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October 7, 2004

Daniel M Cislo
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Suite 900
233 Wilshire Boulevard
Santa Monica, CA 90401

**Control Number :** 61-209-9348 (C)
**Re:** Nikken Logo

Dear Mr. Cislo:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated December 9, 2003, on behalf of your client, Nikken USA, Inc. ("Nikken"), in which you requested reconsideration of the refusal to register a copyright claim for the Nikken Logo. The Board has carefully examined the application, the deposit, and all the correspondence in this case concerning this application and affirms the denial of the registration of the Nikken Logo as a two-dimensional artwork.

**ADMINISTRATION RECORD**

The work at issue here, the Nikken Logo, consists of three design elements, a square with rounded edges, a circle and a broad band that has been bent to represent the upraised arm of a stylized human figure.



Two of the bands are used to represent the body of a human figure and a circle is used for the head. This arrangement is repeated once to create two such stylized human figures that are identical in all respects except coloration; one is black and the other is white. These figures are situated so that the raised arm portion of the black figure overlaps the raised arm portion of the white figure. Both figures are circumscribed within a square with rounded edges.

**Initial Submission**

On August 22, 2002, the Copyright Office received a Form VA application for registration of the Nikken Logo on behalf of your client, Nikken USA, Inc. In a letter dated January 16, 2003, Visual Arts Section Examiner, Helen Livanios, refused registration of this work because it lacked sufficient authorship to support a copyright claim.

Ms. Livanois explained the fundamental concept that a work of visual art cannot support a copyright claim unless it possesses a minimal amount of pictorial, graphic or sculptural authorship. Moreover, copyright does not protect familiar shapes, or mere variations in size or color. She also noted that copyright does not protect ideas or concepts which may be embodied in a work. (Letter from Livanois to Cislo of 1/16/03).

**First Request for Reconsideration**

On May 15, 2003, the Visual Arts Section in the Copyright Office received a letter from your firm requesting reconsideration of the Office's refusal to register the Nikken Logo. In this letter, you describe the graphic elements of the design and provide a symbolic interpretation of the work, to wit "the artwork could be considered to represent ... the sturdiness and stability of the individuals the figures represent, their teamwork ..., their joy, their diversity and unity of purpose as well as protection in one world (border) and the overall success of their endeavors suggesting uplifting feelings." You then cite Compaq Computer Corp. v. Ergonome, Inc., 137 F. Supp.2d 768 (S.D. Tex. 2001) for the proposition that an original selection and arrangement of elements comprising a work is sufficient to support a copyright claim. You maintain that the Nikken Logo meets this test because the "Nikken Logo elements evince a number of emotions and feelings which are testimony to the work's creativity." You conclude by arguing that the examiner failed to provide an adequate justification for her finding that the work did not possess the requisite modicum of creativity because she did not identify any prior artwork or logo "that was even similar to suggest that [the] client's logo is not original or creative."

In response to your request, Attorney Advisor Virginia Giroux of the Examining Division, reexamined the application and determined that the Nikken Logo lacked any elements, either alone or in combination, that possessed the minimum amount of creativity needed to support a copyright. As Ms. Giroux explained:

> Originality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation of public domain elements. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). In applying this standard, the Copyright Office examines a work to determine whether it contains elements, either alone or in combination, on

> which a copyright can be based. Also, because the Copyright Office does not make aesthetic judgments, the attractiveness of a design, its uniqueness or visual effect, the time and effort it took to create or its commercial success in the marketplace are **not** factors in the examining process. The question is whether there is sufficient original and creative authorship within the meaning of the copyright law and settled case law.

Ms. Giroux then described the Nikken Logo and concluded that the "Y" shaped figures inscribed in a square with rounded corners lacked sufficient creativity to support a copyright registration. She noted that color and the use of geometric shapes are not copyrightable. Based on these findings, she concluded that the logo consisted of a simple combination and arrangement of three elements which together created a simple arrangement that was aesthetically pleasing but not copyrightable. The case law confirms these principles. John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991); and Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988).

