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September 30, 1998

RE: Six Pointed Star With Integrated Cross
Control No. 60-510-9532(L)
Applicant: Goldblum Seed Corp.

Dear Mr. Payne:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter, dated February 5, 1998, in which you appealed the Copyright Office's refusal to register a work entitled "Six Point Star With Integrated Cross" on behalf of your client, Goldblum Seedman Corporation. The Board of Appeals affirms the Examining Division's refusal to register.

Administrative Record

On April 23, 1996, the Copyright Office received a Form VA application from applicant, Goldblum Seedman Corporation, to register a jewelry design. The design is a combination of a cross and a six-pointed star.

In a letter dated July 30, 1996 signed by Visual Arts Section Examiner John M. Martin, the Examining Division refused to register Applicant's claim because it lacks sufficient artistic or sculptural authorship to support a claim of copyright. The letter of denial refused registration on the basis that the work consists of minor variations of familiar symbols or designs.

In a letter dated November 27, 1996, F. David LaRiviere, Esq., representing Applicant, asked the Copyright Office to reconsider its refusal to register. Mr.

LaRiviere argued the work satisfies the originality requirement because it was independently created by Applicant. Citing Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991) and NIMMER ON COPYRIGHT, Mr. LaRiviere argued that the work satisfies the minimal degree of creativity required by Article I, Sec. 8 of the Constitution. Mr. LaRiviere also said that the work at issue here falls within the list of eligible "works of authorship" that are enumerated in 17 U.S.C. §102(a) and that jewelry is not subject to the limitations placed upon useful articles. Mr. LaRiviere argued that the fact that the design is composed of a star and cross, which are familiar symbols, should not preclude registration because Applicant was inspired to combine them into jewelry designs to be worn for adornment. Mr. LaRiviere also argued, in the event that the jewelry was considered a useful article, that the design features are physically and conceptually separable from any utilitarian aspect of the jewelry design.

In a letter dated November 21, 1997 signed by Visual Arts Section Attorney Advisor Virginia Giroux, the Examining Division again denied registration for Applicant's jewelry design on the basis that it lacks copyrightable authorship. The letter from Ms. Giroux observed that the star and cross are each familiar symbols or designs in the public domain which are not copyrightable, and that the design is a simple combination of these two public domain symbols that does not satisfy the minimum level of creativity required for copyright protection. Thus, the work fails to meet the low level of creativity required by the standard set forth in Feist Publications. Nor does the work satisfy the standard even in light of the principle set forth in Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992), that a work be viewed in its entirety with individual elements being considered in relation to the whole rather than being judged separately.

The letter from the Examining Division also stated that works of jewelry are not considered useful articles; therefore, there is no need to consider the issues of physical or conceptual separability.

In a letter dated February 5, 1998, you submitted a second request for reconsideration. You stated that the jewelry design is entitled to registration because it was independently created and clearly possesses a greater than minimal degree of creativity. You pointed out that Applicant made decisions about combining the cross and six pointed star that resulted in a design that is rare or never seen, and that the confluence of the two religious symbols is a powerful, artistic expression. You stated that it is the "use" of familiar shapes (meaning the combination and artistic commentary or idea created) rather than the fact that they are incorporated that determines originality. As evidence of a modicum of creative spark, you pointed to

the fact that the horizontal bar of the cross is congruent with one of the bars of the star; the bars of the cross are slightly longer than the bars of the star; the vertical bar of the cross is interwoven through the star's top point and the bars are rounded as opposed to being flat or squared. You again stated that the features of the jewelry design are physically and conceptually separable from any useful aspect of jewelry.

De Minimis Authorship

The Board of Appeals has determined that the design elements in Six Pointed Star With Integrated Cross do not reveal copyrightable authorship. The Board agrees that the required level of authorship is modest. *See* Feist Publications (only a modicum of creativity is necessary for copyrightable expression). However, as the Supreme Court recognized in Feist Publications, although there is a low standard for determining the copyrightability of a work, some works fail to meet that standard. The Court held that the originality required for copyright protection consists of "independent creation plus a modicum of creativity." 499 U.S. at 346. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," *id.* at 363, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. The Court also recognized that some works, such as a "garden-variety white pages directory devoid of even the slightest trace of creativity," are not copyrightable. *Id.* at 362.

