

The Martinez Group PLLC

August 13, 2018

Via Federal Express

FRANK J. MARTINEZ
Attorney at Law, MBA
FM@martinezgroup.com

Senator Charles Schumer
780 Third Avenue Suite 2301
New York, NY 10017

Re: **REQUEST FOR ASSISTANCE**
Type Face Font Software - Copyright FOIA Request
Our Reference: 1005-93

Dear Senator Schumer:

We are intellectual property counsel to a significant number of type face font designers in the United States. We have submitted a Freedom of Information Act (FOIA) request relating to new Copyright Office requirements for the copyrightability of the software associated with type face fonts. Our request is attached hereto as Exhibit A. The basis for our FOIA request is explained in detail below. We note that the issues giving rise to this letter and our FOIA request represent a serious blow to the livelihoods of U.S. citizens engaged in the design of type face font software and the many, many businesses that rely of such software in the everyday course of their businesses. As noted below, the scope of this type of design and software is global in nature.

Basis for FOIA Request

As provided above, we are intellectual property counsel to a significant number of type face font designers in the United States, Europe and Asia many of whom have, in the past sought protection for their works under the trademark and copyright laws of the United States.

Individually, I hold a position on the Board of Directors of the Society of Typographic Aficionados, a 501(c)(3) organization dedicated to type font design and educating the public about type and typography. In addition, I am an Adjunct Professor who teaches Intellectual Property Law for designers in the MFA Design Program at the School of Visual Arts in New York City. Finally, I provide pro bono counsel to the American Institute of Graphic Arts, a 501(c)(3) organization dedicated to supporting graphic design and designers in the United States as well as, educating the public about graphic design.

Our clients rely on the intellectual property laws of the United States to ensure that their significant efforts enjoy the protection they deserve. We note that our clients derive their livelihood and, not infrequently, support employees as well as their families via the sale of licenses to use their type face font software. Currently, the artistic and design decisions of a type font designer are executed and compiled by special type font design software into a computer file that enables the display and or printing of letterforms using the design created by the designer/author. For over 25 years the Copyright Office accepted applications to register the copyright for type face font works by the submission of 50 pages of XML source code for the subject work.

Office Requirement

Recently, Copyright Examiners have required (hereinafter the “Requirement”) that a statement be entered into the examination record that a work of type face software to the effect that each line of software code for type face software works must have been written by the author. Copyright Examiners have stated that they view type face font software as the result of someone merely “selecting points” and as such, fails to meet the required standard of authorship. On behalf of our clients, we object to the Requirement. If this logic is extended to other digital arts, the software code representing a photographic image is nothing more than a person’s selecting points of light and dark by “clicking” an automated digital camera’s exposure button or a musician’s merely selecting the points corresponding to sound in a computerized digital recording. The result of the author’s acts in modern practice is computer software that enables the display a photograph, listen to music or use a type face font. The Requirement further overlooks the significant creativity involved in designing, hinting¹ and kerning² the type face design, the final compilation of the software code using specially created software that compiles and master the final type face font software that a digital device can use. These creative choices a designer/author makes form a part of the “master” which is the final licensed software file.

We respectfully note that it is not uncommon for the final compiled code of a professional type font software work to exceed 1,000 pages of formatted XML source code. The practical

¹ Hinting is the use of computerized instructions used to adjust the display of a font so that the legibility of text is optimized. Hinting is critical for producing clear, legible text. Hinting is usually created in font design software during the typeface design process and embedded in the final font software. A font can be hinted either automatically or manually. Most type face fonts are normally manually hinted to provide for optimal appearance on computer displays.

² Kerning is the process of adjusting the spacing between characters or individual letterforms of a font, to achieve a visually pleasing and easier to read result.

effect is that the above-referenced Requirement is to make the protection of the subject computer code almost entirely impossible. It is our position that the design and decisions embodied in font software more than exceeds the standard of authorship for copyright and the Requirement is contrary to the Policy Decision issued by the Copyright Office in 1992. See, 57 Fed. Reg. 6201-6202 (February 21, 1992).

Global Uses of Type Face Font Software

By way of illustration and in support of our request, *every* digital device such as desktop and laptop computers, tablet type devices, smart watches, mobile telephones, cable television set top boxes, digital signs, electronic books, home appliances and industrial appliances, among others, use and display type font software to function usefully. The use of type face fonts is now common in consumer devices, applications, industrial applications and large consumer and industrial goods including, but not limited to, smart thermostats, ovens, washers, televisions, gas station fuel pumps and even automobile and aircraft driver interfaces. Any device with a touchpad or display device is likely to use type face font software. This trend will only increase as the use of visual control surfaces/interfaces grows. In addition, recent technical developments have enabled the serving of type font software, like photos, to most Internet websites viewed via a computer or mobile device. Stated simply, fonts are everywhere, and their use is growing and the Copyright Office has made protecting this valuable resource impossible.

U.S. Leadership in the Type Face Design Industry

The use of type face font software is pervasive and omnipresent. In fact, a conservative estimate is that the value of type face font license sales by U.S. companies *exceeds \$100 million* annually. Even the U.S. Government has published standards for the use of type font on government websites. See, <https://designsystem.digital.gov/components/typography/>, retrieved August 8, 2018. In sum, the modern world relies on type face font software to effectively function. The above-referenced Requirement threatens the font design industry and has significantly endangered the businesses and livelihoods of many U.S. citizens. These entrepreneurs provide type face font software to users and companies around the world. Indeed, without hyperbole, U.S. companies currently enjoy a global leadership position in the design, development, marketing and sales of licenses to use type face font software. The above-referenced Requirement will limit the ability of such companies to protect their work and grow as well as having an impact on other design practices such as graphic and industrial design since they are heavily reliant on type face font software. I believe that the continued imposition of the above-referenced Requirement will significantly harm the United States' leadership position in the type face software industry.

