March 26, 2002

Derek D. Wood
Woodcock, Washburn, Krutz, Machiewicz & Norris, LLP
One Liberty Place 46th Fl.
Philadelphia, PA 19103

RE: 2000 SCULPTURE AND SKETCH
Control No. 60-707-7007(W)

Dear Mr. Wood:

The Copyright Office Board of Appeals has reviewed your request for reconsideration of the Office's refusal to register the above referenced works submitted for copyright registration by your client, Robert Indiana. The Appeals Board has reviewed the claims and all correspondence from your office regarding these claims, and it has determined that the works do not embody sufficient originality to support a copyright claim.

Administrative Record

On December 9, 1999, the Copyright Office received applications, deposits, and fees for two works, a three-dimensional sculptural work and a sketch, both entitled "2000." The sketch is a line drawing of the number "2000" in which the two and zero are positioned atop the other two zeros. The only variation in the position of the numbers is that the top zero is slanted toward the right. The sculptural work is a three-dimensional representation of the same design. The outer surface of the sculpture is red and all other surfaces are blue. By letter dated May 10, 2000, Visual Arts Examiner, Helen Livanios, refused registration of both works because they did not contain even a *de minimis* amount of creativity based upon her observation that the works were comprised only of the number "2000."

In a letter dated September 6, 2000, Ms. Mroz, an attorney at your firm, requested a reconsideration of this refusal to register both the sketch and the three-dimensional sculpture. The central argument offered in support of registering each work was the assertion that the works had creative design elements beyond the use of the number "2000," which when considered together exhibited at least the minimal amount of creativity needed to support a copyright registration. Specifically, she cited the use of shape, color and arrangement.

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The Examining Division considered the first appeal and, in a letter dated October 30, 2000 from Attorney Advisor Virginia Giroux, determined that the works did not meet the standard set forth in Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991). In this case, the court held that a work need contain only a modicum of creativity to meet the threshold of originality required to support a copyright claim. Ms. Giroux noted that the only pictorial material in the sketch was the number "2000," which like letters and common geometric shapes lacks the requisite amount of creativity to support the claim. She also evaluated the size, thickness and arrangement of the various number components and found there still to be insufficient creativity to constitute a copyrightable work. She then applied much the same analysis to the sculpture, finding the sculptural elements simple, plain and commonplace, and thus, unable to support a copyright registration.

On February 27, 2001, you sent a second letter asking the Board of Appeals to examine the works and reconsider the refusal to register the claims. The key premise upon which you base your appeal is that each work contains sufficient creativity to warrant copyright protection. You argue that both the sketch and the sculpture possess additional design elements beyond the number "2000," which, when considered together, convey artistic expression. These elements include shape, color, and the arrangement of the numbers themselves.

De Minimis Authorship

The Board agrees that only a "modicum of creativity" is necessary for copyrightable expression, under the Feist standard. However, neither the sketch nor the sculpture contains even the minimum amount of creativity necessary to support a copyright.

While it is clear that Feist requires a work to possess only a modicum of creative authorship to support a copyright claim, it is equally clear that the court observed that some works fail to meet this standard. The Court stated that "as 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 work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Id. at 359.

For this reason, Copyright Office regulations forbid registration of certain works, including words and short phrases, common shapes or designs, or simple arrangements of common elements such as letters, colors, or numbers, that do not embody copyrightable elements. See 37 CFR § 202.1(a). Thus, the depiction of a

standard numeric symbol, like the number "2000," whether represented in a two-dimensional image or as part of a three-dimensional object, is not copyrightable, even with minor linear or spatial variations.

What the Office does require with respect to pictorial, graphic and sculptural works such as the works involved in this appeal, is a "certain minimal amount of original creative authorship for registration in Class VA or any other class. Compendium of Copyright Office Practices, Compendium II, ("Compendium II") § 503.02, (1984). The Compendium recognizes that it is the presence of creative expression and not aesthetic merit that is determinative of copyrightability, id., and that:

> 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. For example, it is not possible to copyright a new version of a textile design merely because the colors of red and blue appearing in the design have been replaced by green and yellow, respectively. 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.

Id.

Nevertheless, you argue that the requisite creativity lies in the use of color, shape and the arrangement of the numbers. We do not agree. In the case of the sculpture, the use of only two colors is an insufficient variation to warrant a registration based on artwork. Moreover, each of the numbers is unadorned and depicted in a standard style. Even the slight variation in the placement of a slanted zero next to the 2 is merely a trivial variation and lacks the creative spark needed to support a copyright claim. This analysis applies with equal force to the depiction of the design in the sketch.

The Board also notes that, for purposes of copyright, creative expression does not include any possible symbolic interpretations attributable to the work or the work's ability to evoke a philosophical concept. Thus, it is not relevant to the Board's consideration of this appeal that the arrangement of the numeric elements may symbolize a particular interpretation of the state of the world in the year 2000 or

represents the adage that time marches on without regard to societal predictions or fears. See 37 C.F.R. § 202.1(b) (ideas as distinguished from the particular manner in which they are expressed are not subject to copyright). To be registrable, the "translation" of an idea must be converted into fixed expression that in itself exhibits a sufficient quantum of creativity.

Similarly, the Board finds the other cases cited in support of your appeal unhelpful to your cause. In each of the three cases, the work under consideration contained more creative authorship than that displayed in the sketch and sculpture of the number "2000." See Weindling Int'l. Corp. v. Kobi Katz, Inc., 56 U.S.P.Q.2d 1763 (S.D.N.Y.) (finding ring design required numerous creative choices to create an original bridge motif design apart from those choices associated with the functional aspects of the work); Thomas Wilson & Co. v. Irving J. Dorfman Co., 433 F.2d 409 (2nd Cir.), *cert. denied*, 401 U.S. 1977 (1970) (finding a pansy design in a lace pattern sufficiently creative to support a copyright because the configuration of the design, including such details as petals and leaves, required an appreciable amount of creative skill and judgment); and Amplex Manuf. Co. v. A.B.C. Plastic Fabricators, Inc., 184 F. Supp. 285 (E.D. Pa. 1960) (finding a distinguishable variation in the arrangement and manner of presentation of illustrations in the form of pen-and-ink drawings, based on use of a dark green background, the particular size of the letters, their spacing, and their arrangement into three rows).

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

Sincerely,

Nanette Petruzzelli

Nanette Petruzzelli
Chief, Examining Division
for the Board of Appeals
U.S. Copyright Office

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