Next, she discussed the standards set forth in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) and Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989), for determining whether a work contains sufficient originality to support a copyright and found that the logo did not possess even the slight amount of original authorship required under Feist. Moreover, she ascertained that even viewing the work in its entirety under the premise set forth in Atari, the arrangement of the elements did not rise to the level of creativity needed to sustain a copyright registration. She also explained that any symbolic meaning imputed to the design is the result of the viewer's perception of the elements and not a test for determining whether the composition of the design contains copyrightable authorship. And finally, she pointed out that uniqueness of a design is not determinative of copyrightability.

**Second Request for Reconsideration**

On December 9, 2003, you submitted a second request for reconsideration on behalf of your client, Nikken USA, Inc., maintaining that the Nikken Logo exhibits the modicum of creativity necessary to support a copyright registration. You argue that the logo design meets the standards for originality required to support a copyright registration articulated by the courts in L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976) and Feist. Specifically, you note that under Batlin, "[t]o be 'original,' the work need not be novel, but rather only belong to the author and not be copied from another."

You then argue that the cases cited by the examiner who rejected the claim for registration are not applicable to the work in question, maintaining that the courts in Jon Woods and Homer Laughlin failed to address the question of the copyrightability of the works and only decided that the Register's decision not to register the works was not arbitrary, capricious or an abuse of discretion. However, you do acknowledge that these cases, as did Forstmann, support the premise that some degree of creativity is needed to support a copyright registration. But, you distinguish the Nikken Logo from the works in the above cited cases on the basis that the Nikken Logo "is not the label for a useful article and because it, unlike the design in Forstmann, does not 'lack [] all creative originality.'" Moreover, you assert that the logo is "more than the 'formatting type authorship' and 'familiar presentation,' that were the basis of, respectively, the court's decision in the Jon Wood and Homer Laughlin cases."

In essence, your overall argument is that the arrangement of the elements comprising the Nikken Logo, although a stylized depiction, "creates a 'distinguishable variation' of those design elements" which, when viewed as a whole, contain the requisite modicum of creativity. You stress that an original arrangement of public domain elements is copyrightable, citing Couleur Int'l, Ltd. v. Opulent Fabrics, Inc. et al., 330 F. Supp. 152 (S.D.N.Y. 1971), Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc., 184 F. Supp. 285 (E.D. Pa. 1960) and Reader's Digest Ass'n, Inc. v. Conservative Digest Ass'n, Inc., 821 F.d 800 (D.C. Cir. 1987) in support of this proposition. You also dispute the Attorney Advisor's contention that a work must contain a certain degree of complexity in order to be copyrightable and challenge her use of this concept as the appropriate standard for determining whether a work contains sufficient originality to warrant registration.

**DISCUSSION**

In determining whether a work has a sufficient amount of original artistic authorship to sustain a copyright claim, the Board adheres to the standard set forth in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991), where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. However, the Court also ruled that some works (such as the work at issue in Feist) fail to meet the standard. The Court observed that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," 499 U.S. 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.

In your second request for reconsideration, you acknowledge the standard in Feist, but also rely on the standard articulated in Batlin for what could arguably be a standard which sets a lower threshold based upon the court's statement that a work need only belong to the author and not be copied from another. But the court in Batlin had more to say on the criteria needed to support a finding of originality in a derivative work and acknowledged that the author must

contribute more than a "merely trivial" variation to meet the test–a concept fully developed in Feist and employed by the Office.

The Board also applies the principles of the Compendium of Copyright Office Practices, Compendium II (1984) ("Compendium II") that are relevant to the particular work being examined. Compendium II states "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." Compendium II, § 202.02(a)(1984). With respect to pictorial, graphic, and sculptural works, the class within which the design falls, *see* 17 U.S.C. § 102(a)(5), 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 emphasizes that it is not the aesthetic merit or commercial appeal of a work, but the presence of creative expression that determines the copyrightability of a work, and that

> registration cannot be based upon the simplicity of standard ornamentation . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . 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.

*Id. See also* 37 C.F.R. § 202.1 ("familiar symbols or designs; mere variations of . . .coloring" are "not subject to copyright and applications for registration of such works cannot be entertained.").

