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July 6, 1999

Re: DRESDEN
Control Number: 60-507-6921(S)

Dear Mr. Baynham:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated dated April 9, 1998, appealing a refusal to register a work entitled "DRESDEN" on behalf of your client, Simpson Timber Company. The Board has carefully examined the application, the work, and the correspondence from your firm concerning the application, and has concluded that it must deny registration because the work does not represent sufficient artistic or sculptural authorship to support a claim to copyright.

Administrative Record

The Copyright Office received an application on behalf of Simpson Timber Company for registration of DRESDEN, a "glass design," on June 7, 1996. The deposit consisted of photograph of a door with a translucent glass window and sidelights. The window was made of glass arranged in a design described below, and the sidelights were made of glass arranged in a similar design. By letter dated November 13, 1996, Visual Arts Examiner James Shapleigh, noting that copyright does not protect familiar symbols and designs and minor variations of basic geometric shapes, refused registration of the work because it did not contain the requisite amount of original artistic or sculptural authorship.

In a letter dated January 21, 1997, Lorraine Linford of your firm appealed the refusal to register. She asserted that since a unique design of geometric shapes is not barred from copyright, the Office should register this claim. In support of her request for reconsideration, she submitted five other allegedly similar works registered by the Office.

The Examining Division again refused to register DRESDEN on December 11, 1997. In a letter from Virginia Giroux, Attorney Adviser, the Examining Division recounted its review of the entire work including the overall interrelatedness of the

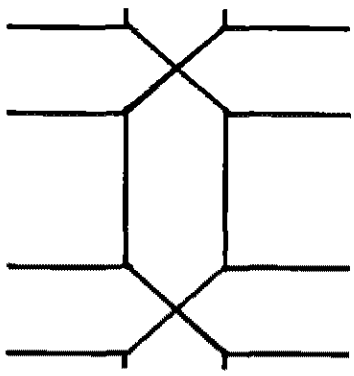
elements, before concluding that this design does not have the necessary minimum level of original authorship to be registered.

On April 9, 1998, you wrote to the Register of Copyrights seeking a second appeal of the refusal to register. You argued that the Examining Division's refusal to register had focused on the single cross motif of the design, and not on the selection and arrangement of crosses or other graphics. Relying on Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991), Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989) ("Atari I"), and Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992) ("Atari II"), you urged the Office to register the work based on that selection and arrangement.

Familiar Shapes and Designs

The Board has concluded that this work is not registrable because it is made up of public domain geometric shapes in a commonplace design. You acknowledge that "a cross alone which is in the public domain is not copyrightable," but assert that you are "not claiming a simple cross alone as being copyrightable." Rather, "it is the selection and arrangement of crosses or other graphics that form the subject matter of this application that does meet the test of copyrightability." But you dismiss the Examining Division's description of the work — "one motif — a cross repreated vertically, with its vertical elements longer in the sidelights and shorter and wider in the center door" — as too simplistic and maintain that the artwork "can also be characterized as a series of symmetrically arranged groupings of rectangles, x's and squares arranged in a pattern that is created to be pleasing to the eye."

The Board recognizes that the design in question can be characterized in a number of ways. For example, one simple and accurate description would be that the design consists of a series of x's arranged vertically, connected by straight vertical lines beginning at each end of each of the two diagonal lines that form the letter "x," and with straight horizontal lines, also beginning at each end of each of the two diagonal lines, extending out from the "x." What is important, of course, is not the description but the design itself. A representation (not to scale) of that design appears to the right. The only apparent difference between the design as it appears in the door and the design as it appears in the sideboards is that the distance between the x's is greater in the sideboards.



The design consists of simple geometric forms (x's and straight lines) in a simple, commonplace pattern. We agree that artwork is made up of geometrical

shapes; therefore, the use of such shapes does not preclude protection. However, to transform a work consisting of public domain shapes into intellectual property subject to a copyright claim, something more must be added: creativity.

You recognize that creativity is a requirement for copyright protection, but complain that "the Copyright Office applies an unreasonably high level of creativity for some types of works." Although the Board agrees that the required level of authorship is modest, *see* Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991) (only a modicum of creativity is necessary for copyrightable expression), we disagree with the assertion that the level of creativity required by the Office for registration of works such as DRESDEN is unreasonably high. As the Supreme Court recognized in Feist, although there is a low standard for determining the copyrightability of a work, some works fail to meet that standard. The Court held in Feist 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 DRESDEN 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"); 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

This principle has been supported by numerous judicial decisions. *See* Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d 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).

