United States Copyright Office
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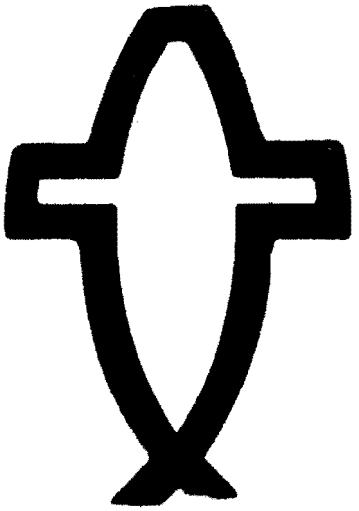
Re: STABILIZED CROSSFISH
Correspondence ID: 1-2DDC8L

Dear Mr. Fischer:

I am writing on behalf of the Copyright Office Review Board (the "Board") in response to your letter dated August 13, 2009, requesting reconsideration of the Copyright Office's refusal to register a work of sculpture and jewelry design on behalf of your client, O-I-C it Studios. The Board has carefully examined the applications, the deposits, and all correspondence in this case and affirms the refusal of registration. The work in question does not contain the quantum of creativity necessary for copyrightability.

I. DESCRIPTION OF THE WORK

The **Stabilized CrossFish** is described on the application as a 3-Dimensional sculpture/Jewelry design. It is a one-inch high sculpture that combines, in a single piece of material, the Christian cross and the Greek fish (or Ichthys), so that the same sculptural line describes both objects simultaneously, with the outline of the fish viewable 90 degrees from the outline of the cross, on the horizontal axis.



II. ADMINISTRATIVE RECORD

A. Initial Submissions and Refusal to Register

On March 14, 2008, the Copyright Office ("Office") received a Form VA from claimant O-I-C it Studios, LLC, seeking to register Stabilized CrossFish ("CrossFish") as a 3-Dimensional sculpture and as a Jewelry design.

On December 16, 2008, Ms. Beth Garner, a Registration Specialist in the Visual Arts and Recordation Division sent a letter to you stating that the Office could not register the CrossFish because it "lacks the authorship necessary to support a copyright claim." Examiner letter at 1. Ms. Garner found that CrossFish failed to meet the minimum standard of creativity for copyright registration. Under section 202.1 of the copyright regulations, Ms. Garner pointed out, copyright protection does not extend to familiar symbols or designs, or basic geometric shapes. Moreover, under section 102(b) of the Copyright Act, copyright does not extend to any idea, concept, system, or process that may be embodied in a work. The final reason Ms. Garner cited for refusing registration is that aesthetic appeal, commercial value, and amount of time and effort are not elements of copyrightability. *Id.*

B. First Request for Reconsideration and Copyright Office Response

First Request for Reconsideration

On March 12, 2009, the Office received a letter from you requesting reconsideration of the refusal to register CrossFish. You argued that CrossFish's creativity exceeded a mere combination of familiar symbols, and that registration was not sought on the basis of CrossFish's embodiment of an idea, concept, system, or process. First Request Letter at 1-2.

You acknowledged that the Christian cross and the Greek fish are familiar symbols, but maintained that their "combination and juxtaposition . . . into a uniquely curved expansion resulting the three-dimensional sculpture or jewelry article" is an original and creative expression under the standard set by *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Id.* at 1. Such a combination, you note should be evaluated as such and not as separate elements. *Id.* at 2, citing *Atari Games v. Oman*, 888 F.2d 878 (D.C. Cir. 1989). You also stated that the cross and fish symbols are only visible from certain viewing planes, and that other viewing angles reveal "hybrid designs [that] are unique and entirely original to the applicant." *Id.* at 1-2.

You claimed that the Office's reliance on the rule barring copyright protection for ideas, concepts, systems, or processes that may be embodied in a work is misplaced. You further maintained that "under the merger doctrine of the idea-expression [dichotomy], it is only when the idea and its expression appear to be indistinguishable and inseparable that the courts will withhold protection." *Id.* at 2, citing *Herbert Rosenthal Jewelry Corp. v. Kalpakian,* 446 F.2d 738 (9th Cir. 1971). Using this formulation of the "merger" doctrine,

you argued that the idea of combining the Christian cross and Greek fish in a 3-dimensional sculpture/jewelry design "can result in unlimited forms of expressions," and CrossFish is one of those expressions, separate from the idea. *Id.* at 2.

