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September 30, 1999

Bruce E. Lilling, Esq.
Lilling & Cohen, LLP
11 Martine Avenue, PH
White Plains, NY 10606

Re: **RETINOL VITAMIN A CREAM EXXTRA STRENGTH PACKAGE;**
RETINOL VITAMIN A CREAM EXXTRA STRENGTH ULTRA SUNSCREEN PACKAGE;
RETINOL VITAMIN A EYE GEL PACKAGE
Control No. 60-603-533-5(L)

Dear Mr. Lillig:

The Copyright Office Board of Appeals has reviewed your request that the Office reconsider its decision not to register your client's cosmetic packaging as 2-dimensional artworks. The Board has reviewed the claims and all correspondence from your firm regarding these applications. Because the Board could find no insufficient authorship to support a claim to copyright registration, the Office affirms its decision to refuse to register these works.

Administrative Record

Initial Refusal

On May 16, 1997, you submitted four applications on behalf of your client, Fran Wilson Creative Cosmetics, and a fee for expedited handling of these applications. Three of the four applications were for packaging, which you described as two-dimensional artwork, and the fourth application was for a package insert. All four claims were refused registration initially because the examiner found that the works did not have sufficient artistic or sculptural authorship necessary to support a copyright. (Letter from Senior Examiner Gordon A. Richardson to Bruce E. Lillig dated May 28, 1997).

First Appeal

In a letter dated June 27, 1997 addressed to Mr. Richardson, you asserted that based on your examination of the relevant case law, a claim need have only "a small level of originality" to support a copyright, and that the submitted works contain "sufficient originality so as to be entitled to copyright protection." Citing the court's decision in Parfums Givenchy Inc. v. CNC Beauty Sales, Inc., 832 F. Supp. 1378, 29 U.S.P.Q.2d 1026 (C.D. Cal. 1993), you noted that the artistic design of a package can support a copyright, and you asserted that the requisite "modicum of creativity" is present in the packaging and insert sheet.

On November 13, 1997, Melissa Dadant, Special Assistant to the Chief of the Examining Division, responded to your letter of June 27. Based on a review of the application and the submitted materials, she acknowledged that the insert sheet contained sufficient creative expression and should be registered, but then denied again your request to register the three packages as 2-dimensional artworks because they lacked any "artistic elements, either alone or in combination, on which to base a registration." (November 13, 1997 letter from Melissa Dadant to Bruce E. Lillig, at 3).

In her letter, Ms. Dadant characterized the works as "useful objects" because, as containers for a cosmetic product, they have "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." "Useful objects," however, may be considered a pictorial, graphic, or sculptural work and support a copyright, "if and to the extent that such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article." 17 U.S.C. §101. Because the subject applications presented claims based upon "2-dimensional artwork," no claim was presented for the text itself that appears on the packaging. Ms. Dadant identified the elements on the packaging that could possibly be considered pictorial works for the copyright purposes: the two black stripes of varying width on each package, the cut-out diagonal on the eye gel box, and the arc containing the words "RETINOL SPF 20" on the ultra sunscreen package. However, she concluded that none of these elements contained sufficient originality, either alone or in combination, to sustain a claim to register the work as a 2-dimensional artwork.

Second Appeal

In a letter dated March 13, 1998, you again sought reconsideration and requested that the Office register each of the three packages. You argued that the works are "physically separable from the utilitarian aspects of the Retinol creams and gels with which they are associated," and that the pictorial elements, although not sufficient to sustain a copyright individually, do have the modicum of originality necessary for registration when combined "with each other and with the text appearing on the packages in different sizes and boldness, the logo, as well as with the additional colors or clear plastic on the packages." In support of your

sufficient copyrightable authorship on which to base a registration. The text and logos on the package in combination with the two black lines and either a single black arc containing words identifying properties of the product or a single cut-out diagonal with the words "MAXIMUM EYE GEL" do not present sufficient creativity to merit copyright protection

Every copyrightable work must contain at least a modicum of creativity. Feist Publications Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991). Unfortunately, the Retinol Vitamin A package designs fall short of that admittedly modest required level of creativity. The package designs consist of descriptive phrases, two black lines, and either a black arc or a black diagonal each with some descriptive text. Familiar symbols or designs and mere variations of typographic ornamentations, lettering and coloring, however, are examples of works not subject to copyright protection. 37 C.F.R. §202.1(a). The geometric stripes fall into this category. *See* Magic Marketing v. Mailing Services of Pittsburgh, 634 F. Supp 769 (W.D. Pa. 1986) (holding that envelopes imprinted with solid black lines containing the words "PRIORITY MESSAGE: CONTENTS REQUIRE IMMEDIATE ATTENTION" or the word "TELEGRAM" were not copyrightable as pictorial, graphic or sculptural works). Even if the claims to copyright presented in these applications included the short descriptive phrases on the packaging (and, as noted above, they do not, being limited to "2-dimensional artwork"), words and short phrases such as names, titles, and slogans are not subject to copyright protection. 37 C.F.R. § 202.1(a).

Nevertheless, you argue that the particular arrangement of the artistic elements, which admittedly standing alone are not copyrightable aspects of the design, contain sufficient creativity for copyright registration. The practices of the Copyright Office support your approach, and its staff would have issued a registration for the works, had the artistic expression consisted of "something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations." U.S. Copyright Office, Compendium of Copyright Office Practices, "Compendium II § 503.02(b) (1984); *see also id.*, 503.02(a); Feist Publications (noting that arrangement of common elements may be copyrightable, if arrangement contains sufficient creativity).

The two-dimensional designs on the cosmetic packages merely combine familiar symbols and designs with short descriptive phrases with minor variations in typeface, which, neither individually or in combination, rise beyond the level of *de minimis* authorship needed to support the applications for copyright registration. Compendium II § 503.02(b) (1984). *See also* John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (upholding Register's decision not to register simple logo made up of four angled lines which form an arrow and the word "Arrows" in cursive script below the arrow); 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 consisting of striped cloth over which is superimposed a grid of 3/16" squares, even though "distinctly arranged or printed," did not contain a minimal amount of original artistic material to merit copyright protection); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991)