United States Copyright Office
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May 17, 2010

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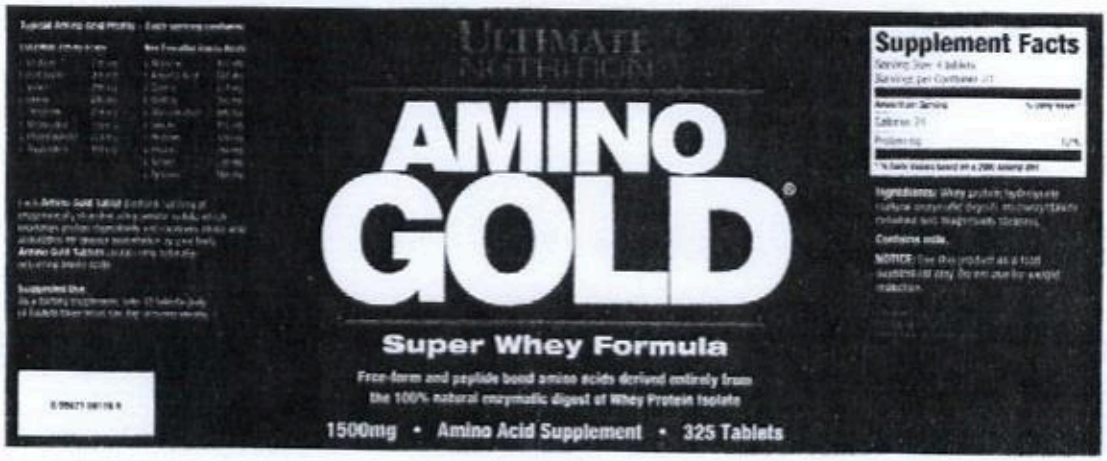
Re: AMINO 2002 Label and AMINO GOLD Label
Correspondence ID: 1-1BKVHH

Dear Mr. Knull,

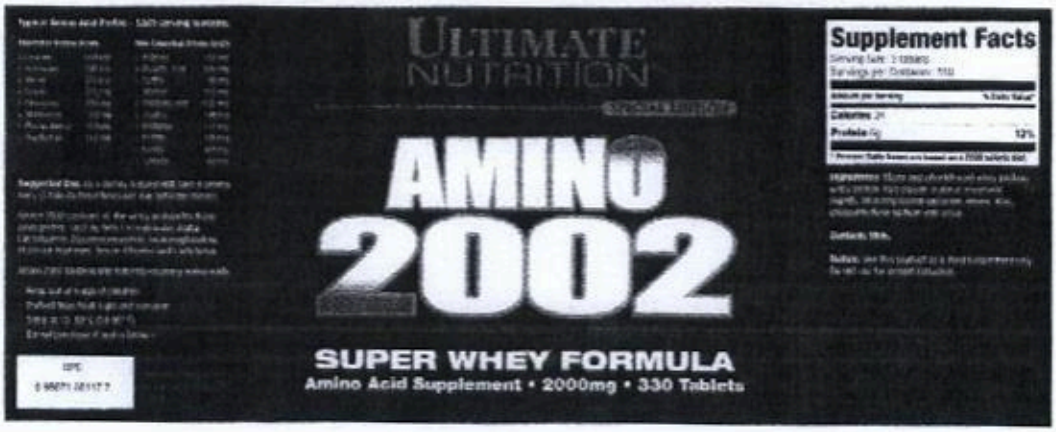
I am writing on behalf of the Copyright Office Review Board (the "Board") in response to your letter dated January 23, 2009, requesting reconsideration of the Copyright Office's refusal to register two works on behalf of your client, Universal Nutrition, Inc. The Board has carefully examined the applications, the deposits, and all correspondence in this case and affirms the denial of registration for the AMINO 2002 and AMINO GOLD Labels.

I. DESCRIPTION OF THE WORKS

The **AMINO GOLD Label** is a two-dimensional product label for a nutritional supplement. The background is graduated from black at the top to dark blue at the bottom. In the center third of the label, at the top, is the Ultimate Nutrition logo in gold type, and underlined in gold. Below that is the word "amino" in large white capital letters and below that is the word "GOLD" in even larger white capital letters. At the bottom, also in white lettering, is a description of the supplement, the milligrams per tablet, and the number of tablets. The left and right thirds of the label contain text in small type regarding facts such as nutritional information, ingredients, serving sizes, and the distributor of the product.