Of course, as you note, some combinations of common or standard forms contain sufficient creativity to support a copyright, but there must be some distinguishable element in the selection or arrangement of the public domain elements or in a modification of a constitutive element itself that reflects choice or authorial discretion that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." For example, in Arica Inst., Inc. v. Palmer, 970 F.2d 1067 (2d Cir. 1992), the court found that the attachment of labels to the various points of a nine-pointed star an original and creative way to express the relationship between the different personality types represented by each star point. *See also* Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc., 184 F. Supp. 285 (E.D. Pa. 1960) (finding a distinguishable arrangement and presentation of a pen-and-ink drawing of Egyptian lettering sufficiently original to support a copyright). You also cite Couleur Int'l Ltd. v. Opulent Fabrics, Inc., 330 F. Supp. 152 (S.D.N.Y. 1971) in which the court noted that "a copyright holder's original expression of ideas in the public domain is protected" in support of this premise, and we agree.

But where the arrangement of a few common elements fails to exhibit a *de minimis* amount of creativity, it falls within the "narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Feist, 499 U.S. at 357, 111 S.Ct. at 1294. *See also,* Magic Marketing, Inc. v. Mailing Servs. of Pittsburgh, Inc., 634 F. Supp. 769 (W.D. Pa. 1986) (holding that envelopes with black lines and words "gift check" or "priority message" did not contain the minimal degree of creativity necessary for copyright protection); John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (upholding Register's refusal to register a simple logo consisting of four angled lines which form an arrow and the word "Arrows" in cursive script below the arrow); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) (upholding Register's decision that fabric design consisting of striped cloth over which is superimposed a grid of 3/16" squares, even though "distinctly arranged or printed," did not contain a minimal amount of original artistic material to merit copyright protection); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) (upholding Register's determination that there was insufficient creative authorship in "Gothic" chinaware design); and Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (finding that reproduction of standard fleur-de-lis lacked original authorship needed to support a copyright claim).

Nevertheless, you maintain that case law which merely upholds the Office's decision not to register a work are inapposite because they do not consider the question of copyrightability directly. On this point, we disagree.

It is the responsibility of the Copyright Office to examine a work in the first instance and determine whether it is copyrightable. "The question of whether a particular work reflects a sufficient quantum of creativity ... is entrusted in the first instance [to the Register of Copyrights.] Such a decision necessarily requires the exercise of informed discretion, and the Register, in part due to having to make such determinations on a daily basis, is generally recognized to possess considerable expertise over such matters ... . For this reason courts accord deference to the Register's decisions to refuse or accede to copyright registration ... ." Atari Games Corp. v. Oman, 693 F. Supp. 1204 (D.D.C. 1988). Moreover, if "the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter ..., the Register *shall refuse registration* and shall notify the applicant in writing of the reasons for such refusal." 17 U.S.C. § 410(b). (emphasis added). Thus, the fact the courts upheld the Register's decision not to register the works discussed in Jon Woods and Homer Laughlin must be viewed as an affirmation that the Register's decision was not incorrect as a matter of law. Moreover, the purpose of citing these cases is to provide legal precedent for the principle that simple arrangements of common shapes and symbols do not exhibit the "distinguishable variation" needed to sustain a copyright registration and as examples of the types of works that fail to meet this standard.

You also object to the Attorney Advisor's statement characterizing the work in Compaq Computer Corp. v. Ergonome, Inc., 137 F. Supp. 2d 768 (S.D. Tex. 2001) because she stated that the case "describe[d] a work of 'greater complexity' and extent of authorship than the design in the present work." (Letter from Giroux to Cislo of August 14, 2003, at 3). It is

evidently your belief that use of the word "complexity" in this statement was meant to articulate a standard for determining whether a work is copyrightable, but that is not the case. Ms. Giroux clearly stated that the Office accepts the Feist standard for determining the copyrightability of a work, *id.* at 2, and, concluded that "the figures embodied in this work coupled with their black and white coloring, as well as their arrangement, do not meet even the low threshold for copyrightable authorship set forth in the Feist case." *Id.* Her reference to the complexity of the work in Compaq was perhaps an unfortunate word choice, but it does not represent a change in the standard.

The Board also notes that with respect to pictorial, graphic and sculptural works, it is not aesthetic merit or symbolic representation, but the presence of creative expression that is determinative of copyrightability. Thus, it is not relevant to the Board's consideration of this appeal that the arrangement of the stylized human figures may symbolize a particular interpretation of their interaction. *See also* 37 C.F.R. § 202.1(b) ("ideas . . . as distinguished from the particular manner in which they are expressed [are] not subject to copyright").

