March 20, 2002

Andrew M. Baer
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1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097

LIBRARY
OF
CONGRESS

RE: ADVANTAGE LAYOUT
EQUITY CARD LAYOUT
FINANCIAL FREEDOM CARD LAYOUT
STATUS CARD LAYOUT
Control No. 60-702-9558(W)

COPYRIGHT
OFFICE

Dear Mr.Baer:

On behalf of the Copyright Office Board of Appeals, I am responding to your September 5, 2000, letter appealing a refusal to register Advanta Corp.'s four design layouts listed above. The Appeals Board has examined the applications, deposits, and associated correspondence regarding these works to determine whether these works can be registered for copyright protection. After careful review, the Board finds that these works cannot be registered because the layout designs do not embody a sufficient amount of creativity to meet the threshold level of authorship needed to support a claim.

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Administrative Record

On September 27, 1999, the Copyright Office received separate applications for registration of the following design layouts: Advantage Layout, Equity Card Layout, Financial Freedom Card Layout, and Status Card Layout. In each case, the "nature of the work" was identified as 2-dimensional artwork. Each work consists of a credit-card-sized card affixed to a letter or a single-sheet brochure inviting the recipient to apply for a home equity loan. By letter dated October 6, 1999, Visual Arts Examiner Wayne Crist refused registration of the four works because they consist only of minor variations of standard letter or form formats with minor variations or simple combinations of familiar shapes or designs. He noted that copyright does not protect simple format and layout of the printed page, *lettering and topography, or mere variation in coloring*.

By letter dated February 1, 2000, Peter Wakiyama of your office appealed the refusal to register the works In his letter, he claimed that the layouts contained sufficient originality to meet the test for copyrightability set forth in Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991). In this case, the court held that a work need possess only a modicum of creativity to meet the threshold of originality required to support a copyright claim. He also discussed several cases where courts have determined that the arrangement and layout of even noncopyrightable elements may meet the test of

originality required for copyright protection, arguing that the submitted works rise at least to the level of creativity of the works deemed worthy of copyright protection by the courts in these cases.

Specifically, he referenced Folio Impressions, Inc. v. Byer California, 937 F.2d 765 (2d Cir. 1991) and Readers Digest Ass'n., Inc. v. Conservative Digest, Inc., 821 F.2d 800 (D.C. Cir. 1987), among others, to show that an arrangement of common elements, if it has the requisite degree of original authorship, is entitled to copyright protection. Mr. Wakiyama then argued that the placement and use of the specific design elements in each layout create an "aesthetic design not dictated by either convention or functionality" and therefore, the designs exhibit the modicum of creativity required under the law. Advanta's works consist of promotional messages, attached plastic cards, and in some instances, use of color bars or typeface to highlight textual material.

The Examining Division considered the first appeal and, in a letter dated June 2, 2000 from Attorney Advisor Virginia Giroux, determined that the "sample" credit cards lacked sufficient original or artistic authorship to support registration. She identified the graphic and textual elements on each card and concluded that use of common geometric shapes, color, words and short phrases, and numbers singularly or in combination was insufficiently creative under the Feist, Bell and Atari standards. See Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951) (originality requires that authorship require something more than a trivial variation of public domain elements) and Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989) (requiring that individual noncopyrightable elements not be judged separately but rather in their overall-interrelatedness within the work as a whole). While Ms. Giroux did consider the overall arrangement of the design elements on each card, she did not consider the overall layout of the work – i.e., not only the cards, but also the letter or brochure to which the card was attached.

On September 5, 2000, you sent a second letter asking the Board of Appeals to review *de novo* the earlier refusals to register the four submitted works. You assert that the Attorney Advisor considering the first appeal failed to understand the nature of the works and, consequently, failed to correctly apply the legal principles for determining whether these works had sufficient original authorship to sustain a copyright registration. The applications are for registration of the graphic design and layout of the brochure arising from the arrangement of pictorials, stripes, colors, and lettering, in addition to the sample credit card and its positioning on the brochure. You assert that the combination of these elements create "an aesthetic design not dictated by either convention or functionality" and that the placement of the various elements reflects deliberate choices that "satisfy the modicum of creativity required for copyright protection."

In support of your position, you cite Feist, Atari and Bell, all cases which underscore the minimal amount of originality that is required to sustain a copyright registration, and argue that Advanta's works satisfy the standard for originality set forth in each of these cases. You acknowledge, however, that such works as words and short phrases, familiar symbols and designs, and mere variations of typographic ornamentation, lettering or coloring are not subject to copyright. See 37 C.F.R. §202.1. As Ms. Giroux pointed out and you emphasize in your appeal, this does not mean that a combination of these elements, taken as a whole, cannot satisfy the requisite level of creativity. To illustrate this point, you discuss a number of cases, including Reader's Digest and Folio Impressions, where the courts found simple arrangements of individual elements adequate to fulfill the originality requirement.

