The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

November 29, 2005

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Re: SOURCE OF KNOWLEDGE
Copyright Office Control Number: 61-307-9211(S)

Dear Ms. Lewis:

I write on behalf of the Copyright Office Review Board ("Board") in response to your Second Request for Reconsideration in which you requested the Copyright Office ("Office") to reconsider its refusal to register a graphic design entitled "Source of Knowledge." The Office received your undated request on February 11, 2005. The Board has carefully examined the application, the deposit and all correspondence concerning this application, and affirms the denial of registration of this work.

I. DESCRIPTION OF WORK

The subject graphic design consists primarily of a black square. A negative-space "S" divides the square.[1] The design could also be viewed as a white "S," the same height as the square, superimposed on the center of the black square. The "S" is wider at its bottom than it is at its top, and is reminiscent of a winding footpath.



II. ADMINISTRATIVE RECORD

A. Initial Application and the Office's Refusal to Register

On October 3, 2003, the Office received from you a Form VA application on behalf of your client Graceland College Center for Professional Development and Lifelong Learning, Inc., to register a graphic design. In a letter dated December 23, 2003, Visual Arts

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[1] The Board refers to this design as an "S" because that is how it is referred to in your client's trademark registration (Reg. No. 1798278) for the same graphic design.

Section Examiner Joy Fisher Burns refused registration of this work because she concluded it lacks the authorship necessary to support a copyright claim. (Letter from Burns to Lewis of 12/23/2003, at 1.) Ms. Burns explained that copyright protects original works of authorship, where "original" requires the work to have been independently created and to possess a minimal degree of creativity. (*Id.*) (citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)). She noted that copyright law does not protect familiar shapes, basic geometric borders, coloring, lettering, calligraphy, typography, typeface, layout, format or mere variations of typographic ornamentation. (*Id.*) She further explained that the Office does not consider the aesthetic appeal or commercial value of a work, nor the time and effort expended to create a work, when evaluating copyrightability. (*Id.*) (citing *Feist* and *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)). After considering the subject work in light of these standards, Ms. Ware concluded that registration was not available. Ms. Ware also noted that some logos and labels may be entitled to trademark protection, and referred you to the Patent and Trademark Office and the Copyright Office's Circular 34. (*Id.* at 2.)

B. First Request for Reconsideration

In an undated letter received by the Copyright Office on April 22, 2004, you requested reconsideration of the Office's refusal to register the subject graphic design. (Letter from Lewis to Chief, Receiving and Processing Division rec'd 04/22/04, at 1.) You recounted several basic tenets of copyright law: that copyright protection is afforded to original works of authorship fixed in any tangible medium of expression, which encompasses the three requirements of originality, authorship and fixation; that the Copyright Act specifies pictorial, graphic and sculptural works as works of authorship, the definition of which carries with it no implied criterion of artistic taste, aesthetic value or intrinsic quality; that the element of creativity a work must evidence in order to command copyright protection is of a most humble and minimal nature; that familiar symbols and designs are examples of works not subject to copyright, but that the presence of a familiar symbol or design is not the *sine qua non* of copyright determination; that the test for copyrightability is whether a work contains certain "minimal levels of creativity and originality;" that "originality" does not connote novelty and "creativity" does not mean an inventive leap or new idea. (*Id.* at 1-4) (citing 17 U.S.C. §§ 101, 102 (2004); 37 C.F.R. § 202.1(a) (2004); *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980); *Bleistein v. Donaldson*, 188 U.S. 239 (1903); *John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986); *Lotus Development Corp. v. Borland International, Inc.*, 831 F. Supp. 202 (D. Mass. 1993); *Heim v. Universal Pictures Corp.*, 154 F.2d 480 n. 17 (2d Cir. 1946); *NEC Corp. v. Intel Corp.*, 10 U.S.P.Q.2d 1177 (N.D. Cal. 1989)).

You argued that courts are rightly inclined to accept as a work of art any work which by the most generous standard may arguably be said to evince creativity, but recognize that

no very precise standard can be evolved. You stated that a thing is a work of art if it appears to be within the historical and ordinary conception of the term art, provided that it is regarded as a work of art by any meaningful segment of the population, regardless of their particular taste. (*Id.* at 2-3) (citing *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2nd Cir. 1970); *Vacheron & Constantin-Le CoultreWatches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958); *Rosenthal v. Stein*, 205 F.2d 633 (9th Cir. 1953); *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958); *Gustave v. Zuppiger*, 540 P.2d 176 (Ariz. 1975)). You also recognized that consistent with the Copyright Office's regulations, cases have denied copyright protection to fragmentary words or phrases, non-creative variations of musical compositions, numbers generated sequentially or randomly and to forms of expression dictated solely by functional considerations, as well as to works of art with insufficient creativity. (*Id.* at 3-4.)

