United States Copyright Office
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August 1, 2014

Stern, Shapiro, Weissberg & Garin, LLP
Attn: Paul Sennott
90 Canal Street
Boston, MA 02114-2022

RE: JAWS ILLUSTRATION
Correspondence ID: 1-F0KQ5D

Dear Mr. Sennott:

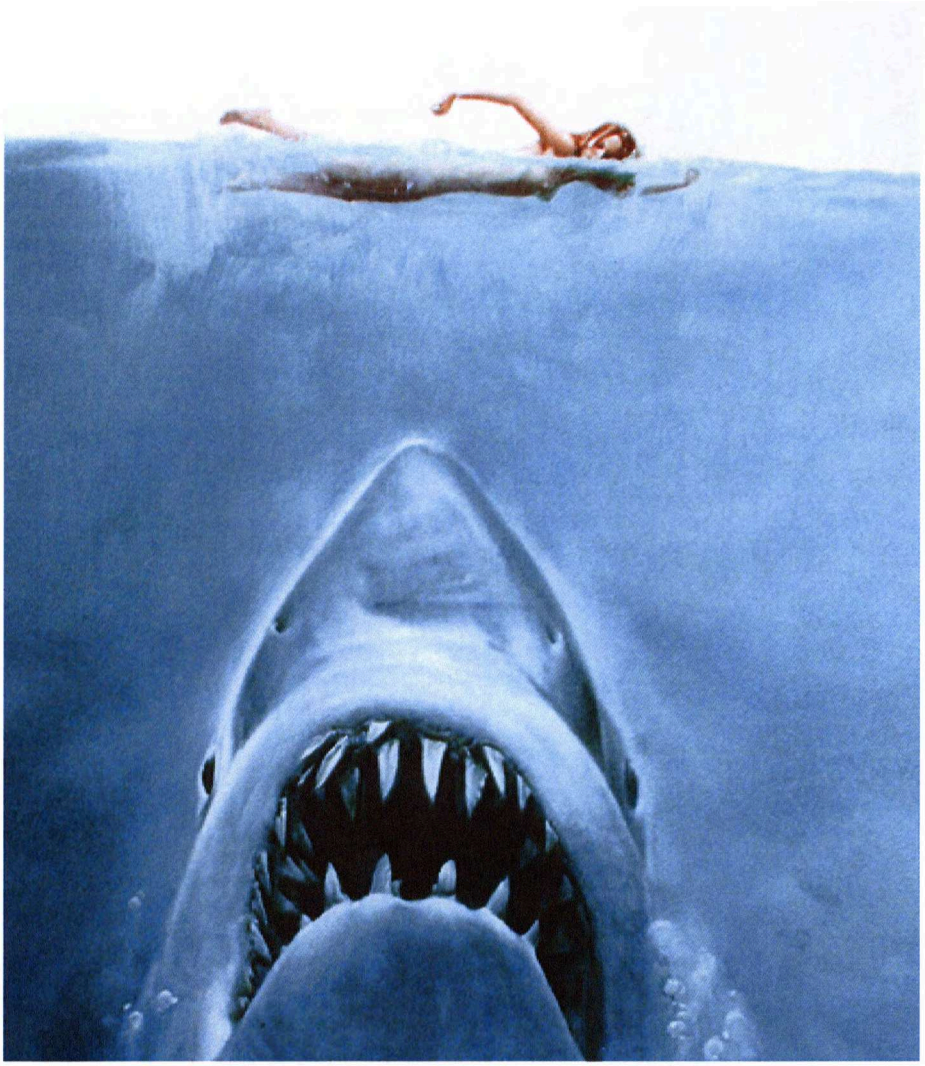
The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Jaws Illustration* (the "Work"). You submitted this request on behalf of your client, Roger Kastel. It was received by this office on February 7, 2014.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of the Work. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORK

The application for registration of the Work was filed as a 2-D artwork. The illustration consists of a large shark with an open mouth full of jagged teeth moments before it attacks an unsuspecting female swimmer. The Work was completed in 1974 and was first published on January 1, 1975 as the cover artwork for the paperback version of Peter Benchley's novel *Jaws* (the "Book"). Immediately following the title page, the Book contains a copyright notice which states "Copyright © 1974 Peter Benchley." There is no copyright notice on the Work itself.