Furthermore, you question Ms. Giroux's interpretation of a Copyright Office policy statement dated June 10, 1981 which reaffirmed the Office's position that "the arrangement, spacing, or juxtaposition of text matter which is involved in book designs falls within the realm of uncopyrightable ideas and concepts." 46 FR 30651, 30653 (June 10, 1981). Ms. Giroux cited this notice in support of her analysis of the sample credit cards when she considered the placement and arrangement of the elements on the cards. She stated that such arrangements are in the nature of format and layout, and therefore, not copyrightable. Your challenge to her view is that the noted excerpt from the policy statement appears to counsel against recognizing copyright in the arrangement, spacing and juxtaposition of text material, but not in text and pictorial elements which comprise a graphic design or layout. Consequently, you argue that the arrangements of pictorial and graphic elements in the Advanta promotional kits, in combination, are copyrightable provided that the arrangement (layout) satisfies the creativity requirement.

***De Minimis* Authorship**

Every copyrightable work must contain at least a modicum of creativity. In this case, the Board has determined that the four layouts of Advanta's promotional brochures fall short of the admittedly modest level of creativity required to support a copyright.

In making its determination, the Board adheres to the standard set forth in Feist, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. However, the Court also ruled that some works (such as the work at issue in Feist) fail to meet the standard. The Court observed that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," 499 U.S. at 363, and that there can be no copyright in work in which "the creative spark is utterly lacking or so trivial as to be virtually

nonexistent." Id. at 359. Even before Feist, the Copyright Office followed this standard, refusing to register "works that lack even a certain minimum amount of original authorship." Compendium of Copyright Office Practices, Compendium II ("Compendium II") §202.02(a)(1984).

For this reason, the Office has identified certain works, including words and short phrases, common shapes or designs, or simple arrangements of common elements such as letters or colors, that do not embody copyrightable authorship. See 37 C.F.R. § 202.1(a). But use of these elements does not necessarily preclude copyright registration. As you correctly observe in your letter, an arrangement of noncopyrightable elements may meet the *de minimis* standard and support a copyright registration.

Nevertheless, as a general proposition, format and layout designs are not copyrightable because the arrangement, spacing, or juxtaposition of textual matter falls within the realm of uncopyrightable ideas or concepts. See Compendium II, § 305.06. The Office reaffirmed this policy during its proceeding that considered whether to amend the Office's regulations regarding the registration of claims to copyright in the design of books, periodicals, pamphlets, brochures, and other printed publications. See 46 FR 30651 (June 10, 1981). In concluding the proceeding, the Office observed that "for a work to be copyrightable it must be on a basis other than typography, coloring, general format or arrangement." The Office's policy, however, is not meant to preclude registration of elements of pictorial posters or illustrated title pages that contain sufficient original, creative expression to constitute a work of authorship.

The Layout Designs

A. ***Description of design elements***

The Equity Kit layout consists of a promotional message set in a standard letter format. The basic letter format consists of a traditional greeting, a signature block, and a postscript message, headed by a promotional message in dark blue script across the upper right-hand corner that reads, "Your credit is good with us!" Additional text material, consisting of short sentences, is positioned in the right-hand corner above and below the sample "Equity Card." The resulting arrangement, including the use of color to emphasize certain text and the placement of the card in the upper left-hand corner, is a basic graphic design layout routinely used in promotional brochures. The attachment of a rectangular plastic credit card to an otherwise routine layout - a commonplace practice in direct-mail solicitations - adds no creative spark to elevate the layout design above the commonplace. Likewise, the fact that the colors in the credit card and the text are meant to complement each other does not transform the basic layout into an original design.

The Advantage Card Kit layout uses the same basic letter format with the plastic card affixed in the upper right-hand corner of the brochure. Again, color is used to emphasize the introductory text at the top of the page. There is, however, nothing creative about the overall design layout of this brochure.

The Status Card Kit layout differs markedly from the standard letter layout used in the two prior works discussed above, but again, the design layout does not contain the requisite degree of creativity to merit copyright protection. The basic layout elements include the Status Card attached again to the upper right-hand side of the brochure, an address block on the opposite left-hand side, and a blue rectangle in the lower two-thirds of the page containing the textual information. The material in the large blue rectangle is arranged in discrete rows with the heading set in blue typeface on the left-hand side of the page and highlighted by slightly darker blue rectangles of the same size. The descriptive informational text is positioned on the opposite side and aligned in neat rows, justified on the left side. The arrangement of the information is dictated in form by the placement of the first row of information. Furthermore, the headings are centered, and though set off in red in one instance, they do not add any creative spark to the layout design.

The last work, Financial Freedom Card Kit layout, is comprised of two parts separated by a perforated line. The "Financial Freedom Card" has been placed on the upper portion on the left-hand side. Promotional text in black typeface and a sample address have been set in a standard block style and positioned on the right-hand side of the brochure. Just below the card is more promotional text, again in black text, and apparently aligned with the left-hand margin. The information in the bottom half of the kit is laid out in two columns and is aligned perfectly on the left-hand side of each column, except for the information within the light blue rectangle on the left-hand side and the address block at the bottom of the right-hand column. Just below the perforated line is a solid teal blue rectangle with a centered promotional message that extends across the entire width of the page. The use of color again highlights certain text. However, the use of two blue rectangles does not create a creative graphic design, either individually or when considered with the position of the blue rectangular Freedom Card and the columnar layout of the text.

