COPYRIGHT
OFFICE

February 5, 1997

RE: LINDOS and CITY BLOCKS
Control No. 60-409-6821 (C)

Dear Messrs. Cleary and Komen:

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OF
CONGRESS

This is in response to your letter dated November 13, 1996, addressed to the Copyright Office Board of Appeals, on behalf of your client, Jack Lenor Larsen Incorporated, appealing the Office's refusal to register fabric designs **LINDOS and CITY BLOCKS**.

The Copyright Office Board of Appeals has examined the claims and considered all correspondence from your firm regarding the claim. Because the fabric design consists of familiar designs and minor variations of basic geometric shapes and colors, the Board of Appeals affirms the Examining Division's decision to refuse registration for these claims.

Washington
D.C.
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Administrative Record

The Copyright Office received the applications to register these two works of fabric design on March 2, 1995. One of the fabrics is woven and sheer, with a contrasting beige and off-white checkerboard pattern consisting of three broad stripes and one slender stripe that are crossed by a slender beige stripe. The other is a more densely woven fabric, bearing rows of squares that alternate off-white and ochre against a beige background.

In a letter dated April 11, 1995, Visual Arts Examiner Peter Vankevich notified your office that the Copyright Office could not register the works because they lack the artistic or sculptural authorship to support a copyright claim. The letter stated that copyright does not protect familiar symbols and designs, minor variations of basic geometric shapes, or mere variations in coloring, and that ideas or concepts embodied in a work are not protected by copyright. On August 7, 1995, you appealed the Office's refusal to register **LINDOS and CITY BLOCKS**. While conceding that both designs are "undeniably based" on familiar design elements, your letter claimed copyrightability based on the "original and creative selection and arrangement of these design elements." You described LINDOS, noting that the vertical bars repeat in a series of varying widths and spacings "designed to create a pleasing artistic impression" with a "subtle horizontal bar which casts an almost subliminal influence on the overall design." You described CITY BLOCKS by suggesting that the off-

setting rows of lighter and darker squares create an "aesthetic image substantially different from merely presenting solid squares in a geometric pattern." You said these designs are "deceptively simple but intrinsically complicated," and protectable in their selection and arrangement.

On October 17, 1996, Visual Arts Attorney-Advisor David Levy issued the Office's second refusal to register. This refusal after reexamination of the work noted that whether a work is copyrightable depends not on aesthetic or commercial value, but on whether the work contains sufficient creative authorship. The letter noted that under 37 C.F.R. § 202.1, color per se, and familiar symbols such as squares and bands or bars, are not copyrightable. Mr. Levy further noted that the combination of such familar elements in these fabric designs does not contain sufficient original pictorial or graphic authorship to be copyrightable. He cited Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (holding not copyrightable label with words "Forstmann 100% Virgin Wool" interwoven with three fleurs de lis); and Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (holding not copyrightable cardboard star with two flaps which when folded enabled star to stand for display). Finally, the letter noted that a "subliminal influence on the over-all design" is "in the nature of an idea, concept or method," and is also not copyrightable.

On November 13, 1996, you wrote to the Board of Appeals with a second request for reconsideration. First, you suggested that attorney Levy mistakenly believed the claim was based on uniqueness, and failed to sufficiently consider the claim in the "original and creative selection and arrangement." Second, you said the cases cited by the Office, Forstmann and Bailie, each addressed designs exhibiting substantially less creativity and originality than **LINDOS and CITY BLOCKS** and were decided some 40 years ago. You said the Office's analysis thus failed to consider the impact of Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991). You said the Supreme Court's citing in Feist of Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) indicates that it intended its holding to be applicable to artwork. You also cited three cases from the Second Circuit that you said are applicable and represent the current trend in case law: Knitwaves Inc. v. Lollytogs Ltd., 71 F.3d 996 (2d Cir. 1995); Folio Impressions Inc. v. Buyer California, 937 F.2d 759 (2d Cir. 1991); and Weissmann v. Freeman, 868 F.2d 1313 (2d Cir. 1989), cert denied, 110 S.Ct. 219 (1989).