The below image is a reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On March 19, 2013, the United States Copyright Office (the "Office") issued a letter notifying Roger Kastel (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Adrienne Brown, Registration Specialist, to Paul Sennott* (March 19, 2013). In its letter, the Office stated that it could not register the Work because it was published without copyright notice as required by the Copyright Act of 1909 (the "1909 Act"), the governing statute at the time of creation and publication of the Work. *Id.* Without proper notice the Work was injected into the public domain upon publication and, therefore, it lost the ability to be protected by copyright. *Id.*

On June 18, 2013, the Office received your First Request for Reconsideration in which you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Paul Sennott to Copyright RAC Division* (June 17, 2013) ("First Request"). Upon reviewing the Work in light of the points raised in your letter, the Office concluded that "the [W]ork as published did not contain a copyright notice in the name of the owner as required by the 1909 Copyright Act" and again refused registration. *Letter from Stephanie Mason, Attorney-Advisor, to Paul Sennott* (November 8, 2013).

Finally, in a letter received by the Office on February 7, 2014, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. *Letter from Paul Sennott to Copyright RAC Division* (February 6, 2014) ("Second Request"). In the Second Request you assert that, while the 1909 Act requires a copyright notice that includes the name of the copyright proprietor in order to obtain copyright protection upon publication, the mere fact that the only notice in the Book was in Peter Benchley's name – and not Roger Kastel's – does not forfeit the Work into the public domain. *Id.* at 3.

In support of your assertion, you offer three primary arguments. First, because the Work is part of a collective work, only one name is required in the copyright notice to protect all of the preexisting contributions. *Second Request* at 3, 6-7. Second, you argue that there has been an increasingly liberal application of the 1909 Act's notice requirements by the courts so as to avoid forfeiture of copyright due to "technical error in copyright notices." *Id.* at 3. Third, you submit that the notice contained in the Book should be sufficient because it serves the purpose of the notice requirement by informing the public of the existence of a copyright. *Id.* at 4, 7-8. The Second Request references a number of cases – principally *Goodis v. United Artist Television, Inc.*, 425 F.2d 397 (2d Cir. 1970) and *Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.*, 661 F.2d 479 (5th Cir. 1981) – in support of these arguments.

III. DECISION

A. *The Legal Framework*

The adequacy of a copyright notice on a work is examined under the statute as it existed on the date that the work was first published. 37 C.F.R. § 202.2(a)(1) (2013). If a work that was published before January 1, 1978 – the effective date of the Copyright Act of 1976 (the "1976 Act") – does not meet the statutory requirements of copyright notice under the 1909 Act, the Office must reject an application for copyright registration of the work. 37 C.F.R. § 202.2(b) (2013). The Work was first published in 1975 and, therefore, must meet the statutory requirements of the 1909 Act in order for the Board to approve Applicant's registration request. As the Work falls under the control of the 1909 Act, discussion of the 1976 Act is irrelevant in determining the sufficiency of the notice for the Work.

Under the 1909 Act, notice was very clearly required to "consist either of the word 'Copyright', the abbreviation 'Copr.', or the symbol ©, accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication." 17 U.S.C. § 19

(1970). When copies of a work are made available to the public without the required notice, there results a forfeiture of any copyright protection and an injection of the work into the public domain. *Wildman v. N.Y. Times Co.*, 42 F.Supp. 412, 414 (S.D.N.Y. 1941). The Code of Federal Regulations specifically lists a common defect in the notice as one that lacks the name of the copyright proprietor. 37 C.F.R. § 202.2(b)(1) (2013). While the Supreme Court stated in a pre-1909 Act decision that the term "proprietor" is understood to mean the author or any legal assignees of a work, the term is now understood to mean "either the owner's true name, or an abbreviation by which such name can be recognized, or a generally known alternative designation of the owner." *Mifflin v. R.H. White Co.*, 190 U.S. 260, 262 (1903); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.09[B], at 7-62.