Applying these principles in Homer Laughlin China v. Oman, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991), the court affirmed the Copyright Office's refusal to register a commercially successful chinaware design where the Office had concluded that the work was not copyrightable because "familiar shapes and symbols are not copyrightable nor are simple variations or combinations of basic geometric designs capable of supporting a copyright registration." 22 U.S.P.Q. at 1075 (brackets omitted). As the Court observed, "[w]hether a particular work reflects a sufficient quantum of creativity to satisfy the copyright laws is not susceptible to bright line rules or broad principles," but "in determining creativity, such a decision necessarily requires the exercise of informed discretion, and the Register, in part due to having to make such determinations on a daily basis, is generally recognized to possess considerable expertise over such matters." *Id.* Based upon our review of the work, the correspondence in the file, our regulations and the Compendium, the statute and the case law, we cannot find the requisite quantum of creativity to justify registration of DRESDEN.

DRESDEN is a simple combination of one or two basic geometric figures. However pleasing to the eye the design may be, and however much skill may have been exercised in creating and executing the design, it fails the test set forth in Feist and the Compendium. In the view of the Board, the design is commonplace and "garden-variety," and does not rise to the level of creativity required for copyright registration.

You cite Atari II to remind us that the Register has a duty to heed the teachings of Feist that the requisite level of creativity is extremely low. As noted above, the Board accepts that teaching, but also recognizes, as Feist does, that some works do not rise to that level of creativity. You also rely on Atari II and Atari I for the proposition that simple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection. The Board accepts that proposition as well, but as indicated in the discussion above, the selection or combination of simple shapes in DRESDEN simply does not make the grade. The use of simple shapes alone does not disqualify a work for copyright protection. The particular selection and combination with other elements determines whether or not a work will be considered sufficiently creative.

The Board declines to register this work not because it employs simple shapes, but because of the simple, commonplace way in which the simple shapes are employed. Feist, 499 U.S. at 358.

Although the principles enunciated in the Atari cases are indeed applicable in this case, the facts in this case are very different than in Atari. The shapes in the work at issue in Atari, a video game, involved a changing combination of familiar symbols in a successive series, not just one familiar symbol in one commonplace arrangement. In Atari II, the court accepted the Register's conclusion that the individual graphic elements of each screen were not copyrightable. However, the court found the game to be copyrightable after considering it as a whole, including its full "series of related images," the interrelationship of which the court considered "crucial," including "the relationship of each screen to the others and/or the accompanying sound effects." 979 F.2d at 244. In contrast, there is no such interrelationship of images or other elements in DRESDEN that warrants a conclusion that the work meets the requisite level of creativity.

You have submitted for comparison a number of door designs registered with the Office that you maintain are similar to this work. In general, the Office does not compare designs in the course of examining works for registration. Homer Laughlin China, 22 U.S.P.Q. 2d at 1076, citing Compendium II, § 108.03. This is because, unlike the Patent Office, the Office examines works for originality, rather than novelty. The Office applies the copyright standards to each individual work in the examination process. Nevertheless, the Board observes that the other registrations that you have submitted for comparison all exhibit more creativity than is present in DRESDEN.

You cite Adobe Systems Inc. v. Southern Software Inc., 45 U.S.P.Q. 2d 1827 (N.D. Cal. 1998), apparently for the proposition that when elements can be arranged in an infinite number of ways, any particular arrangement must be copyrightable. The district court in Adobe did not reach such an extreme conclusion, but simply observed that there are a number of ways for font software editors to produce the same font image, and that the plaintiff in that case had demonstrated that font editors made creative choices in selecting reference points for those images. The court did not conclude that the availability of choices meant that *any* choice necessarily constituted copyrightable authorship. Nor does Adobe lead to the conclusion that when "simple crosses" — or any other uncopyrightable elements — can be arranged in any number of configurations, then any single configuration necessarily is based on sufficient creativity to support a copyright. Undoubtedly one could conceive of a number of arrangements of the elements found in DRESDEN that would be sufficiently creative, but the mundane arrangement found in DRESDEN is not one of them.

The Board accepts your assertion that it must look not only at the simple geometric shapes in the work, but also at "the combination of shapes, designs and textures creatively selected by the artist." 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 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").

Because this work does not possess the required minimal degree of creativity necessary to support a copyright registration, we must affirm the Examining Division's decision to refuse registration.

The Board's decision constitutes final agency action.

Sincerely,

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for the Appeals Board
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