LIBRARY
OF
CONGRESS

COPYRIGHT
OFFICE

101 Independence
Avenue, S.E.

shington, D.C.
)9-6000

August 12, 1999

Marvin Jacobson, Esq.
Jacobson and Johnson
MidAmerica Bank Building, Suite 260
175 West Lafayette Frontage Road
St. Paul, Minnesota 55107-1424

RE: Drawstring Runestone Bag; Set of Rune Stones With Raised Lettering Copyright Office Control Number: 60-513-1837(J)

Dear Mr. Jacobson:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated June 22, 1998, appealing a refusal to register the above named sculptural works. You submitted these works on behalf of Nancy E. Smith, dba Freya Runestones. The Appeals Board has examined the application, deposit, and associated correspondence regarding these works to determine whether they could be registered for copyright protection. After careful review, the Board agrees with the Examining Division's decision to refuse registration of the works because neither work embodies copyrightable subject matter.

Administrative Record

On June 3, 1996, the Copyright Office received applications for registration of "Set of Rune Stones With Raised Lettering" and "Drawstring Runestone Bag," both described as "sculpture". The deposit photographs showed circular stones with raised lettering and a drawstring bag with drawn renderings of stones with lettering. Visual arts examiner John Ashley explained in a letter dated October 25, 1996, that the works could not be registered due to lack of protectable sculptural, pictorial, or graphic content. Specifically, the stones could not be registered for their round shapes or for the lettering or characters on them. The bag, a useful article decorated with a circular arrangement of stones embellished by rune symbols, did not embody sufficient separable, original authorship for registration.

First Request for Reconsideration

Following several telephone calls with Mr. Ashley, you responded in a letter the Office received January 27, 1997. You requested that the Office reconsider its original decision and register the two works.

You acknowledged that the Drawstring Runestone Bag was a useful article, but stressed that copyright protection was sought for the circular arrangement of decorated tiles in geometrical patterns on the bag. You asked for registration of the pictorial illustrations on the stones placed on the bag and noted that the "combination of the shape of the bag along with the decoration in the form of the artist's renderings is the copyrightable material and not the shape and/or the utilitarian function of the bag per se." First request for reconsideration at 2.

Regarding the Set of Runestones With Raised Lettering, you wrote that sufficient creativity was embodied in the raised lettering on the stones to merit copyright registration. You also noted that "The combination of the set of stones with the raised lettering gives an artistic impact created by the applicant." Id. You argued that the rule against protecting lettering, calligraphy, etc., "applies only with respect to their uses for those purposes; in other words, a type font is not protectable by copyright for use as a type font and alphabet characters used for alphabet purposes are not accorded copyright protection." Id. However, other use of letters may be protected, you asserted, especially in a case where a letter is used as a design.

Additional Claimant Correspondence

You followed the first appeal letter with correspondence received September 22, 1997. In this brief letter, you mentioned that you had made many telephone calls to the Office about your client's applications, and claimed that the Office had not clearly communicated why the works were not copyrightable. You enclosed headnotes from the decision in C&F Enterprises, Inc. v. Barringtons, Inc., 43 U.S.P.Q.2d 1607, to show that the level of originality needed for copyright registration is minimal. You insisted that the works should be registered based on originality and requisite authorship.

On January 26, 1998, the Office received a copy of a statement signed by author Nancy E. Smith declaring that the arrangement of stones on the Runestone bag was selected for its aesthetic effect, and since this appeared to be the criteria for registration, that work should be registered. The statement also noted that the author was selective in choosing and sculpting the Runestones in the set submitted, and argued that the set should be registered.

Second Refusal to Register

The Office responded on February 24, 1998 in a letter from Attorney Advisor Virginia Giroux, again refusing to register copyright claims in the two works because they did not embody separable copyrightable authorship.

Attorney Advisor Giroux wrote that the Runestone bag was a useful article without separable authorship that could be registered. The arrangement of stones on the bag, either alone or in combination, expressed familiar symbols or public domain designs. The conceptual separability test the Office uses to examine works was cited from Compendium of Copyright Office Practices, Compendium II ("Compendium II"), § 505.03. Attorney Advisor Giroux noted that simple variations of standard designs are not registrable (citing John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986)(logo consisting of four angled lines forming an arrow, with the word "arrows" in script below, not copyrightable) and Jon Woods Fashions v. Curran, 8 U.S.P.Q.2d 1879 (S.D.N.Y. 1998)(fabric pattern of stripes and squares not copyrightable)).