The **AMINO 2002 Label** is laid out in the same fashion as AMINO GOLD, with the focal point being the center third. The background is solid black. The Ultimate Nutrition logo, this time in gray type, is at the top. Underneath it is a grey line that widens into a bubble reading "Special Edition" at its right end. The words "AMINO 2002" appear in the center of the label in large white type, outlined in grey, with "2002" underneath and slightly larger than "AMINO." The "O" in "AMINO" is colored red at the top, shading to white. Similarly, the "2" in "2002" is colored red at the bottom, shading to white.



II. ADMINISTRATIVE RECORD

A. Initial Submissions and Refusal to Register

On July 22, 2008, using the Copyright Office's electronic registration system, Sarah Kickham of your firm applied for copyright registration for the AMINO GOLD and AMINO 2002 labels. The listed author was Ultimate Nutrition, Inc., and the labels were described as "2-D artwork, text."

The next day, a copyright examiner sent a letter to your firm refusing registration of the labels. The examiner set forth the copyrightability standards of originality and creativity as explained in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) and in the copyright statute (Title 17) and regulations (Chapter 37). The examiner also explained that aesthetic and commercial value are not aspects of copyrightability, and neither is the time and effort expended in creation of the work. Examiner Letter at 1.

B. First Request for Reconsideration and Copyright Office Response

First Request for Reconsideration

In a letter dated August 5, 2008, you and Ms. Kickham submitted a first request for reconsideration of the Copyright Office's refusal to register the AMINO GOLD and AMINO 2002 labels. You stated that the labels are Ultimate Nutrition's' original design, and sought to bolster this point by noting that the AMINO GOLD and AMINO 2002 labels are easily distinguished from other Ultimate Nutrition labels (of which you provided color copies). First Request Letter at 1. You argued that "the placement of the text on the label, the style of the text, and the colors used" satisfy the *Feist* standard for minimum creativity. *Id.*

The creativity exhibited by the labels is further evidenced, you maintained, by the fact that Ultimate Nutrition could have chosen any number of ways to convey the product names and nutritional facts, but carefully chose the designs submitted. *Id.* Specifically, you claimed that originality in the AMINO 2002 Label inheres in the "colors, layout, and styles used, right down to the placement of red within the O of AMINO and the 2 of 2002." *Id.* Originality in the AMINO GOLD Label, you claim, is exhibited by its "fading blue background and color scheme." *Id.*

Your First Request Letter closes with the claim that Ultimate Nutrition's labels are so distinctive that companies throughout the world seek to copy them and thus benefit from Ultimate Nutrition's reputation. *Id.* Ultimate Nutrition seeks to register the copyright in the labels in order to "garner stronger international protection for its intellectual property." *Id.*

Copyright Office Response

In a letter dated October 27, 2008, Ms. Virginia Giroux-Rollow, attorney-advisor in the Copyright Office's Registration and Recordation Program, supported the initial refusal of registration for the AMINO GOLD and AMINO 2002 labels, stating that "they do not contain any artistic, graphic, or even textual authorship." Giroux-Rollow Letter at 1. Ms. Giroux-Rollow pointed out that, while product labels are certainly eligible for copyright registration, they must have at least a *de minimis* level of original and creative content, a proposition for which she cited to *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541 (2d Cir. 1959) as well as to *Feist*. *Id.* at 1. She also cited to Copyright Office regulations stating that "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents" are not subject to copyright protection. 37 CFR § 202.1(a).

Regarding works that consist of the variation or arrangement of public domain, pre-existing, or non-copyrightable elements, Ms. Giroux-Rollow stated, citing *Alfred Bell & Co.*

v. Catalda Fine Arts, Inc., 191 F. 2d 99 (2d Cir. 1951), that such assemblages can receive copyright protection only if they are of non-trivial originality and creativity. *Id.* at 1.

