COPYRIGHT
OFFICE

June 2, 1997

Re: INTUITION
Control No. 60-503-4852(C)

Dear Mr. Komen:

LIBRARY
OF
CONGRESS

On behalf of the Copyright Office Appeals Board I am responding to your January 22, 1997, request for reconsideration of the Office's decision not to register the work INTUITION. The Board examined the claim and all associated documentation, and upholds the Examining Division's decision to refuse registration because the work your client submitted does not embody sufficient original authorship to support a claim to copyright protection.

The Administrative Record

Washington
D.C.
20559

On October 20, 1995, your firm submitted registration materials for the work INTUITION on behalf of your client, Jack Lenor Larson, Incorporated. The nature of the work was described as design on fabric.

In a letter dated December 21, 1995, the Office rejected the work, writing that there was no copyrightable artwork or sculpture in the work that could support a registration. The Office added that ideas and concepts embodied in a work also are not copyrightable. Other noncopyrightable elements are familiar symbols and designs, lettering, and variations in coloring.

You responded in a letter dated January 2, 1996, requesting reconsideration of the refusal to register. You described the design as basic building blocks of bars and stripes "selected and arranged in a uniquely original and creative manner" providing the work with special flavor and presence and a "texture" effect. You claimed that registration should be made on the basis of selection and arrangement of the shapes.

Visual Arts Attorney Advisor David Levy replied in a letter dated January 14, 1997. He wrote that the work INTUITION could not be registered because it did not contain copyrightable authorship. He described the work as consisting of public domain shapes and designs that were not copyrightable under 37 CFR §202.1. He also cited as support John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986)(logo consisting of four angled lines forming an arrow, with word "arrows" in script below, not copyrightable work) and Jon Woods Fashions Inc. v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988)(district court gave

heightened deference to the Register's decision to refuse registration for a work consisting of striped cloth over which was superimposed a grid of 3/16" squares, in view of the fact that the Register's decision was based on two reviews of the same copyright application).

Mr. Levy pointed out that "uniqueness" is not a copyrightable quality, and that presentation of a "textured" effect referred to a process, material or feel of a work, not copyrightable without sufficient accompanying authorship.

You responded in a second appeal dated January 22, 1997, in which you highlighted the applicant's "original and creative selection and arrangement" of elements comprising the design. You agreed that the individual elements in the design were familiar designs, but claimed that the selection and arrangement of the elements brought the work to a sufficient level of original, creative authorship to support copyright registration.

You distinguished the John Muller case, writing that the applicant's design was substantially more complicated than that in Muller. You also wrote that in Woods the court did not necessarily agree with the Office's opinion about the copyrightability of the work, but deferred to the Register's conclusion, holding that the rejection was not arbitrary or capricious under the Administrative Procedure Act. (Also citing OddzOn Products, Inc. v. Oman, 924 F.2d 346 (D.C. Cir. 1991)). You suggested that the Appeals Board should not use as a standard whether the Copyright Office Examiner's decision was arbitrary or capricious, but should instead base its decision on whether the work was copyrightable.

You noted that the Woods and Muller cases were pre-Feist cases regarding the level of creativity necessary for copyright registration. You described Feist as the Supreme Court's "seminal decision on originality and creativity," emphasizing that originality means independent selection or arrangement, not novelty or anything but a minimum level of creativity. (Also citing Folio Impressions Inc. v. Buyer California, 937 F.2d 759 (2d Cir. 1991), Weissmann v. Freeman, 868 F.2d 1313 (2d Cir. 1995), cert. denied, 110 S. Ct. 219 (1989); Knitwaves Inc. v. Lollytogs, Ltd., 71 F.3d 996 (2d Cir. 1995); Atari v. Oman, 979 F.2d 242 (D.C. Cir. 1992)).

The Appeals Board's Decision

The Appeals Board examined the application, the deposits submitted, and the correspondence related to INTUITION and determined that the work cannot be registered because it lacks sufficient original authorship to support a copyright registration.