Ms. Giroux also emphasized that effect or appearance are not copyrightable elements. Original authorship, not artistic choice of arrangement, is the critical factor in finding copyrightable authorship in a work. Second refusal letter at 2.

Second Request for Reconsideration

You again requested registration of the two Runestone works in a brief letter dated June 19, 1998. You noted that in addition to previous support you provided for registration, the case of Reader's Digest v. Conservative Digest, 821 F.2d 800, 3 U.S.P.Q. 2d 127 (D.C. Cir. 1987) should apply in your favor, presumably because of the court's remarks in that case, about the copyrightability of the appearance of the cover of Reader's Digest, that "the distinctive arrangement and layout of those [individually unprotectible] elements is entitled to protection as a graphic work." The Office has treated this letter as a second appeal.

Decision of the Copyright Office Board of Appeals

The Appeals Board has examined the two Runestone works and has concluded that neither work embodies sufficient original authorship to be registered with the Copyright Office.

Set of Runestones with Raised Lettering

The set of runestones with raised lettering consists of a set of 24 circular stones. On the surface of each stone is a different raised letter from the 24-character runic alphabet (the

"Futhark"). Thus, the entire set consists of one stone for each letter of the alphabet. As you acknowledge, "the generally circular shape of the stone per se does not warrant copyright protection." See 37 C.F.R. § 202.1. Rather, you claim copyright protection for "the uniqueness and originality and creativity of the letterings or shapes of characters formed on the top face of the stones in raised form."

Regarding lettering or use of alphabetical symbols, Copyright Office regulations preclude registration of familiar symbols or designs, or mere variations of typographic ornamentation or lettering. See 37 C.F.R. §§ 202.1(a), 202.1(e). Although you assert that the proscription against registration of type font and alphabetical characters applies only when "used for alphabet purposes," no such limitation exists. Moreover, the Board notes that the characters used consist of the Runic alphabet, the "Futhark," which is traditionally used on rune stones. Clearly, these are familiar symbols for which no copyright protection exists.

The rule against copyright protection for familiar symbols or lettering is an application of the basic originality requirement of 17 U.S.C. § 102. The originality standard has been discussed by many courts, but a hallmark case is Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991). In Feist, the Supreme Court noted that to be original, a work must be independently created, not copied; in addition, the Court noted that a work must possess a modicum of creativity in order to receive copyright protection. Id. at 345, 347. As you note, citing C&F Enterprises, Inc. v. Barringtons, Inc., 43 U.S.P.Q.2d 1607 (E.D. Va. 1997), the level of originality needed for copyright registration is minimal. However, a work must possess "at least some minimal degree of creativity" to be protected. Id. at 1609 (citing Feist at 499 U.S. 340, 344). More than a trivial variation of another's work or a public domain work is necessary for an applicant's work to be registered. In Feist, 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. This overall concept has long been a fundamental aspect of Copyright Office practices. See Compendium II § 503.02(a) (1984).

Additional case law supports the Office's interpretation of its standard of review for original authorship. See, *e.g.*, John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986)(logo of four angled lines forming arrow with the word "Arrows" in cursive script held not copyrightable); Magic Marketing, 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); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(upholding Register's decision that fabric design of striped cloth with grid of squares was not copyrightable); Bailie v. Fisher, 258 F.2d 425, 426 (D.C. Cir. 1958)(cardboard star with

circular center for photographs, and two folded flaps allowing star to stand for display, not a work of art within the meaning of 17 U.S.C. §5(g)(1909)); and Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950)(nothing artistic about way in which plaintiff's name or legend "100 % Virgin Wool" appeared on label, and no originality displayed in form or representation of fleurs de lis).

The Board does not deny that the set of rune stones is aesthetically pleasing, but as the Compendium recognizes, it is not aesthetic merit, but the presence of original creative expression that is determinative of copyrightability. Compendium II, § 503.02(a). The Board finds no such expresssion in the rune stones.

Drawstring Runestone Bag

Separable Authorship in Useful Article

As you recognize in your first appeal letter, the runestone bag is a useful article. Registration of a useful article is possible only if and to the extent that a work contains pictorial, graphic or sculptural features that are separable from the utilitarian aspects of the article. 17 U.S.C. § 101 (definition of "pictorial, graphic, and sculptural works"). However, you assert that "the pictorial illustrations of the replicas of the Runestone stones placed on the circular bag is totally independent and separate from the utilitarian aspect of the bag and therefore clearly warrants copyright protection." First appeal letter at 1-2. The Board agrees that the pictorial matter on the surface of the runestone bag is separable, although the shape of the bag itself is not.[1] The question, then, is whether this separable pictorial matter constitutes copyrightable authorship.[2]

De Minimis Authorship

The pictorial matter on the circular-shaped bag consists of a series of 24 circles (each containing a different letter of the Futhark, or runic alphabet) around the circular perimeter of the unfolded bag, and six circles forming a cross in the middle of the surface (labeled, on the horizontal axis, "Future," "Present," and "Past," and on the vertical axis, "Outcome," "Challenge," "Present," and "Foundation.").