Ms. Giroux-Rollow concluded her overview of the relevant copyrightability standards by stating that the attractiveness, visual effect, recognizability, or commercial success of a work is irrelevant in determining whether a work may be registered. Similarly, the Copyright Office does not take into account the time, effort, or expense it took to create the work. *Id.* at 1-2.

In analyzing the AMINO GOLD and AMINO 2002 labels, Ms. Giroux-Rollow began by stating that there is no textual authorship: the nutritional information and list of ingredients are not copyrightable, and section 202.1 of the Copyright Regulations places "names, titles, and slogans" outside of copyright protection. Furthermore, she contends that the stylization of the lettering of "AMINO GOLD" and "AMINO 2002," even when combined with color variations, is not sufficiently creative to constitute a copyrightable work of art. Ms. Giroux-Rollow bolstered this conclusion by citing to section 503.02(a) of *Compendium of Copyright Office Practices* (*"Compendium II"*), which explains that the simple arrangement of non-copyrightable elements such as names and colors, without sufficient creative expression, is *de minimis* and not worthy of registration.

In support of the general soundness and applicability of the *Compendium II* registration principles, Ms. Giroux-Rollow cited a number of cases: *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) (upholding a refusal to register a logo design consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below); *Magic Marketing, Inc. v. Mailing Service of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986) (holding that black lines and the words "gift check" and "priority message" on an envelope fall short of copyrightable authorship); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (finding that a label with the words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lis is not copyrightable); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) (upholding a refusal to register chinaware "gothic" design pattern composed of simple variations and combinations of geometric designs); and *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) (upholding a refusal to register a fabric design consisting of a striped cloth with small grid squares superimposed on the stripes). *Id.* at 2.

Ms. Giroux-Rollow next addressed your claims that the **placement** of the text on the labels and the overall **layout** of the labels exhibit more than *de minimis* creativity and originality so as to warrant registration. Format and layout, she explained, are generally outside of copyrightable subject matter (*Compendium II*, 305.6), and "the arrangement, spacing, or juxtaposition of text matter" are non-copyrightable when involved in book design (*Compendium II*, 305.7). *Id.* at 3. By analogy, Ms. Giroux-Rollow argued, the

arrangements of text on the AMINO GOLD and AMINO 2002 labels are likewise non-copyrightable. *Id.*

The fact that the design of the labels required deciding among various options such as size, color, and text placement, does not, Ms. Giroux-Rollow stated, affect the copyrightability calculus. "All designs involve choices," she wrote, "it is not the possibility of choices that determines copyrightability, but rather whether the particular resulting expression or product contains copyrightable authorship." *Id.*

Finally, Ms. Giroux-Rollow noted that, while the Copyright Office has no jurisdiction in such matters, protection of the AMINO GOLD and AMINO 2002 labels might be found through unfair competition or trademark rules. *Id.* at 4.

C. Second Request for Reconsideration

On January 23, 2009, you submitted a Second Request for Reconsideration on behalf of Ultimate Nutrition, Inc. To begin, you noted that the applications for the AMINO GOLD and AMINO 2002 labels were filed "on an expedited basis as a result of copyright of them by unauthorized third parties." Second Request Letter at 1.

Your argument commenced with discussions of two infringement cases concerning product labels: *Kitchens of Sara Lee*, as cited by Ms. Giroux-Rollow, and *Yankee Candle Co. v. Bridgewater Candle Co.*, 99 F. Supp. 2d 140 (D. Mass. 2000). You argued that the usefulness of these cases lies primarily in their "underlying facts" and that their holdings should not be applied "to all labels at all times in all circumstances." *Id.* at 2. Specifically, you contended that "the copyrightability of simple labels" was upheld in *Sara Lee*, and that the decision in fact turned on the non-copyrightability of ideas as opposed to expressions. *Id.* at 1. You similarly characterized the holding in *Yankee Candle* as one upholding copyright protection for the plaintiff's labels but also finding that what copying occurred was of non-copyrightable ideas. *Id.* at 2.

