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Washington
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May 5, 1997

RE: NEXT DISK
Control No. 60-500-8422 (F)

Dear Mr. Hieken:

This is in response to your letter dated August 15, 1996, addressed to David Levy, Visual Arts Section Attorney Advisor, and forwarded to the Copyright Office Board of Appeals on behalf of your client, Bose Corporation, appealing the Office's refusal to register "Next Disk," originally submitted for registration on July 13, 1995.

The Copyright Office Board of Appeals has examined the claim and considered all correspondence from your firm regarding this claim. Because the work consists of familiar symbols and designs, and basic geometric shapes, adorned with a simple slogan, in an arrangement that does not rise beyond the level of de minimis authorship, the Board of Appeals affirms the Examining Division's decision to refuse to register this claim.

Administrative Record:

The Copyright Office received the application for registration of this work on July 13, 1995. The work consists of an arrow pointing to a circle, in the center of which is a dot, and below which are the words "NEXT DISC," and the entire icon is surrounded by a rectangular square. The registration application described the work, in space 1 "nature of this work," as a "Panel Label." The first letter appealing refusal to register described the work as a "Label having original design of arrowhead pointing toward center of circle above NEXT DISC parallel to the arrowhead."

In a letter dated September 28, 1995, Visual Arts Examiner Donna Dugger notified you that the Copyright Office could not register the work because it lacks the artistic or sculptural authorship necessary to support a copyright claim. The letter stated that copyright does not protect familiar symbols and designs, or minor variations of basic geometric shapes, lettering and typography.

On November 7, 1995, you appealed the refusal to register "Next Disk," asserting that the work is an original work of authorship fixed in physical form, containing a minimum amount of original artistic material. You said that your client sought copyright only in the copyrightable expression, not in the ideas or concepts embodied in the work. You asserted that the Examiner had not established that the work is a familiar symbol or design. You further requested case law or other authority to support the refusal and to explain why the work does not contain the requisite minimum amount of original artistic material. You quoted the Supreme Court's statement in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991), that "the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark..." You also quoted the statement in 1 Nimmer On Copyright §2.08[B] that "Virtually any distinguishable variation created by an author in an otherwise unoriginal work of art will constitute sufficient originality to support a copyright. Therefore, a very modest quantum of originality will suffice."

On July 8, 1996, Visual Arts Section Attorney Advisor David Levy issued the Office's second refusal to register NEXT DISC. After reexamination of the work, the Office again refused to register what it described as "a simple graphic icon." Citing Copyright Office Regulation 37 C.F.R. §202.1, Mr. Levy reiterated that familiar designs and symbols such as rectangles, dots, arrows and circles, and short phrases and expressions such as "NEXT DISC," are not copyrightable, and the simple combination of these elements here contains insufficient authorship to be copyrightable. Mr. Levy noted that icons by nature are usually simple and direct but, no matter how successful and effective, for copyright purposes a graphic icon must be judged as two-dimensional artwork. He acknowledged the Supreme Court's statement in Feist that the requisite level of creativity for copyright is very low, but said that this work fails to meet even that low threshold. He cited Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (label containing the words "Forstmann 100% Virgin Wool" interwoven with three fleurs de lis not copyrightable) and Bailie v. Fisher, 258 F.2d (D.C. Cir. 1958) (cardboard star with

two flaps which, when folded back, enabled it to stand for display was not copyrightable work of art).

On August 15, 1996, you wrote to the Office with a second request for reconsideration, addressing your letter to Mr. Levy. You stated that the Office had identified only two cases, "neither of which is in point, decided long before Feist." You quoted statements from Forstmann that the work in that case lacked "all creative originality," and said the Copyright Office examiners had made no such assertion with respect to the work in this case. You quoted statements from Bailie v. Fisher that the work in that case was not suitable for subject matter protection as a "work of art" while, in this case, no contention is made that the work does not fit within section 102 and the scope of copyrightable subject matter for "pictorial, graphic and sculptural works." You again cited Nimmer's statements that only a minimal degree of creativity is required. You stated that the Office's reliance on 1950 and 1958 cases was "inapposite" and that our conclusion that the work fails to meet the low threshold for copyrightable authorship was "arbitrary." You urged the Office to "identify prior artistic material which supports a contention that the work does not" meet the minimum standard set forth in Feist.

Minimum Amount of Authorship Not Met

As noted in our previous correspondence to you, under Copyright Office regulations, familiar designs and symbols such as rectangles, dots, arrows and circles, and short phrases and expressions such as "NEXT DISC," are not copyrightable. 37 C.F.R. §202.1 (1996). Moreover, the simple combination of these elements here contains insufficient authorship to be copyrightable. As stated in the manual of Copyright Office practices, for expression to be capable of supporting copyright, it must consist of something more than the bringing together of two or three standard forms or shapes with minor linear or spatial variations. U.S. Copyright Office, Compendium of Copyright Office Practices, Compendium II § 503.02(b)(1984). This simple graphic icon with a dot in the middle of a circle and a short slogan surrounded by a rectangle is not copyrightable; the combination of these public domain elements contains insufficient authorship as revealed by cases such as Forstmann and Bailie.

These cases that you criticize as having been decided prior to the Feist opinion may date from the 1950s and 1960s, but the decisions have not been overturned, modified or repudiated, and their precedential value remains undiminished. Both Forstmann and Bailie, like L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir.) (en banc), cert. denied, 429 U.S. 857 (1956) (requirement of originality not met in plastic Uncle Sam bank copies from public domain version), are consistently cited in court opinions and agency letters as defining the standard for the amount of creativity needed to sustain copyright.

Regarding more recent cases, in Norma Ribbon & Trimming, Inc. v. Little, 51 F.3d 45 (5th Cir. 1995), the court found a flower design had no distinguishable variation from public domain elements and was not copyrightable. In Oddzon Products, Inc. v. Ralph Oman, Register of Copyrights, 924 F.2d 346 (D.C. Cir. 1991), the Register's decision to deny registration to the KOOSH ball as a sculptural work was held to be not an abuse of discretion, where the ball was a familiar symbol with a utilitarian function. John Muller & Co. v. New York Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), held that the Register's refusal to register a logo of four angled lines forming an arrow with the word "Arrows" was not an abuse of discretion, where the Register determined the logo did not meet the minimum degree of creativity. Id. at 990 (citing 37 C.F.R. §202.10(a)(1985)). See also Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words like "gift check" or "priority message" did not contain minimum degree of creativity necessary for copyright protection); M&D Intern Corp. v. Chan, 901 F. Supp. 1502 (D. Hawaii 1995) (mechanical selection and arrangement of crystal sculpture stock pieces did not meet low threshold of creativity stated in Feist); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q. 1074 (D.C.D.C. 1991) (refusal to register de minimis GOTHIC china design not an abuse of discretion); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) (upholding decision of Register to deny registration for fabric design consisting of square grid over striped cloth because design lacked minimum amount of creativity).

As in the above cases, the Board of Appeals concludes that the work "Next Disk" lacks sufficient authorship to sustain a copyright claim. The Board therefore affirms the decision of the Examining Division.

This letter constitutes final agency action.

Sincerely,

Nanette Petruzzelli

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