**THE DECISION**

In light of the legal principles discussed above, the Board has again considered the applicant's copyright registration claim and it has determined that the logo falls within the category of works which fail to exhibit even a modicum of creativity.

As an initial issue, it should be noted that the figure is virtually identical to the universal symbol for man,[1] *see insert below,* except that the arms in the Nikken figure are raised and the body has been longitudinally transected for a more stylized effect.



a. Universal symbol for man



b. Nikken logo

Nevertheless, the slight alterations are de minimis. Consequently, we have determined that the stylized human figure in the logo by itself lacks sufficient originality for a copyright as does the simple square with rounded edges. Thus, the only question is whether the combination and arrangement of the design elements exhibit the modicum of creativity necessary to support a copyright registration.

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[1] This icon is available from http://classroomclipart.com/cgi-bin/kids/imageFolio.cgi?direct=Clipart/Signs.

In assessing the copyrightability of a work which is a compilation of individually uncopyrightable elements, the Office holds as it guideline Feist but also looks to other cases, both pre- and post-Feist, which give guidance on the issue. *See, e.g.*, Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989) (a case in which, although the Office had initially refused to register the video game at issue, registration, upon Office reconsideration, was made in recognition of the overall audiovisual authorship composed of several individual elements which, taken together, were sufficient) and Florabelle Flowers, Inc. v. Joseph Markovits, Inc., 296 F.Supp. 304, 307 (S.D.N.Y. 1968) (An "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright).

In the case before us, however, the Board finds that the arrangement of the design elements does not result in a fixed expression which supports a copyright. The logo is comprised of three basic elements. The two stylized human figures are identical, except for the color, and are centered within the square. This arrangement, including the fact that the figures' arms overlap, is just too modest to qualify for copyright protection. A compilation of elements is registrable if, as explained in Compendium II:

> its selection, coordination, or arrangement as a whole constitutes an original work of authorship. The greater the amount of material from which to select, coordinate, or order, the more likely it is that the compilation will be registrable. Where the compilation lacks a certain minimum amount of original authorship, registration will be refused.

Compendium II, § 307.01.

We also cite a more recent case concerning the composition of a three-dimensional sculpture. In Satava v. Lowry, the Ninth Circuit held unprotectible an artist's lifelike glass-in-glass sculptures of jellyfish. 323 F.3d 805 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 472 (2003). In reversing the judgment of the district court, the appellate court acknowledged that a combination of unprotectible elements may qualify for copyright protection, 323 F.3d at 811, and, citing among other cases Feist, 499 U.S. at 358, for the teaching that the "principal focus should be on whether the selection, coordination and arrangement are sufficiently original to merit protection," opined that "a combination of unprotectible elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Id.* In the Board's analysis, and consistent with Feist, the combination of relatively few elements— a square and a minor variation of a common symbol for man does — not rise to the level of copyrightable authorship required by Feist. Such a combination essentially brings together a few elements in an overall two-dimensional design which is, if not categorically commonplace, trivial and scant in its overall configuration.

Similarly, the Appeals Board finds the few cases cited in support of your position unhelpful to a resolution of this appeal. In each case, the work at issue appears to have contained more creative authorship than that displayed in the Nikken Logo. *See, e.g.,* Readers Digest Ass'n, Inc. v. Conservative Digest Ass'n, Inc., 821 F.2d 800 (D.C. Cir. 1987) (a pre-Feist case in which the court, interpreting the originality requirement as meaning only that "the work is independently created, rather than copied from other works," found that the "distinctive arrangement and layout of" individually unprotectible elements was "entitled to protection as a graphic work ... a unique graphic design and layout") and Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc., 184 F. Supp. 285 (E.D. Pa. 1960) (finding a distinguishable arrangement and presentation of a pen-and-ink drawing of Egyptian lettering sufficiently original to support a copyright).

**CONCLUSION**

For the reasons stated above, the Copyright Office Board of Appeals concludes that the Nikken Logo cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

/s/

Marilyn J. Kretsinger
Associate General Counsel