B. ***Discussion***

We note that Advanta has not asserted any claim in the text appearing on the cards, letters, and brochure, but claims authorship only of two-dimensional artwork. Therefore, our analysis is confined to the claim of artistic authorship.

In each case, Advanta's designs start with a standard layout form to which are added a few noncopyrightable graphic elements, e.g., colored rectangles to highlight the

promotional information and a sample credit card. In two instances, the Equity Card Layout and the Advantage Layout, the layout designs are merely standard letter formats where a sample credit card has been added in the usually empty spaces located at the top of the letter. In both cases, additional promotional text is used in the upper portion of the "letter" and color is used to emphasize certain textual material. Likewise in the two remaining works, the standard columnar layout for displaying textual information and the block form layout, both common layout arrangements, have been used to display the promotional information.

In conducting its review, however, the Board, did not consider only the overall arrangement; it also considered, as did Ms. Giroux, the design elements on each sample credit card in addition to the overall arrangement of all the design elements, including the placement of the sample credit card. The Board found that, in each case, the sample cards are composites of standard geometric designs or public domain elements, e.g., lines, rectangles, letters, numbers, or the Advanta design mark, which individually or in combination simply do not possess the requisite spark of creativity. Consequently, the Board has determined that the choice and placement of the elements comprising each layout, even with the use of color blocks or typographic text, fails to exhibit the necessary creativity required under Feist, Reader's Digest or Atari.

What caught the attention of the court in Atari was the movement of the game pieces on the sequential screens and the interplay of the movement with the sounds throughout the game, elements not present in the Advanta works. Likewise, the cover design considered in the Reader's Digest case is also distinguishable. In that case, which was decided before Feist and in which the court interpreted the originality requirement as meaning only that "the work is independently created, rather than copied from other works," the court considered that what it described as "distinctive arrangement and layout of" elements appearing on the cover of the Reader's Digest were "entitled to protection as a graphic work" as a combination and arrangement of common forms that created "a unique graphic design and layout." Such is not the case with the layouts of the Advanta Kits. The difference between the Advanta works and the cover design for Reader's Digest is the unique and distinctive asymmetrical arrangement of the index list of stories, headings, and graphic elements exhibited on the cover page of Reader's Digest which sets its design apart from the commonplace.

You also cite a number of additional cases in which courts have held that a simple arrangement of conventional elements contain the modicum of original authorship needed to support a copyright registration to support your claim in the design layout. But in each case, the arrangement as described by the court contained more creative authorship than that displayed in the four submitted works. Folio Impressions v. Byer California, 937

F.2d 759 (2nd Cir. 1991) (finding that the arrangement of a distinctive copyrightable rose design, the Folio rose, in a straight line pattern against an ornate background was entitled to copyright protection); Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc., 184 F. Supp. 285 (E.D. Pa. 1960) (a pre-Feist case finding a distinguishable variation in the arrangement and manner of presentation of illustrations in the form of pen-and-ink drawings, based on use of a dark green background, the particular size of the letters, their spacing, and their arrangement into three rows); The Prince Group, Inc. v. MTS Products, 967 F. Supp. 121 (S.D.N.Y. 1997) (finding that the irregular shape, shading and various colors of polka dots and the placement of polka dots in "imperfect and conflicting diagonal lines at varying distances from each other giving the appearance of randomness," was sufficiently creative to distinguish them from generic polka dot design, and thus, support a copyright). You also cite Gemini Industries, Inc., v. Labtec Industries, Inc., 31 U.S.P.Q. 2d 1776 (W.D. Wash. 1993), but in that case the district court simply denied the defendant's motion for summary judgment, and the court's sketchy description of the work provides little basis for comparison with the works at issue here.

The Board's conclusions are consistent with many other cases which have denied protection to common symbols and shapes and which serve as precedents for denying protection on the basis of layout or position. Where copyright claimants have attempted to secure copyright protection in the arrangement of common elements, the courts have usually found the arrangements to lack the spark of creativity needed to sustain a copyright claim. See, e.g., Florabelle Flowers, Inc. v. Joseph Markovits, 296 F. Supp. 304 (S.D.N.Y. 1968) (finding "the aggregation of well known components to comprise an unoriginal whole" fell short of the standard of originality); and DBC of New York, Inc. v. Merit Diamond Corp., 768 F. Supp. 414, 415 (S.D.N.Y. 1991) (rejecting DBC's gestalt theory that the whole is greater than the sum of its parts is rejected by the great weight of evidence that these two rings are, on the whole, not exceptional, original, or unique").

For the reasons stated in this letter, the Copyright Office Board of Appeals affirms the refusal to register the submitted claims. This decision constitutes final agency action on this matter.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
U.S. Copyright Office

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