Policy Background

On September 29, 1988, The Copyright Office (hereinafter, "Office") restated its position that under existing law, a typeface as such, was not copyrightable subject matter. See, Policy Decision 53 Fed. Reg. 38110-38113 (Sept. 29, 1988). Later, however, the Office amended the policy stating that:

[a]fter a careful review of the testimony and the written comments, the Copyright Office is persuaded that creating scalable typefonts using already-digitized typeface represents a significant change in the industry since our previous Policy Decision. We are also persuaded that computer programs designed for generating typeface in conjunction with low resolution and other printing devices may involve original computer instructions entitled to protection under the Copyright Act. For example, the creation of scalable font output programs to produce harmonious fonts consisting of hundreds of characters typically involves many decisions in drafting the instructions that drive the printer. The expression of these decisions is neither limited by the unprotectible shape of the letters nor functionally mandated. This expression, assuming it meets the usual standard of authorship, is thus registrable as a computer program.

See 57 Fed. Reg. 6201-6202 (February 21, 1992).

Since that time, entrepreneurs and businesses in the United States have grown to depend upon copyright as the principal means of protecting their creative work product and business endeavors. As noted above, the Requirement has endangered many businesses, livelihoods, and the development and growth of an otherwise vibrant industry throughout the United States.

Request for Assistance from Your Office

We hereby respectfully request that your office inquire of the Copyright Office as to the basis for the Requirement that we have noted above and why such a change was deemed necessary after more than a quarter century of Copyright Office policy and practice. If helpful, we are prepared to provide ample materials demonstrating the arduous process associated with designing type face font software. We are also making form copies of this letter available to our clients so that they may also seek the assistance of their own representatives in this matter.

Thank you very much for your cooperation and any assistance you may lend in this matter. Please feel free to contact me if there are any questions.

Respectfully submitted,
THE MARTINEZ GROUP PLLC

By: _____

Frank J. Martinez
55 Poplar Street Suite 1-D
Brooklyn, New York 11201
718.797.2341
FM@martinezgroup.com

cc: Senator Kirsten Gillibrand
Congresswoman Nydia Velázquez
Congressman Hakeem Jeffries
Congresswoman Yvette Clarke
Congressman Jerrold Nadler
Congresswoman Carolyn Maloney

EXHIBIT A

ATTORNEYS & COUNSELORS IN INTELLECTUAL PROPERTY LAW

TRADEMARK · COPYRIGHT · LITIGATION

55 POPLAR STREET, SUITE 1-D
BROOKLYN, NY 11201

718 797 2341 TELEPHONE

AFFILIATED OFFICES
CHICAGO, ILLINOIS
AUSTIN, TEXAS

MARTINEZGROUP.COM

The Martinez Group PLLC

August 13, 2018

Via Electronic Mail Only
(copfoia@loc.gov)

FRANK J. MARTINEZ
Attorney at Law, MBA
FM@martinezgroup.com

FOIA Requester Service Center
The United States Copyright Office
PIE
P.O. Box 70400
Washington, DC 2004

Re: **FREEDOM OF INFORMATION ACT REQUEST**
Type Face Font Software - Copyright
Our Reference: 1005-93

Dear Sir/Madam:

This is a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552. Recently, Copyright Examiners have required that a work of type face font software to be registered must have a statement entered into the examination record that each line of software code must have been written by the author (hereinafter the "Requirement"). In light of this Requirement, I hereby respectfully request the following documents relating to the following Copyright Office ("Office") activities:

1. Communications sent to the Copyright Office (written and electronic) since 2014, from third parties relating to type face fonts and/or type face font software;
2. Communications from the Copyright Office (written and electronic) since 2014, to third parties, relating to type face fonts and/or type face font software;
3. Documents, notes, and memoranda (written and electronic) since 2014, reviewed, used and/or otherwise relied upon by the Office in formulating the above-referenced Requirement; and
4. Office communications, notes and memoranda (written and electronic), relating to the final decision to impose the above-referenced Requirement in applications to register a copyright for type face font software.

Pursuant to 5 U.S.C. § 552(a)(4)(iii), I respectfully request a waiver of fees because disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. In that regard, I note that I am intellectual property counsel a significant number of type face font designers in

the United States, Europe and Asia. I also hold a position on the Board of Directors of the Society of Typographic Aficionados, a 501(c)(3) organization dedicated to type font design and educating the public about type and typography. In addition, I am an Adjunct Professor, teaching Intellectual Property Law for Designers in the MFA Design Program at the School of Visual Arts in New York City. Finally, I provide pro bono counsel to the American Institute of Graphic Arts, a 501(c)(3) organization dedicated to supporting graphic design and designers in the United States as well as, educating the public about graphic design.

Accordingly, Disclosure of the requested information is in the public interest because such information is likely to contribute significantly to the public understanding of the operations or activities of a governmental office and how such operations, activities, and policy decisions affect the design, graphic design and type face font industries. In addition, disclosure of the requested is likely to add to knowledge of copyright law to design practitioners and students of design. Finally, the requested information is not primarily in my personal financial interest, but is instead in the interest of the design, graphic design, and type face font industries.

Thank you very much for your cooperation in this request. Please feel free to contact me if there are any questions.

Respectfully submitted,
THE MARTINEZ GROUP PLLC

By: _____

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Brooklyn, New York 11201
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