March 20, 2002

Buchalter Nemer Fields & Younger
601 South Figueroa Street, Suite 2400
Los Angeles, CA 90017-5704
Attn: Mitchell N. Reinis

RE: PARIS BLUES POCKET DESIGN
Copyright Office Control Number: 60-704-488(R)

Dear Mr. Reinis:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated September 28, 2000, appealing a refusal to register a design entitled "Paris Blues Pocket Design" filed on behalf of your client, Paris Blues, Inc. The Board has carefully examined the application, the deposit and correspondence in this case, and affirms the Examining Division's decision to deny registration because the work does not embody sufficient artistic authorship to support copyright registration.

Administrative Record

On May 21, 1999, you filed an application for registration of your client's design, Paris Blues Pocket Design. The application indicated that the claim was in 2-dimensional artwork. On December 17, 1999, Examiner Helen Livanios responded that the Office could not register the Paris Blues Pocket Design because it lacks the original artistic authorship which is necessary for copyright protection. She noted that the work was a familiar design and that copyright does not protect familiar shapes, symbols and designs and minor variations or simple combinations of the foregoing.

In a letter dated April 6, 2000, you appealed the refusal to register; you asserted that your client's design was not "familiar." You also observed that the examiner had pointed to no prior work or public domain predecessor to your client's work. You indicated that the examiner may have confused your client's work with the well-known Levi Strauss pocket design and enclosed the trademark registration for that design. You also asserted that the design in question was original to your client and cited Nimmer and others for the proposition that only a minimal amount of creativity is required over and above the requirement of independent effort.

In response to the points made in your letter requesting reconsideration, Attorney Advisor Virginia Giroux reviewed the claim in the Paris Blues Pocket Design. In her response dated August 4, 2000, she agreed that the work in question could not be classified as a familiar design. Following her review, she nevertheless concluded that the Office was still unable to register a claim in your client's design which she described as a "loop like design intersected by three connected curved in or concaved lines" because it lacks the artistic or graphic authorship necessary to support a copyright registration.

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Ms. Giroux did not question the originality of your client's work but emphasized that "to be regarded as copyrightable, a work must not only be original, but also 'possess more than a de minimis quantum of creativity.'" See Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991) (a modicum of creativity is required for copyright protection). She also cited other cases to illustrate her point that in order to be subject to copyright protection, a work must not only be original but also embody more than *de minimis* authorship. These cases included Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951) (mezzotints were sufficiently distinguishable from paintings which they allegedly reproduced to warrant copyright protection); John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (registration denied for logo consisting of four straight lines forming an arrow with the word "arrow" in script); Jon Woods Fashions, Inc. v. Curran, 8 USPQ2d (S.D.N.Y. 1988) (upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where the Register concluded design did not meet minimal level of creative authorship necessary for copyright); and Forstmann Woolen Co. v. J.W. Mays, 89 F.Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100% Virgin Wool" interwoven with three fleurs de lis held not copyrightable).

In response to your submission of the Levi Strauss trademark which is a pocket design, Ms. Giroux observed that the standards for copyright and trademark protection are quite different and pointed out that the fact a work may be registered for trademark protection, such as an identifying logo, does not necessarily mean the same work may be registered for copyright protection.

In a letter dated September 28, 2000, you submitted a second appeal to the Office requesting registration for the Paris Blues Pocket Design, asserting that the work was original, not a familiar shape, symbol or design, and that it should be registered. You also noted that the discussion of trademark registration was unfounded, and that the cases cited by the Examining Attorney were not on point.

Decision

The Board of Appeals begins its analysis with the sole issue before it on review. Does the Paris Blues Pocket Design contain sufficient artistic authorship to support a copyright registration?

De Minimis Authorship

The Board begins with a description of the design itself since you have spent considerable time challenging the Office's description of your client's design. Ms. Giroux described the design as "a loop like design intersected by three connected curved in or concaved lines." Giroux letter of August 4, 2000 at 1. You disagree, however, with Ms. Giroux's description of the Paris Blues Pocket Design claiming that:

> Such a description appears to be a construct in order to make it appear as though it is somehow a "standard" design, but it is not an accurate

> description of the work. Indeed, the work cannot be so simply described. It is unclear to this writer as to what is mean by "a loop like design" or what three lines intersect it. As a whole, the design includes many lines, including those framing the pocket and the interior design, which is both original and artistic and is comprised of two intersecting lines, one of which forms an oval at the base of an arc constructed by the other line.

