Roth Greeting Cards, the court considered the overall design created by the author's choice to arrange the text and the art work in a particular manner when making its determination that each greeting card was both original and copyrightable, even when some elements of the composition lacked the *de minimis* authorship needed to support a separate copyright. *See also* Stillman (holding that a particular arrangement of nonprotectible elements used in creating a silent commercial was not dictated by the concept of the silent commercial).

But, "[w]here the author fails to such a degree to transcend the apparent limitations imposed by the subject and the preexisting materials, the author's work, like the directory in Feist, falls within the 'narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.' M & D Intern. Corp. v. Chan, 901 F. Supp. 1502, 1516 (D. Hawaii 1995) (holding that crystal sculptures created from stock parts lacked degree of creativity necessary to merit copyright protection because the structural simplicity of the natural subject matter of the sculptures limited the selection and arrangement of the stock components), citing Feist, 499 U.S. at 357. Such is the case with the submitted work. In contrast to the works considered in the North Coast, Runstadler, Roth, and Stillman, the expression of the three player chess board follows a set pattern which offers little choice to the author once the basic pattern is selected and the first piece is set. Consequently, the arrangement of geometric shapes fails to rise above the *de minimis* authorship needed to support registration of the work.

Because the Board of Appeals concludes that the three player chess board consists of 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 deny registration for this work.

This letter constitutes final agency action.

Sincerely,

David O. Carson,
General Counsel
for the Appeals Board
United States Copyright Office