United States Copyright Office
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February 10, 2004

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Re: DOUBLE ACTION ROULETTE GAME BOARD LAYOUT
Copyright Office Control No. 61-202-9557(G)

Dear Mr. Burke:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated December 17, 2002, requesting reconsideration of a refusal to register a work entitled "Double Action Roulette Game Board Layout," on behalf of your client, Richard M. Fitoussi. The Board has carefully examined the application, the deposit, and all correspondence in this case concerning this application and affirms the denial of registration of this work.

ADMINISTRATIVE RECORD

On October 11, 2001, the Copyright Office received a Form VA application from you on behalf of your client, Richard M. Fitoussi, to register a game board layout as a two-dimensional artwork or as a design on sheetlike material. In a letter dated, November 24, 2001, Visual Arts Section examiner Helen Livanios refused registration of this work because it lacked the artistic authorship needed to support a copyright claim.

Ms. Livanios explained that an artwork must be fixed in a tangible medium and contain at least a minimum amount of original authorship in order to support a copyright. Ideas or concepts which may be embodied in a work are not protected by copyright. Moreover, copyright does not protect familiar shapes, mere variations in size or color, or traditional or customary layouts or formats. Letter from Livanois to Burke of 11/24/01.

In a letter dated February 13, 2002, you requested reconsideration of the Office's refusal to register the work. You argue that the board game layout "comprises novel arrangements of numbers and is, therefore, entitled to copyright protection" because the arrangements exhibit more than a "minimum degree of creativity." You also suggest that the applicant's arrangement of colors was sufficient unto itself to garner copyright protection. In support of your position, you rely upon a second circuit case, Boisson v. Banian Ltd., 273 F.3rd 262 (2d Cir. 2001), in which the court found certain elements in the plaintiff's quilt designs to be sufficiently creative to support a copyright registration, *e.g.*, the alphabetic arrangement of the letters into a five-by-six block format and the selection and use of specific colors. You also rely upon the landmark copyright case, Feist Publications Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991), for the proposition that the amount of creativity to sustain a copyright is extremely low, and correctly note that Feist

affirms the premise that an arrangement of noncopyrightable elements can entail sufficient creativity to support a copyright claim.

In response to your request, Attorney Advisor Virginia Giroux of the Examining Division, reexamined the application and determined that the roulette game board design lacked any elements, either alone or in combination, that possessed the minimum amount of creativity needed to support a copyright. As Ms. Giroux explained:

> Originality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation of public domain elements. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). In applying this standard, the Copyright Office examines a work to determine whether it contains elements, either alone or in combination, on which a copyright can be based. Also, because the Copyright Office does not make aesthetic judgments, the attractiveness of a design, its uniqueness or visual effect, the time and effort it took to create or its commercial success in the marketplace are not factors in the examining process. *See* Compendium II, Copyright Office Practices, Sec. 503.02(a). The question is whether there is sufficient original and creative authorship within the meaning of the copyright law and settled case law.

Ms. Giroux then described the roulette game board and concluded that the graphic elements on the gameboard were nothing more than common geometric shapes used to format the numbers and the words and, as such, their use was insufficient to support a copyright registration. She also noted that the arrangement of the chosen geometric shapes and the use of coloring were not uncommon and, in fact, were configured in much the same way as they are on a standard roulette table. Based on these findings, she concluded that the design was but a simple variation of standard designs whose simple arrangement was aesthetically pleasing but not copyrightable. The case law confirms these principles. John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1879 (S.D.N.Y. 1988); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 969 (W.D. Pa. 1986). *Id.* at 2.

Next, she observed that you were seeking registration for the positioning and placement of the elements used in the work. However, she did not accept this premise for registering the work either because the particular placement and arrangement of the graphic and literary elements in the work were in the nature of layout and format and, therefore, not copyrightable. Compendium of Copyright Office Practices, Compendium II, §§ 305.06 and 305.07 (1984). *Id.* She also explained that the possibility of choices does not determine copyrightability; rather, it is whether the resulting expression contains copyrightable authorship. And finally, she pointed out that uniqueness of a design is not determinative of copyrightability.

In a letter dated December 17, 2002, you again asked the Office to reconsider its refusal to register the layout of the Double Action Roulette Game Board. You reiterate your earlier

arguments and maintain that the game board layout is significantly more complex than a copyrighted five-by-six block format used to arrange the letters of the alphabet in a quilt design. Boisson v. Banian Ltd., 273 F.3rd 262 (2d Cir. 2001). You also argue that the applicant made an independent choice to arrange the numbers in two separate six-by-six layouts and to separate these two arrangements by an oval ring of numbers. You then maintain that these two factors, independent choice and the resulting complexity of the design, entitle your client to a copyright registration.

DECISION

In determining whether a work has a sufficient amount of original artistic authorship to sustain a copyright claim, the Board adheres to the standard set forth in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991), 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.

The Board also applies the principles of the Compendium of Copyright Office Practices, Compendium II (1984) ("Compendium II") that are relevant to the particular work being examined. Even prior to the Court's decision, the Copyright Office recognized the principle set forth in Feist; the Compendium II, states "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." Compendium II, § 202.02(a)(1984). With respect to pictorial, graphic, and sculptural works, the class within which the design falls, *see* 17 U.S.C. § 102(a)(5), Compendium II states 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). Compendium II emphasizes that it is not the aesthetic merit or commercial appeal of a work, but the presence of creative expression that determines the copyrightability of a work, and that

> registration cannot be based upon the simplicity of standard ornamentation . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. . . . 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 37 C.F.R. § 202.1(a) ("familiar symbols or designs; mere variations of . . .coloring" are "not subject to copyright and applications for registration of such works cannot be entertained.").