Your letter of September 28, 2000, at 3.

Although it may be possible to describe the lines on the deposit submitted for a pocket design somewhat differently than Ms. Giroux did, the Board finds Ms. Giroux's description to be apt.

As to your claim that the design contained many lines, the Board does not agree. While it is true that Ms. Giroux did not comment on the two lines that framed the pocket and the interior design, these two lines are a standard stitching element which frequently frame any pocket design. Although Ms. Giroux described three intersecting lines[1], the Board agrees that these lines can be described as two intersecting lines which appear to be stitching on a pocket and are overlaid. One is a curved line that forms a loop or oval in the middle of the design. The other is in a scalloped form; the line slightly descends, forms a raised, rounded section in the middle of the line, and then slightly ascends.

As to whether the shape formed by the intersecting lines is described as an oval or loop, the Board finds no harm in describing the shape as a loop. In fact one dictionary definition of loop is "a curving or doubling of a line so as to form a closed or partly open curve." The Board would, however, agree that the loop formed in this design is in the shape of an oval rather than a circle or a square.

Regardless of whether you see the central part of the design as an oval or a loop and say that two or three lines intersect, there is not enough distinguishable variation in this pocket design to warrant copyright protection. Even if one were to include as part of this graphic design the standard two lines that frame the pocket, the overall combination of lines on this design is *de minimis*.

While the Board agrees with the Supreme Court's holding in Feist that only a "modicum of creativity" is necessary for copyrightable expression, the Board finds that the Paris Blues Pocket Design lacks the minimal level of authorship required for copyright registration. This decision is supported by the Court's holding in Feist that "[a]s a constitutional matter, copyright protects only

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[1] Ms. Giroux described the lines in the center of the pocket as forming a loop and stated that this loop was intersected by three lines. Giroux letter of August 4, 2000, at 1. The Board sees no harm in Ms. Giroux's description of three lines intersecting rather than two. If the loop stands out, it is intersected by three lines--two of which meet and form the loop and a third which appears to follow the contours of the other line(s) and also intersects the loop.

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.

Even before Feist, the Copyright Office followed this standard practice, refusing to register "works that lack even a certain minimum amount of original authorship." Compendium II, Compendium of Copyright Office Practices, 202.02(a)(1984). Simple arrangements of designs, even if original, do not embody registrable authorship. *See* 37 CFR 202.1(a). With respect to pictorial, graphic and sculptural works, such as the Paris Blues Pocket Design, the Compendium states in section 503.02(a) that a "certain minimal amount of original creative authorship is essential for registration in Class VA or any other class." The presence of creative expression is determinative of copyrightability.

Case law supports this long standing practice. In Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951), the court recognized that to be copyrighted, a work must be original to the author, although the elements of uniqueness or novelty are not required. *Id.* at 102. The Office agrees that original creativity must be embodied in a work for registration. The authorship in a work submitted for registration must be expressed in more than a "trivial variation" of previous works or designs. *Id.* at 103. Although the Paris Blues Pocket Design may be original to the author, the design does not embody more than a slight, or trivial, variation of a design comprised of two simple lines intersected to form an unadorned, oval-type loop.

The Board further finds the citation to John Muller & Co. v. N.Y. Arrows Soccer Team germane to disposition of this appeal. In John Muller the court upheld the Office's refusal to register a logo consisting of four straight, angled lines forming an arrow with the word "arrow" in script. *See* John Muller, 802 F.2d at 989, 990. Here, the design consists of two lines, one with a loop and one angled. The Board concludes that there is not sufficient artistic authorship embodied in the Paris Blues Pocket Design to support registration as there was not in the work at issue in John Muller.