B. *Analysis of the Work*

The sole copyright notice in the Book reads "Copyright © 1974 Peter Benchley," followed by a separate line underneath stating "This book may not be reproduced in whole or in part, by mimeograph or any other means, without permission." In your Second Request you make the argument, citing language from *Goodis*, that because the Book is a collective work consisting of Peter Benchley's text and Applicant's Work, "notice in the name of Peter Benchley, despite the fact that he is not the owner of Applicant's separate contribution, must be treated as an error that does not affect the validity of Applicant's ownership of copyright in the illustration." *Second Request* at 7. Indeed, the 1909 Act explicitly states that when copyright applies to a composite work or periodical, that copyright extends to the parts of those publications as if each part were individually copyrighted. Copyright Act of 1909 § 3. While the 1909 Act doesn't explicitly define "composite works," the term is considered closely analogous to "collective works" in the 1976 Act. 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 9.03[B], at 9-17.

However, it seems apparent that *Jaws* would not qualify as a composite (or collective) work. A collective work does not result when only a few separate elements are brought together, such as "a work published with illustrations or front matter...." Nimmer, *supra*, § 3.02, at 3-6 (quoting H.R. Rep. No. 94-1476, at 122 (1976)). Furthermore, courts have held that the copyright of a book does not extend to the cover because there is ordinarily no copyrightable literary content on a book cover, and since the statute requires copyright notice to be placed on or immediately following the inside title page of the book, the cover's "relation to the copyrighted literary content is remote and its authorship and ownership do not prima facie appear" connected to the book's text. *Fawcett Publ'ns v. Elliott Publ'n Co.*, 46 F.Supp. 717, 718 (D.C.N.Y. 1942). Having found that the Book is not a collective work, the Board cannot accept your argument, pulled from *Goodis*, that the Work should be protected because it is part of a collective work that has sufficient notice in Peter Benchley's name to protect all of the components of that collective work.

In your Second Request you argue that, throughout the 20th Century, courts "became increasingly forgiving of...technical error in copyright notices" – so much so that the notice in the Book which is in Peter Benchley's name and which excludes Applicant's name is sufficient to grant copyright protection to the Work upon publication. *Second Request* at 3. While the Board recognizes that a number of judicial decisions have allowed slight variations in the name

of the proprietor to satisfy the notice requirement of the 1909 Act, we find no authority to support the extension of this liberalized standard to the circumstances of the notice in this case. The form of the name in the notice can be "either the owner's true name, or an abbreviation by which such name can be recognized, or a generally known alternative designation of the owner." Nimmer, *supra*, § 7.09[B], at 7-62. A number of the cases you have cited in support of your argument contain variations in the name of the proprietor of this kind. *See Uneeda Doll Co. v. Goldfarb Novelty Co.*, 373 F.2d 851 (2d Cir. 1967) (holding that an abbreviation of the proprietor's name satisfied the notice requirement); *See also Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970) (holding that an abbreviation of the proprietor's name satisfied the notice requirement); *See also*, *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F.2d 143 (7th Cir. 1963) (holding that the name of a subsidiary company which had identical officers and interests as the proprietor company satisfied the notice requirement). In all of these cases the name in the notice still served to identify the proprietor in a way that provided notice to the public of who was claiming copyright over the work.