You then described in detail the AMINO GOLD and AMINO 2002 labels, claiming that "these works involved creative decisions concerning colors and the selection and size of the type, as well as the additional graphic elements (lines and the arrangement of blocks of text and boxes.)." These creative decisions, you emphasized, were made out of a multitude of options. *Id.* at 2.

You next maintained that the AMINO GOLD and AMINO 2002 labels exceed the creativity displayed by certain cases cited by Ms. Giroux-Rollow, specifically *Magic Marketing* and *John Muller & Co.*

You concluded by asserting that the Ultimate Nutrition labels "rise above" the "constitutional baseline" established by *Feist* – "a collection of facts that are selected,

coordinated, and arranged in a way that utterly lacks originality." *Feist*, 499 U.S. at 363-64. *Id.* at 3.

III. DECISION

After carefully reviewing the AMINO GOLD and AMINO 2002 labels, along with your letters, the Review Board upholds the initial decision to refuse registration for the labels. Neither label possesses more than a *de minimis* quantum of creativity, and certain aspects of both labels lack the requisite originality as well. Below, the Board addresses the arguments in your Second Request Letter in the order they are presented.

You begin your Second Request Letter with a note that the AMINO GOLD and AMINO 2002 registration applications were filed on an expedited basis because of unauthorized duplication of them by third parties. You fail, however, to explain what relevance this information has to the question of copyrightability. If, as the Board finds likely, it was intended to bolster the claim made in the First Request Letter that international, unauthorized copying of the labels is evidence of their distinctiveness, and thus of their copyrightability, then it is unavailing. As correctly explained by Ms. Giroux-Rollow, the fact of a work's aesthetic or commercial value is not a basis for copyright protection. *See Compendium II*, § 503.02(a) ("Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value").

The registration applications for the AMINO GOLD and AMINO 2002 labels state that the works consist of two-dimensional artwork and text. While the bulk of your arguments for registration address the labels as pictorial works, the claim of copyright in the text on the application requires some attention as well. Briefly, the Review Board finds that the textual aspects of the labels fail to exhibit any protectible creativity. Specifically, the names "Ultimate Nutrition," "AMINO GOLD" and "AMINO 2002" are uncopyrightable under 37 CFR § 202.1(a) (stating that names are not subject to copyright). The listings of ingredients and contents on the labels are similarly uncopyrightable. *Id.* The Board includes as "listing of contents" not just the small-type text on the left and right thirds of the labels, but the center-third text "Super Whey Formula/Free-form and peptide bond amino acids derived entirely from the 100% natural enzymatic digest of Whey Protein Isolate/1500mg – Amino Acid Supplement – 325 Tablets" (AMINO GOLD) and "SUPER WHEY FORMULA/Amino Acid Supplement – 2000mg – 330 Tablets" (AMINO 2002).

The remainder of the text on the labels consists of uncopyrightable instructions or statements of fact. *See, e.g., Kitchens of Sara Lee*, 266 F.2d at 545. To the extent that the content and/or placement of this text was mandated by federal law (*see* Food and Drug Administration regulations for designation of ingredients (21 CFR § 101.4) and nutrition labeling of dietary supplements (21 CFR § 101.36), its selection was not chosen by Ultimate

Nutrition and thus it may not be "original" in the copyright law sense of originating with the author. *See, e.g., Feist*, 499 U.S. at 363 (suggesting that because Rural's selection of subscribers' names and phone numbers was dictated by state law and not by Rural itself, it was not "original"). But even assuming their originality, the preexisting ingredients, nutritional facts, and instructions for use are certainly not selected or arranged with any measure of creativity. Like the telephone listings at issue in *Feist*, these textual aspects of the labels are useful, but not creative. 499 U.S. at 363.

You urge the Board to look to the "underlying facts" of *Kitchens of Sara Lee* and *Yankee Candle*, apparently out of concern that we might apply their holdings too rigidly and in doing so fail to discern the creativity in the AMINO GOLD and AMINO 2002 labels. Second Request Letter at 1-2. The Board is cognizant that the facts of a case may restrict the application of its holding. This is not the case with *Kitchens of Sara Lee* and *Yankee Candle*, however, both of which directly confront the question of when graphic elements of a mass-market consumable product may be protected by copyright. The *Kitchens of Sara Lee* court, contrary to your assertion, did *not* uphold the copyrightability of the Sara Lee labels as a whole, but only of the pictures of cakes. *See id.* at 545. Moreover, it found that the non-pictorial aspects of the Sara Lee labels were, both individually and in combination, non-copyrightable, and stated that a copyrightable label must contain sufficient "original text and pictorial matter or both," *Id.* at 544 – a statement of general applicability that the Board finds useful in the present reconsideration matter.