With respect to pictorial, graphic & sculptural works, the class within which Six Pointed Star With Integrated Cross would fall (*see* 17 U.S.C. §102(a)(5)), the Compendium of Copyright Office Practices, Compendium II (1984) ("Compendium II") has long recognized this principle, stating that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, §503.02(a)(1984). The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability, *id.*, and that "registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. ... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations." *Id.* See also section 202.1(a) of the Copyright Office regulations, 37 C.F.R. §202.1(a) ("familiar symbols

or designs" are "not subject to copyright and applications for registration of such works cannot be entertained").

This principle has been supported by numerous judicial decisions. *See* Jon Woods Fashions, Inc. v. Curran, 8 USPQ2d 1870 (S.D.N.Y. 1988) (upholding Copyright Office's refusal to register design consisting of striped cloth over which was superimposed a grid of 3/16" squares); John Muller & Co., Inc., v. New York Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, found not copyrightable); Magic Market, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W.D.Pa. 1986) (envelopes printed with solid black stripes and a few words such as 'priority message' or 'gift check' did not exhibit minimal level of creativity necessary for copyright registration) ; Forstmann Woolen Co. v. J. W. Mays, Inc., 89 F. Supp. 964 (E. D. N. Y. 1950) (reproduction of standard *fleur-de-lis* could not support a copyright claim without original authorship).

The Board recognizes that works of jewelry are copyrightable where they represent the "original, tangible expression of an idea rather than a merely pleasing form dictated solely by functional considerations." Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F.Supp. 551 (S.D.N.Y. 1955). The Board also accepts the statement in Trifari that copyrighted matter "need not be strikingly unique or novel," but Trifari also held that an author must "contribute more than a merely trivial variation" of public domain elements, "something recognizably his own." Trifari, 134 F.Supp. at 553. *Accord*, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2nd 99 (2nd Cir. 1951). Not all jewelry designs contain sufficient creative expression to support a copyright. DBC of New York, Inc. v. Merit Diamond Corp., 768 F. Supp. 414 (S.D.N.Y. 1991).

The Six Pointed Star With Integrated Cross is a simple combination of two of the most familiar religious symbols in the world, the Christian cross and the Star of David — both clearly in the public domain. Neither of these symbols standing alone would be copyrightable. Nor is the simple combination of these two universally recognized symbol an original work of authorship.

As evidence of a modicum of creative spark, you have pointed to the fact that the horizontal bar of the cross is congruent with one of the bars of the star; the bars of the cross are slightly longer than the bars of the star; the vertical bar of the cross is interwoven through the star's top point and the bars are rounded as opposed to being flat or squared. However, the Board of Appeals does not find that these trivial

variations supply the requisite copyrightable authorship. The authorship is, at best, *de minimis*.

You have also asserted that the authorship in Board must view all of the elements in Six Pointed Star With Integrated Cross consists of the combination of elements rather than in the elements themselves. The Board recognizes that all elements of a work must be considered as a whole when determining whether copyrightable authorship is present. However, the simple combination of very few commonplace elements present in the design at issue here simply does not rise to the level of copyrightable authorship. An "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright. Florabelle Flowers, Inc. v. Joseph Markovits, Inc., 296 F. Supp. 304 (S.D.N.Y. 1968); DBC, 768 F. Supp. at 415 ("DBC's gestalt theory that the whole is greater than the sum of its parts is rejected by the great weight of evidence indicating that these two rings are, on the whole, not exceptional, original, or unique").

For the reasons stated in this letter, the Board of Appeals affirms the refusal to register the submitted claims and is closing the file in this case. This decision constitutes final agency action on this matter.

Sincerely,

David O. Carson

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for the Appeals Board
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