In addition, you asserted that the idea-expression dichotomy is "generally not a basis for denying copyright registration." You cite to Professor Nimmer's claim that the dichotomy "constitutes not so much a limitation on the copyrightability of works, as it is a measure of the degree of similarity that must exist between a copyrightable work and an unauthorized copy, in order to constitute the latter an infringement." *Id.* at 2, citing NIMMER ON COPYRIGHT § 2.03[D]. Thus, you concluded, CrossFish's original and creative expression merit its registration even if this expression "merges" with its animating idea. *Id.*

Finally, you challenged the Office's implication that non-copyright factors such as aesthetic and commercial appeal have been claimed as bases for copyright protection in CrossFish. You acknowledged the irrelevance of these factors and maintained that the claimant seeks registration solely based on creative authorship. *Id.*

Copyright Office Response

On May 29, 2009, Virginia Giroux-Rollow, an Attorney-Advisor for the Office's Registration and Recordation Program, wrote to you affirming the denial of copyright registration for CrossFish. Ms. Giroux-Rollow explained that copyright protection does not attach to any public domain or pre-existing shapes when they comprise a significant part of a work. Because the CrossFish is such a work, she continued, copyright protection is limited to "the other original copyrightable elements and/or in the overall copyrightable design." These elements of CrossFish, Ms. Giroux-Rollow concluded, do not contain sufficient authorship in and of themselves – and the combination and arrangement of the work as a whole is not creative enough – to make CrossFish copyrightable. Giroux-Rollow Letter at 3.

In reaching this conclusion Ms. Giroux-Rollow relied upon the three reasons cited by Ms. Garner in the initial refusal: lack of protection for familiar symbols; the idea-expression dichotomy, and the irrelevance of aesthetic appeal, commercial value, and time and effort to copyrightable authorship.

Ms. Giroux-Rollow acknowledged that CrossFish is an original work in that it originated with the author. However, she found that it did not possess "more than a *de minimis* quantum of creativity," *Feist*, 499 U.S. at 363, or "more than a trivial variation" on pre-existing elements, *Alfred Bell v. Catalda Fine Arts, Inc.*, 191 F. 2d 99, 103 (2d Cir. 1951). *Id.* at 1. Viewed in its entirety, CrossFish does not combine and arrange the cross and the fish symbols with sufficient creativity to support a registration, Ms. Giroux-Rollow stated. *Id.* at 2. In addition, she argued that those elements of CrossFish independent from the arrangement of the cross and fish fall within the narrow area "where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Id.*, quoting NIMMER ON COPYRIGHT § 23.01(b).

Apart from her analysis of the registrability of CrossFish, Ms. Giroux-Rollow notes that the Office does not judge art, and the question of copyrightability is quite separate from that of artistic merit. *Id.* at 3.

C. Second Request for Reconsideration

On August 31, 2009, you filed a second request for reconsideration regarding the registration of CrossFish. You argued that CrossFish merely creates the "illusion" of a cross and a fish, and thus it is improper to consider it the combination of those two symbols. Instead, you maintained, CrossFish is an abstract sculpture containing more than the requisite quantum of creative expression.

You asserted that the basis of copyrightability in CrossFish is not an idea, process, or technique. In addition, you requested that the Office consider the "elements expressed" in CrossFish, and not the "visual effect" or "illusion" it creates of a cross and a fish. Second Request Letter at 1-2. You submitted a detailed description of CrossFish in structural terms "for the purpose of clearly distinguishing it from the proposition that it is a combination of the known images of a cross and a fish." *Id.* at 2. Indeed, you argued that the cross and the fish are merely two of the shapes perceivable in the sculpture. "From the other 356 degrees of view and from any angle in any non-horizontal plane of view," you stated, "the sculptural expression provides otherwise unique and primarily unrecognizable creative expressions of the artist." *Id.* You concluded that it is the three-dimensional sculpture itself, as a tangible object, and not the two-dimensional impressions it creates, or the presumed intent of the author, that is the proper basis for determining copyrightability. *Id.* at 3.

Regarding the proper basis for determining copyrightability – the *Feist* rule of possessing more than a *de minimis* quantum of creativity – you argue that CrossFish meets this standard. First of all, you claim that "there is no known work of art that is remotely similar to the actual structure itself." *Id.* Second, you compare CrossFish to three works refused registration by the Office – a graphic design of a stylized white "S" on a black background, a sculpture of the number 2000, and a jewelry design consisting of two circular bands with square stones attached at certain intervals – and state that its creativity rises above theirs. *Id.* citing Source of Knowledge, Copyright Office Board of Appeals Denial of Registration, Control No. 61-307-9211(S) (2005); 2000 Sculpture and Sketch, Copyright Office Board of Appeals Denial of Registration, Control No. 60-707-7007(W) (2002); Single Stone Mesh Summit Collection, Copyright Office Board of Appeals Denial of Registration, Control No. 60-414-6577(S) (1997). The necessary creative spark, you argue, is nontrivial, especially compared to the three earlier works, and thus rises to the level of copyrightability. *Id.*

III. DECISION

After carefully reviewing the CrossFish 3-Dimensional sculpture and jewelry design, along with your letters, the Review Board upholds the initial decision to refuse registration. CrossFish does not possess more than a *de minimis* quantum of creativity.

You acknowledge that both the Christian cross and Greek fish symbols are in the public domain. You claim, however, that their presence in CrossFish is but an "illusion," and thus the work should not be considered a simple combination or arrangement of the two. Second Request Letter at 1. You assert that, intent of the author aside, a "structural" view of the work reveals it to be a three-dimensional design that, when viewed from particular angles, gives only a "special effect" of portraying a cross and a fish, and that the view from other angles is of "unique and primarily unrecognizable" shapes that are the true creative expression. *Id.* at 2. You further attempt to distance CrossFish from its constituent elements by claiming that "neither two-dimensional structure is even present in the sculptural expression." *Id.* at 3. This is apparently based upon your earlier claim that the Christian cross and Greek fish symbols are "characterized by being notably two-dimensional in nature." First Request Letter at 1.