Regarding *Yankee Candle*, while your analysis of the court's holding is correct, the Board fails to understand how it helps your argument. The Yankee Candle court, while it found the photographs used on the plaintiff's labels to be copyrightable, did not discern copyrightability in the "crude, physical elements" of the labels: "gold-bordered name plate, full-bleed photos." The Board sees much more similarity between the AMINO GOLD and AMINO 2002 labels and these formatting elements than between the labels and the photographs.

Ultimately, the graphic elements of the AMINO GOLD and AMINO 2002 labels simply do not provide more than a *de minimis* amount of creativity. The lettering choices for the company name and brand names – including the red coloring on "AMINO 2002" – do not exhibit enough variation on standard typefaces, and thus fall under the non-copyrightable category of "mere variations of typographic ornamentation, lettering, or coloring." 37 CFR § 202.1(a). The selection of a black-to-dark blue background for the AMINO GOLD label is similarly a mere variation, if that, of coloring; whereas a black background for the AMINO 2002 label is simply not original. Moreover, the format and layout of the labels – *e.g.*, "the arrangement of blocks of text and boxes" – is not a copyrightable expression. *See Compendium II*, §§ 305.06 and 305.07.

Whether or not the AMINO GOLD and AMINO 2002 labels are by degrees more creative than the envelope in *Magic Marketing* or the soccer team logo in *John Muller &*

Co. is beside the point (although the Board has its doubts). Contrary to your assertions, these cases, and the others cited by Ms. Giroux-Rollow in the same discussion, were not cited for the proposition that the works they discuss are of a comparable or higher level of creativity than the Ultimate Nutrition labels. Second Request Letter at 2-3. They merely illustrate the application of the *Compendium II* creativity principles to works that consist solely or primarily of the combination of uncopyrightable textual, color, and design elements.

Beyond noting the specific aspects of the AMINO GOLD and AMINO 2002 labels that render them unsuitable for copyright protection, the Board would also like to correct two misunderstandings regarding copyrightability in general in your Second Request Letter.

First, the fact that there are "a multitude of ways" in which the elements of a work can be expressed is not a factor in determining copyrightability. Second Request Letter at 2. On one view, the creative process can be seen as consisting entirely of a series of choices among available options – this word instead of that one, this color instead of that one. But no matter how many choices are made, if the final work does not display the minimum amount of creativity, it does not warrant copyright protection. As the U.S. Court of Appeals for the Ninth Circuit has held, "a combination of unprotectable 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." *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

Second, and in conclusion, the Board takes issue with your reading of *Feist*. You cite the *Feist* court's statement that "as a statutory matter, 17 USC § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality." Second Request Letter at 3, quoting *Feist*, 499 U.S. at 363-64. You then conclude that this establishes a "constitutional baseline." Second Request Letter at 3. The Board, however, considers the constitutional baseline as having been set earlier in the same paragraph, with the holding 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. The court's use of the phrase "utterly lacking originality" appears in a reference to Title 17's definition of "compilation," and is not announced as a constitutional standard. Furthermore, the context of the relevant paragraph indicates that the court interpolated "utterly lacking originality" into its paraphrase of the statutory definition of "compilation" as a direct reference to the Rural white pages directory, and not as a more generally applicable standard. Indeed, the next two sentences of the paragraph hold up Rural's directory as an exemplar of an uncopyrightable work.

The Board concludes that the AMINO and AMINO 2002 labels lack the requisite modicum of creativity to rise above the *de minimis* level, and thus fail to merit copyright protection.

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the AMINO and AMINO 2002 labels as 2-dimensional artwork and text. This decision constitutes final agency action in this matter.

Sincerely,

/s/

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