Of course, some combinations of common or standard forms contain sufficient creativity to support a copyright. But in those instances, where the courts have examined this question, the courts consider whether the layout and interplay of the common elements required the author to choose from a variety of potential options when creating the design. For example, in North Coast Indus. v. Jason Maxwell Inc., 972 F.2d 1031 (9th Cir. 1992), the court determined that a geometric design consisting of colored rectangular blocks banded in heavy lines may be copyrightable. The creativity in the design, however, lies in the interplay arising from the author's choice of color for the rectangles, the size of the rectangles, and the size of the bands separating the rectangles. None of which is dictated by the design. Similarly, in Arica Institute, Inc. v. Palmer, 970 F.2d 1067 (2nd Cir. 1992), the court found that the attachment of labels to the various points of a nine-pointed star an original and creative way to express the relationship between the different personality types represented by each star point. Because there were a number of ways to express these relationships, the court found the use of the graphic design, together with the labels, an unique and creative way to convey this information.

But, "[w]here the author fails to such a degree to transcend the apparent limitations imposed by the subject and the preexisting materials, the author's work, like the directory in Feist, falls within the 'narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.' M & D Intern. Corp. v. Chan, 901 F. Supp. 1502, 1516 (D. Hawaii 1995) (holding that crystal sculptures created from stock parts lacked degree of creativity necessary to merit copyright protection because the structural simplicity of the natural subject matter of the sculptures limited the selection and arrangement of the stock components), citing Feist, 499 U.S. at 357, 111 S.Ct. at 1294. *See also*, John Muller & Co. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986) (upholding Register's refusal to register a simple logo consisting 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) (upholding Register's determination that there was insufficient creative authorship in "Gothic" chinaware design).

After examining the Double Action Roulette Game Board Layout again, the Board has determined that the design layout falls within this second category of works because the work exhibits virtually no creative spark.

The work consists of two identical six-by-six arrays of squares containing the numbers 1 through 36 circumscribed in a red or black oval, and placed on a green background. The number zero lies just above the six-by-six array within a trapezoid and is circumscribed within an oval shape, but without any additional background color. To the left side of the six-by-six array are six congruent rectangles which contain one of six elements: the words "odd" or "even," the phrase "1 to 18" or "19 to 36," and one red six-sided polygon and one black six-sided polygon. At the bottom of the board are three identical rectangles with the phrase "2 to 1" inscribed inside each rectangle. Between these two identical configurations is an oval ring of numbers, arranged randomly in alternating red and black sections, except for the number zero, which has been placed

in the only green segment at the top of the oval–a conventional way to highlight the number zero on a roulette wheel.

Clearly, the design is comprised of nothing more than familiar geometric shapes (e.g., ovals, rectangles and trapezoids), words, short phrases, numbers, and coloring and, as Ms. Ciroux already pointed out, these elements are not copyrightable under 37 C.F.R. § 202.1(a). *See also*, Compendium II, § 202.2(j) (1984).

The Board also finds that the arrangement of the geometric shapes is not original. Rather the Double Action Roulette Board Layout is merely a slight variation on the standard layout design of the garden variety roulette table. Both design layouts contain all the elements found in the applicant's design, but the standard roulette table usually arranges the squares in a three-by-eight array on a green background, rather than in the six-by-six array used by the applicant. Moreover, in both the standard roulette table design and the applicant's layout design, the rectangles with the phrase "2 to 1" are located at the bottom of the array, while the rectangles with the remaining game elements are placed to the left of and adjacent to the first column of numbers. Certainly, the use of a standard geometric configuration of squares, whether a three-by-eight array, a four-by-six array, or a six-by-six array is not particularly creative, especially where, as here, there are only three ways to arrange the blocks with the 36 numbers in a symmetrical configuration in keeping with the standard layout of this particular element of the game board. Likewise, the placement of the corresponding rectangles with the remaining game elements are dictated by this initial choice and involve little creativity in their placement. Similarly, neither the repetition of a non-protectible geometric design nor the insertion of an additional geometric configuration–in this case, an oval with corresponding numbers–contribute sufficient creativity to the overall design to support a copyright registration. Instead, the repetition is a necessary choice because the applicant wished to create a game board with a dual action option, just as the oval with the numbers is a necessary element because it represents the final game component, the roulette wheel itself.

Yet, you argue that the game board layout required independent selection and that the arrangement of the numbers is more complex than the five-by-six block format used to arrange the alphabet in two quilt designs, which were the focal point of a copyright infringement action. Boisson v. Banian Ltd., 273 F.3rd 262 (2d Cir. 2001). The Board respectfully disagrees for the reasons already discussed, and observes that the court in Boisson merely noted three factors that supported a presumption that the five-by-six array of blocks was "original and therefore a protectible element:" a valid copyright registration, the lack of a federal regulation establishing that the use of the disputed layout is unprotectible, and an observation that the layout "displayed some minimum degree of creativity." *Id.* at 269. The fact is the quilt designs included much more than the five-by-six block format arrangement containing the letters of the alphabet. In addition to the letters, the blocks contained pictorial icons of a cat, a house, a single starred flag, and a basket, which together with the block arrangement of the letters exhibits much more creative authorship than the arrangement of the numbers and game elements in the Double Action Roulette Game Board Layout.

Moreover, 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. 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 3065. (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. *See* Compendium II, Copyright Office Practices (1984), Section 305.06.

CONCLUSION

For the reasons stated herein, the Copyright Office Board of Appeals affirms the refusal to register the game board design entitled, "Double Action Roulette Game Board Layout." This decision constitutes final agency action on this matter.

Sincerely,

Marilyn J. Kretsinger

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