The Board reviewed the INTUITION file de novo, interested not in past evaluations by the Office of the copyrightability of the work, but rather, in determining whether INTUITION could be registered for copyright protection. Appeals Board members used their

expertise in copyright law to apply the law to examination of the submission, and determined that original authorship embodied in the work did not rise to a minimal level that must be expressed in a work to register the work. The design elements embodied in INTUITION are familiar shapes and designs, which may not be copyrighted under 17 U.S.C. § 102 and 37 C.F.R. § 202.1(a). The Board used the same test for copyrightability that the Examiner originally used, which is to perceive whether the fixed creative aspects of a work constitute original authorship which is more than a mere representation of public domain elements.

As was the case in review of the fabric design in Woods, the Board found that the INTUITION design consisted of familiar symbols which were arranged in a simple combination that did not constitute copyrightable authorship in whole or in part. There was not sufficient creative, original authorship in INTUITION to be registered. See Woods, 8 U.S.P.Q. 2d at 1872. If INTUITION had been registrable as a copyrightable compilation, the copyright would have extended "only to the material contributed by the author...as distinguished from the preexisting material employed in the work...." 17 U.S.C. §103. Such additional contributed material was not perceived.

The selection and arrangement of the public domain designs in INTUITION, submitted as a "design on fabric," required thought, but did not constitute expressed copyrightable authorship under the statute or case law preceding, including, or following, Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). The Appeals Board agrees with the Feist determination that the threshold level of originality and creativity a work must embody to be copyrighted is low; however, a minimum threshold must be met. Elements within a work must, alone or in their entirety, embody original authorship.[1] This standard has been used by the Office to examine works under the 1976 Copyright Act both before and after issuance of the Feist decision.

The court in Knitwaves Inc. v. Lollytogs Ltd., 71 F.3d 996 (2d Cir. 1995), which you cite in support of your request for reconsideration, noted the Supreme Court's discussion of the originality standard in Feist, but did not contradict or invalidate the Office's

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[1] Two cases you cite to support registration of INTUITION, Folio Impressions, Inc. v. Byer California, 937 F.2d 759 (2d Cir. 1991), and Knitwaves, Inc. v. Lollytogs Ltd. Inc., 71 F.3d 996 (2d Cir. 1995), do not contradict the fact that elements, alone or in their entirety, which embody original authorship must be expressed in a work in a way that can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" to support a copyright registration. 17 U.S.C. §102. You labeled these cases as "Second Circuit decisions [which] represent the current trend in case law." The cases follow the principles the Supreme Court enunciated in Feist, which is to say that a level of original creativity, however minimal, must be demonstrated for a work to be registered. The Office has followed this policy under the 1909 and 1976 Acts, and continues to do so.

refusal to register INTUITION for lack of sufficient creative authorship. The Board perceived the arrangement of threads in parallel lines, pairs of which appeared stripelike on the fabric. The narrower sets of threads were tufted, and the fabric had variances in texture. But the Board did not find copyrightable authorship which could form the basis of registration. See 17 U.S.C. §§ 101 (definition of pictorial, graphic, and sculptural works); 102 (subject matter of copyright); 103 (subject matter of copyright: compilations and derivative works). INTUITION's simple raised stripes sewn on fabric display common shapes that are in the public domain, and may not be copyrighted. See 37 C.F.R. § 202.1(a).

Conclusion

Even aesthetically pleasing designs may not be registered for copyright protection if they lack expression of authorship that rises above simple variations of public domain elements, whether alone or in combination. See L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir.), cert. denied, 429 U.S. 857 (1976); see also 37 C.F.R. § 202.1. For the reasons discussed above, the Copyright Office Appeals Board cannot register the work INTUITION. This letter constitutes final agency action.

Sincerely,

Julia B. Huff

Julia B. Huff
Acting Chief, Examining Division
for the Appeals Board
United States Copyright Office

Cleary & Komen
600 Pennsylvania Ave., S.E., Suite 200
Washington, D.C. 20003
Attn: Edwin Komen

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