While the term "proprietor" originally referred to the author of a work or to someone whom the author had assigned the rights to a work, later courts' interpretation of the statute allowed the name of licensees to satisfy the notice requirement. *Mifflin*, 190 U.S. at 262. *Goodis* is one such example of this extension. In *Goodis*, the court held that "where a magazine has purchased the right of first publication under circumstances which show that the author has no intention to donate his work to the public, copyright notice in the magazine's name is sufficient to obtain a valid copyright on behalf of the beneficial owner, the author or proprietor." *Id.* at 399. While you argue that to deny Applicant copyright protection in this case would be to subject him to the "harsh results" that *Goodis* sought to avoid, the Board does not agree that *Goodis* extends to the facts of this case. The rationale behind the holding in *Goodis* was to do away with the doctrine of indivisibility of copyright, which rejected partial assignment of a copyright. The "harsh results" of which *Goodis* spoke occurred when a licensee of partial rights under a copyright lawfully published a work with a notice that did not include the name of the proprietor; when the doctrine of indivisibility was applied, the author or proprietor would have lost her right to copyright protection whether she intended to forfeit the work to the public domain or not. *Goodis* rectified this situation by allowing a copyright notice in the name of a licensee to shield the proprietor from forfeiture even though the licensee did not hold the entirety of the copyright.

Fantastic Fakes involved a case where a licensee published works with notices in the licensee's name and not in the proprietor's name. As stated above, any reference to the 1976 Act, including § 406(a), which is discussed in *Fantastic Fakes* and in your argument, is irrelevant to the Board's analysis of whether the notice in the Book is sufficient to meet the statutory notice requirement under the 1909 Act.

The notice in the Book stating "Copyright © 1974 Peter Benchley" does not meet the statutory notice requirement as interpreted under the 1909 Act. Roger Kastel, the Applicant, is the proprietor of the Work. However, Peter Benchley is neither the name of the proprietor nor a name by which the proprietor is generally known. Furthermore, Peter Benchley is neither an assignee of the Work nor a licensee in the sense that the justification for cases like *Goodis* and *Fantastic Fakes* would permit Peter Benchley's name to satisfy the notice requirement in order

to avoid the harsh results that occurred when the indivisibility of copyright doctrine was applied. Because Peter Benchley is an independent third party with no legal relationship to the Applicant, the Board has concluded that the copyright notice in the Book, which includes only Peter Benchley's name, does not meet the statutory notice requirement under the 1909 Act and, as such, the Work was forfeited to the public domain upon its publication.

Finally, you assert that although the notice appearing on the Work is not applicable to Mr. Kastel as author of the cover illustration, the purpose of copyright notice is nonetheless satisfied. *Second Request* at 7-8. However, this conclusion overlooks an important part of this purpose: informing the public of the identity of the person claiming copyright on a work. Echoing a quotation found in both your Second Request and *Fantastic Fakes*, the purpose of the notice provision of the 1909 Act is "to inform the public of the existence of the copyright, the time of commencement, *and by whom it is claimed*; and to prevent innocent persons who are unaware of the existence of the copyright from suffering by making use of the material." *Harry Alter Co. v. Graves Refrigeration, Inc.*, 101 F.Supp. 703, 705 (N.D. Ga. 1951) (emphasis added). Furthermore, just because a copyright notice might give the name of a person from whom the public can obtain further information about the true identity of the copyright holder, it does not make it an adequate notice. *See Mifflin*, 190 U.S. at 264. When there is "indiscriminate substitution" of the name of the proprietor, "considerable confusion" could result and the public may not be able to trace the title of the copyright to the owner. *See Group Publishers, Inc. v. Winchell*, 86 F.Supp. 573, 577 (S.D.N.Y. 1949). A court is not required to look beyond the face of the notice and determine if a reasonable person could have been misled or could have discovered the true identity of the copyright holder. *See Mifflin*, 190 U.S. at 264.

The Board concludes that the notice in the Book containing only the name of Peter Benchley does not notify the public that the Work is protected by copyright, nor does it inform them of who is claiming copyright on the Work. A reasonable person might conclude that Peter Benchley, a famous author, did not create the Book cover illustration and that it is, therefore, not under copyright protection for lack of notice. Consequently, the Board disagrees that the purpose of copyright notice is served by the notice appearing in the Book.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *Jaws Illustration*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board