Selection and Arrangement of Design

In your correspondence, you conceded that the **LINDOS and CITY BLOCKS** designs are "undeniably based" on familiar design elements. Your letter instead claimed that the designs are copyrightable based on the "original and creative selection and arrangement of these design elements."

Under the standard enunciated by the Supreme Court in Feist, to qualify for copyright protection a work must be original to the author, meaning it was independently created (as opposed to copied) and possesses at least some minimal degree of creativity (even a slight amount will suffice). 499 U.S. at 345-46. Compilations of even public domain material are copyrightable if they feature an original selection and arrangement. Id. at 348. To be copyrightable, the preexisting material must be "selected, coordinated, or arranged *in such a way that* the resulting work as a whole constitutes an original work of authorship." Id. at 356 (citing 17 U.S.C. §101 and adding emphasis). The Court noted that not every selection, coordination, or arrangement will pass muster. Id. at 358-59. For example, in that case, Rural's selection of telephone directory listings (including subscriber names, towns and telephone numbers) and their arrangement in alphabetical order were not sufficiently original, and lacked the modicum of creativity necessary to transform mere selection into copyrightable expression. Id. at 361-64.

Recent Second Circuit cases like Weissmann, Folio Impressions, and Knitwaves are consistent with the ruling in Feist. Weissman, which was decided before Feist, concerned the question of whether a revised research syllabus was the product of joint authorship and whether it qualified for protection as a derivative work. The Weissman court noted that the standard for copyrightability in the Second Circuit had been enunciated in Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951), which held that an author must contribute "something more than a 'merely trivial' variation, something recognizably 'his own.'" Folio Impressions and Knitwaves each involved the protectability of fabric designs both of which contained more creativity and originality than the fabric designs here and are therefore distinguishable. The fabric design in Folio was an arrangement of "clip art" roses against a public domain background in which the roses were arranged in straight lines but turned and positioned so that the roses faced in various directions, an arrangement the court said involved artistic decision. 937 F.2d at 764-65. Moreover, the scope of copyright protected only the Folio Rose and its particular arrangement, not the idea of arranging roses generally in a straight line pattern; and the court held there was no infringement in that case. Id. at 765. Concerning Knitwaves, that case dealt with representational "squirrel" and "leaf" sweater designs. Citing Feist, the court said Knitwaves' protectable selection, coordination and arrangement was not merely arranging leaves or squirrels in a specific pattern, but in: (1) selecting original leaves and squirrels as the dominant design element; (2) coordinating these design elements with a "fall" palette of colors and with a "shadow-striped" or "four-paneled" background; and (3) arranging all the design elements and colors into an original pattern for each sweater. 71 F.3d at 1003-04.

The works in question are both minor variations of checkerboard and contiguous rectangles in a criss-cross pattern. Further, the use of a few colors in both patterns does not lend an additional authorship element sufficient to rise to the level of copyrightability. As we have stated in our previous correspondence, the Office is guided in its determinations of copyrightability by the Feist standard. The fabric patterns presented for

registration, however, do not contain graphic design expression beyond a minimal variation of standard check and block patterns; the minimal variation is applicable both to the configuration itself and to the color elements found within each configuration pattern.

More analogous to the claims in question is Jon Woods Fashions, Inc. v. Donald Curran, 8 U.S.P.Q. 2d (BNA) 1870 (1988). The plaintiff there produced a fabric design of striped cloth with a grid of 3/16" squares, and contended that the stripes, in combination with the grid, created a copyrightable design. Because familiar symbols and designs are not copyrightable, the Copyright Office refused registration. The court upheld the Register's decision, noting that copyright requires originality and creativity, and citing Bleistein v. Donaldson, Alfred Bell, 1 Nimmer on Copyright §2.08, and 37 C.F.R. § 202.01 (a).

Again, whether a work such as **LINDOS or CITY BLOCKS** is copyrightable does not depend on its aesthetic value, but on whether that work contains copyrightable authorship. The Board concludes that the selection and arrangement in these claims of public domain elements such as grids, squares and stripes, do not rise to the level of copyrightable authorship required under Feist Publications, Inc. v. Rural Telephone Service Co., Inc. The decision of the Examining Division is therefore affirmed.

This letter constitutes final agency action.

Sincerely,

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