COPYRIGHT
OFFICE

April 4, 1997

Re: E IN C
Control Number 60-504-0017(M)

LIBRARY
OF
CONGRESS

ashington
D.C.
20559

Dear Mr. Mybeck:

This letter concerns the work E IN C, which your client Margaret Ann Wrobleski wishes to register with the Copyright Office. Copies of the application, deposit, and correspondence between you and the Copyright Office were carefully reviewed by the Copyright Office Appeals Board in response to your letter of October 9, 1996, in which you requested that the Office reconsider its decision that E IN C is not a copyrightable work. The Board concluded that your client's work can not be registered for copyright protection because it does not contain sufficient original authorship to support a copyright claim.

The Administrative Record

This work is a two dimensional graphic work comprised of a lower case letter "e" placed within a white block letter "c." An application to register this design work, designated by the applicant as two dimensional artwork, was received in the Office November 7, 1995. In a letter dated February 29, 1996, the Office notified you that your client's work could not be registered because it lacked copyrightable authorship. In addition, copyright protection is not available for familiar symbols or designs, for lettering or typography, or for names or labels. 37 C.F.R. § 202.1.

By letter dated March 11, 1996, you responded, disagreeing with the Office's assessment of the work, and arguing that the "unique pictorial expression" in the lettering was not covered by 37 C.F.R. § 202.1. You asked that E IN C be registered.

The Office denied the first appeal in a letter dated September 11, 1996. Visual Arts Attorney Advisor David Levy noted that the fact that a work is "unique" may be relevant for one seeking patent protection, but "uniqueness" is not the standard for copyright registration; the standard for copyright protection is sufficient original authorship, meaning the work must be original with the author, and the authorship must contain a certain minimum amount of original creative authorship. Mr. Levy described the work as the letter "e" enclosed within the letter "c", drawn so that the letters appear to be three dimensional. He likened this rendering to a method, idea or process, uncopyrightable under 17 U.S.C. § 102(b), and added that letters are not protectable under 37 C.F.R. § 202.1.

He also cited Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F.Supp. 964 (E.D.N.Y. 1950) (label containing words "Forstmann 100% Virgin Wool" interwoven with three fleurs de lis not copyrightable) and Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (star shaped cardboard star merchandize display not copyrightable work of art) to demonstrate that the law does not protect minor variations of familiar shapes or designs or their simple arrangements.

You filed a second appeal dated October 9, 1996, stating that assessment of the level of creativity in a work "can often easily be confused with quite subjective interpretations and great care should therefore be taken before a conclusion is reached that a work fails to meet the threshold." (citing Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-2 (1903)). You asserted that statutory and case law are not settled on what constitutes "sufficient creative authorship," and that the Office's regulations do not neatly allow categorization of works as copyrightable or uncopyrightable, with the area of typography being particularly doubtful. You disputed the conclusion that E IN C is a mere variation of typographic ornamentation or lettering, and claimed the work was not the result of a printing process.

You also asserted that the Forstmann and Bailie cases were inapposite to examination of your client's work because they were cited to support "subjective findings without substantive development," contrary to Bleistein (also citing Alfred Bell v. Catalda Fine Arts, 191 F.2d 99, 102-3 (2d Cir. 1953).

The Appeals Board's Decision

The Copyright Office Appeals Board reviewed de novo all material relating to this claim, including your arguments for registration of E IN C. Your client's work displays two letters, an "e" drawn within a "c." Neither lettering nor typeface is copyrightable subject matter. 17 U.S.C. § 102; 37 C.F.R. § 202.1(a). Although this two dimensional graphic work may have been original to the author, it is a presentation of public domain elements, alphabetical letters, that do not embody sufficient original authorship to support a registration.

You expressed concern about the validity of the Eltra Corp. v. Ringer, 579 F.2d 294 (4th Cir. 1978) decision affirming the Office's determination that typeface variations are not copyrightable. The copyright statute as established by Congress does not protect typefaces. The Office has considered the copyrightability of typefaces, and determined that such expressions cannot be protected. See 53 FR 38110 (September 29, 1988). Although you discussed the typeface issue, you also stressed that E IN C was not submitted as a typeface design. Thus, there appears to be no need for further discussion of the copyrightability of typeface in relation to your client's work.

The Board agrees with Justice Holmes' counsel in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), to which you refer in your argument for registration. He stated that great care should be taken before a conclusion is reached that a work fails to embody copyrightable authorship. Such a determination can be difficult and complex. The Copyright Office was charged by Congress with the responsibility to determine whether works submitted for registration constitute copyrightable subject matter, and in examining more than 600,000 applications each year, the Register of Copyrights and the Office staff have developed considerable expertise in making determinations about copyrightability of works. Courts have granted significant deference to the Register's decisions. See, e.g., OddzOn Products, Inc. v. Oman, 924 F.2d 346 (D.C. Cir. 1991); Jefferson Airplane v. Berkeley Systems, 886 F. Supp 713, 715 (N.D. Cal. 1994), quoting Marascalco v. Fantasy, Inc., 953 F.2d 469, 473 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992).

In administering the copyright law, the Office uses as its standard that a work must contain a sufficient amount of original expression to support a copyright claim. The Office does not make subjective determinations about works submitted when examining them for authorship. The Office carefully considered your argument that your client put together an uncommon combination of letters that you state could be considered 3-dimensional and that might suggest the existence of only one letter, the "e" or the "c". In an effort not to make subjective or aesthetic judgements about the copyrightability of a work, the Office does not consider the attractiveness of a design, but examines the work for something more than a simple variation of standard or common elements. The Board does not see enough authorship in the juxtaposition of the two letters in this work to rise to the level needed to sustain a copyright.

Conclusion

In conclusion, because there are no elements in E IN C which support your client's claim to copyright protection, the Copyright Office Appeals Board must refuse to register the work. The Appeals Board's decision as set forth in this letter constitutes final agency action.

Sincerely,

Julia B. Huff

Julia B. Huff
Acting Chief, Examining Division
for the Appeals Board
U. S. Copyright Office

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