In a second case cited by Ms. Giroux, Jon Woods Fashions, Inc. v. Curran, 8 USPQ2d 1870 (S.D.N.Y. 1988), the court considered a challenge under the Administrative Procedure Act, 5 U.S.C.§ 706(2)(A), of the Register's refusal to register a fabric design for lack of original authorship. The court upheld the Register's decision, noting that it did not constitute arbitrary or capricious action or an abuse of discretion. In upholding the Register's refusal to register, the court noted that the 1976 Act requires that in order for a work to receive copyright protection, it must be an "original work of authorship. 17 U.S.C. §102 (a)." The court continued that "[t]o be original the work need not be novel, but rather only belong to the author and not be copied from another." "Moreover," the court iterated that the work "should engender a minimal level of creativity--that is, reflect that the author has contributed something to it recognizable as his own." *Id.* at 1871 (citations omitted). In a footnote, the court quoted Professor Nimmer's distinction between originality and creativity:

> Where creativity refers to the nature of the work itself, originality refers

> to the nature of the author's contribution to the work. Thus...a work may be entirely the product of the claimant's independent efforts, and hence original, but may nevertheless be denied protection as a work of art if it is completely lacking in any modicum of creativity. *See* M. Nimmer, Nimmer on Copyright § 2.08[B][3] at 2-85,-86 (1979 ed.)

Id. at 1872, n2. It is this standard that the Register of Copyrights must uphold in determining copyrightability. The Board finds that the intersecting lines depicted in the Paris Blues Pocket Design like the striped pattern over a grid of small squares in Jon Woods does not contain the modicum of original authorship required to warrant copyright registration.

Your comment that Jon Woods is significantly distinguished in your favor in Knitwaves, Inc. v. Lollytogs, Ltd., 71 F.3d 996 (2d Cir. 1995) is not persuasive. The footnote you cite to in Knitwaves focuses on the complexity of striped designs found in fabric designs, and whether or not stripes placed in complex combinations can be registered. In this footnote, the court includes the ruling by the Southern District Court of New York in Jon Woods which upheld the Copyright Office's refusal to register a combination of familiar symbols or designs because of their lack of original authorship. 71 F.3d 996, 1003, n.1 (2d Cir. 1995). The question addressed in both cases is whether there is a sufficient level of authorship to support copyright registration.

Ms. Giroux also cited Forstmann Woolen Co. v. J.W. Mays, Inc., to support denial of copyright registration. *See* 89 F.Supp. 964 (E.D.N.Y. 1950). Trademark and copyright issues were interwoven in this case. Regarding copyright registration, the court found that the legend "100% Virgin Wool" appearing on the label of Forstmann Woolen products could not be registered because that legend, even placed with fleurs de lis on the label, did not embody copyrightable authorship. *Id.* at 971.[2]

In the instant case, as in the cases discussed above, the issue is whether sufficient artistic authorship, which is required for copyright registration, is embodied in the submission. The Board agrees with the Examining Division that there is not. The Board not only finds that the cases cited by Ms. Giroux are relevant; it also notes that there are many other examples supporting the Feist ruling that more than a minimal amount of authorship is required to support copyright registration. These include the pre-Feist Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F.Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority Message" did not contain minimal degree of creativity necessary for copyright protection); and Homer Laughlin China Co. v. Oman, 22 USPQ2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations of geometric designs due to insufficient creative authorship to support copyright registration).

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[2] The court also ruled on trademark and unfair competition issues, focusing on whether a reseller of manufactured goods made of Forstmann fabrics was misleading in its advertising of those goods.

Finally the Board notes that, regardless of whether one refers to the design as familiar, such stitching on a pocket is commonplace and any difference in similar designs found on other pockets may be too trivial to warrant copyright protection. Without going into what trademark would or would not protect, the Board observes that both the Paris Blues pocket and the Levi Strauss pocket represent garden variety designs.

Conclusion

For the above reasons, the Board of Appeals concludes that the Paris Blues Pocket Design does not embody sufficient artistic authorship to support copyright registration. The Board thus affirms the Examining Division's prior decisions to deny registration for the work. This decision constitutes final agency action.

Sincerely,

Marilyn J. Kretsinger

Marilyn J. Kretsinger
For the Appeals Board
U.S. Copyright Office