---

[1] We do not understand your assertion that "the combination of the shape of the bag along with the decoration in the form of the artist's rendering is the copyrightable material" to be an assertion that the shape of the bag itself constitutes separable authorship, but only that the shape of the bag is relevant to your contention, discussed below, that copyrightable authorship may be found in the author's choice of a combination of individually uncopyrightable elements. If, in fact, it were your contention that there is separable authorship in the shape of the bag, the Board would reject that contention.

[2] No such issues are presented with respect to the set of rune stones with raised lettering.

To the extent that the claim in the runestone bag is based upon the 24 circles around the perimeter, which can fairly be described as two-dimensional representations of the three-dimensional runestones, there is no basis for registration. See the discussion above relating to the claim in the "Set of Runestones with Raised Lettering."

Nor does the decision to place these 24 circles around the perimeter of the bag, in the form of a circle, represent copyrightable authorship. The arrangement of uncopyrightable matter in the shape of a circle, an uncopyrightable geometric figure, does not constitute original authorship. See Compendium II, § 503.02(a),which states that "registration cannot be based upon the simplicity of standard ornamentation such a 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." The order in which the circles with the letters from the runic alphabet appear also fails to support any claim to authorship, since it appears to be the order in which the letters of the Futhark are traditionally presented: ᚠᚢᚦᚨᚱᚲᚷᚹᚺᚾᛁᛃᛇᛈᛉᛊᛏᛒᛖᛗᛚᛜᛞᛟ

The decision to place six of the circles in the middle of the surface of the bag, in the form of a cross, also fails to cross the threshold of copyrightable authorship. A cross is a standard geometric form and religious symbol. See Compendium II, 503.02(a). Moreover, you do not appear to claim that Ms. Smith is the author of the particular configuration of circles and labels constituting the cross on the runestone bag. In fact, it appears that this is a common configuration of a runic cross used in the casting of runestones.

What is left, then, is a claim based upon the combination of the aforementioned elements; *i.e.*, the two-dimensional representation of runestones placed in a circular pattern along the perimeter of the circular bag, and the placement of the runic cross in the middle of that circle. This is presumably the reason for your citation of Reader's Digest v. Conservative Digest. That case, a pre-Feist decision, involved original authorship in a compilation, and allowed registration of a magazine cover based on the layout and arrangement of design elements that, on their own, would not qualify for protection. The court noted that the design was original, *i.e.*, not copied from another work. The court continued (in the passage highlighted by you):

> The question thus turns on whether the design is a "work of authorship" within the meaning of the statutes....None of the individual elements of the Reader's Digest cover - ordinary lines, typefaces, and colors - qualifies for copyright protection. But the distinctive arrangement and layout of those elements is entitled to protection as a graphic work.

Id. at 1280.

The Appeals Board does not find that the simple arrangement of noncopyrightable design elements in the runestone bag is distinctive or rises to the level required for registration as a compilation such as that found in Readers' Digest and other cases finding copyrightable compilation authorship. See Reader's Digest Association, Inc., v. Conservative Digest, Inc., 642 F Supp 144, 145 (D.D.C. 1986), *aff'd,* 821 F.2d 800 (D.C. Cir. 1987) for a recitation of the combination of various elements found to be copyrightable in that case. This is not a case like Reader's Digest, where the court of appeals concluded that "Reader's Digest has combined and arranged common forms to create a unique graphic design and layout." The simple combination of basic and familiar forms found in the pictorial matter on the runestone bag constitutes *de minimis* authorship at best. 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, 307 (S.D.N.Y. 1968); DBC of New York, Inc. v. Merit Diamond Corp., 768 F. Supp. 414, 415 (S.D.N.Y. 1991) ("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"); Compendium II, § 503.02(a) ("it is not possible to copyright ... a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations").

Conclusion

For the reasons stated in this letter, the Copyright Office 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

David O. Carson
General Counsel
For the Copyright Office
Appeals Board

r:\dc\appeal\runes.wpd