The Board disagrees. The CrossFish does not simply "give the illusion" of a cross and fish as a "special effect." The very name of the item reveals that the combination of these two familiar symbols is the essence of the work, and not simply one of many "illusions" perceivable from various angles. In addition, your first letter states that these symbols are in fact combined and juxtaposed in the work. First Request Letter at 1. Finally, whether or not the Christian cross and the Greek fish are naturally two-dimensional is irrelevant, as an additional dimension does not significantly alter their shapes or add an element of creativity. *See Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1222 (quoting NIMMER, § 2.08[C][2]: "the mere act of converting two dimensions to three dimensions, although it creates a distinguishable variation, may not represent a contribution of independent effort because no one can claim to have independently evolved the idea and technique of working in three dimensions.") That CrossFish combines and integrates the cross and the fish in order to form one work could not be plainer.

Likewise, attempting to claim additional creative expression by citing the views of the work at oblique angles does not convince the Board of the work's copyrightability. In fact, by your own argument, if the fact of the "viewable illusions" of the cross and the fish is "irrelevant," so is the fact of the viewable illusions of other shapes. Additionally, according to *Compendium II: Copyright Office Practices*, external effects not intrinsic to the work of authorship itself – such as the impressions created by viewing the work at particular angles or at specific times of day – do not affect the copyrightability of the work. *Compendium II*, § 503.02(b)(3). *Compendium II*'s example of such uncopyrightable expression is of a mobile where registration is sought based upon the "overall effect produced by the play of light upon the suspended glass components of a work which the applicant describes as

'three-dimensional,'" *Id.* This is comparable to your claim of copyrightable expression in the appearance of CrossFish "from any angle in any non-horizontal plane of view." Second Request Letter at 2. Moreover, your assertions that these angles reveal shapes that are "unrecognizable" and that "there is no known work of art that is remotely similar to the actual structure itself" are not relevant to the question of copyrightability. Representational art, for example, is recognizable as well as copyrightable, and novelty per se is not a recognized element of protectable authorship.

The proper analysis of whether CrossFish meets the *Feist* standard of "possessing more than a *de minimis* quantum of creativity," 499 U.S. at 363, is to examine what, apart from the familiar symbols of a cross and a fish, is sufficient to constitute copyrightable authorship. Of course, such an examination must include any selection and arrangement of elements in the work as a whole. However, CrossFish fails to demonstrate sufficient creativity in any individual elements or in the selection, coordination, or arrangement of all of the elements viewed as a whole.

According to your second letter, CrossFish is made up of "two large opposing symmetrical arch portions . . . connected in spaced apart relationship by a pair of bridge elements." Second Request Letter at 2. Viewed as a whole, these arch portions combine to create the familiar symbols of a cross and a fish, but not in a way that expresses a nontrivial variation on the shapes. The way in which CrossFish combines the cross and fish symbols may be novel, but it nonetheless represents an insufficient amount of creative authorship. According to the *Compendium II*, "the creative expression capable of supporting copyright" in a sculptural work "must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations." *Compendium II*, § 503.02(b). Such a mere bringing together, however, is exactly what constitutes CrossFish.

Your favorable comparison of CrossFish to three works that the Board had earlier found to be uncopyrightable is also unpersuasive. Even if the creativity of one work "rises above" that of a another, uncopyrightable work, that is not proof that the first work is itself copyrightable. In this case, you have not demonstrated to the Board how CrossFish is more creative than any of the three other works. For example, the Source of Knowledge design of a stylized "S" shape against a black square consists, like CrossFish, of the arrangement of two familiar shapes. You do not explain, however, what raises the two-shape design of CrossFish above the two-shape Source of Knowledge work. Moreover, even if CrossFish exceeded the creativity in those uncopyrightable works, it fails to contain enough creative authorship to support a claim of copyright.

Finally, your First Request Letter argues that the Office inappropriately refused registration for CrossFish based upon the idea-expression dichotomy and the "merger" doctrine. While it is true that both the initial refusal and Ms. Giroux-Rollow's letter responding to your first request for reconsideration cite to section 102(b) of the Copyright Act (the idea-expression dichotomy), the Board notes that neither prior refusal letter raises the "merger" doctrine as a basis for refusal. Instead, both letters make the point that

copyright cannot extend to the idea of combining two common symbols together. While this is unquestionably true, the Board finds that the idea-expression dichotomy is not necessary to resolve the registrability of the CrossFish claim. The Board finds that the work contains an insufficient amount of creative authorship to support a claim of copyright.

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the Stabilized CrossFish. This decision constitutes final agency action in this matter.

Sincerely,

Robert Kasunic
Deputy General Counsel
for the Review Board
United States Copyright Office