You described the work as "a square image having a black background with a white zone that bisects the darker colored portion of the box in a flowing manner wherein the wider portion of the white zone begins at the bottom of the box and tapers toward the top of the box thereby creating a suggestion of infiniteness." (*Id.* at 4.) You stated that the design suggests "a path of discovery that leads to the source of knowledge," and has a three-dimensional effect that creates "the abstract illusion of the infinite path." (*Id.*) You concluded that applicant's "Source of Knowledge" logo is a work of visual art that demonstrates more than minimal independent effort and artistry to render it a "work of art" and evidences at least the minimal degree of creativity necessary for copyright registration. (*Id.*)

C. Examining Division's Response to First Request for Reconsideration

In response to your request and in light of the points raised in your first request for reconsideration, Attorney Advisor Virginia Giroux of the Examining Division reexamined the application. She too determined that the subject graphic design lacks the artistic or graphic authorship necessary to support a copyright registration. (Letter from Giroux to Lewis of 12/13/2004, at 1.) Ms. Giroux explained that in order to be copyrightable, a work must not only be original, but it must also possess more than a *de minimis* quantum of creativity. (*Id.*) She explained, and agreed with the cases you cited that similarly explained, that this threshold is very low. (*Id.* at 2.) However, she also explained that not all independent efforts will qualify, as in the case of the subject work. (*Id.*) She cited *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) in further support of the proposition that sufficient authorship must constitute more than a trivial variation of public domain elements. Ms. Giroux noted that the requisite creativity can arise from a work's constituent elements alone or from the combination thereof. (*Id.* at 1.)

After describing the subject graphic design, Ms. Giroux concluded that "[s]quares and 'S' shapes, or many minor variation thereof are common and familiar shapes or designs, in

the public domain, and are, therefore, not copyrightable." (*Id.*) (citing 37 C.F.R. § 202.1). She noted that the incorporation of preexisting or public domain shapes into a work does not necessarily preclude its registration. (*Id.* at 3.) However, she found that the work's simple combination and arrangement of two public domain shapes in black and white coloring was *de mininis* authorship not sufficiently creative to constitute a copyrightable "work of art." (*Id.* at 1-2.)

Ms. Giroux cited the *Compendium of Copyright Office Practices II*, § 503.02(a) (1984) ("*Compendium II*") as well as several cases to support the proposition that although simple variations of standard designs and their simple arrangements may be aesthetically pleasing, they do not furnish a basis upon which to support a copyright registration. (*Id.* at 2) (citing *John Muller & Co.*, 802 F.2d 989, *Forstmann Woolen Co. v. J.W. Mays,* Inc., 89 F. Supp. 964 (E.D.N.Y. 1950), *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 1074 (D.D.C. 1991), *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) and *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983)).

Ms. Giroux also explained that in determining copyrightability, the Office does not consider a work's aesthetics, attractiveness, symbolism, visual effect, uniqueness, commercial success or design choices, nor the time and effort expended in creating the work. (*Id.* at 1, 2, 3) (citing *Compendium II, supra*, §§ 503.01, 503.02(a)). She noted that the Office does not judge art; nor is any work excluded from copyright protection based on the type of art it may be. (*Id.* at 3.) (citing *Bleistein*, 188 U.S. 239.) She summarized that "[b]ecause there are no elements in this design, either alone or in combination, upon which a copyright registration is possible, we regret that we must again refuse copyright registration for this particular work." (*Id.* at 3.)

Finally, Ms. Giroux suggested that the laws of unfair competition and trademarks can provide protection for some logos, and referred you to the Patent and Trademark Office. (*Id.* at 4.)

D. Second Request for Reconsideration

In the present undated request for reconsideration received by the Office on February 11, 2005, you request the Office to reconsider for a second time its refusal to register the copyright claim in the "Source of Knowledge" graphic design. (Letter from Lewis to Board rec'd 02/11/05, at 1.) The majority of your second request is identical to your first request. Besides quoting Ms. Giroux's conclusion that the subject work is not sufficiently creative to constitute a copyrightable work of art and quoting Webster's Dictionary definition of the word "Art," the only new text in the second request for reconsideration is a paragraph in which you argue that if the work were merely a *de minimis* design, "it would not be capable of presenting a three-dimensional effect and the illusion of an infinite path." (*Id.* at 5.) You

also note that the applicant made "an aesthetic choice" in designing its logo. (*Id.*) Finally, you argue that "[i]f the mere fact that Applicant's illustration allegedly includes two public domain shapes is enough to render its illustration uncopyrightable, the same could be said of the Superman logo which was merely an 'S' in a pentagon." (*Id.*)

III. DECISION

A. The Legal Framework

1. Copyrightable Subject Matter

Graphic designs are indeed eligible for copyright protection. *See*, 17 U.S.C. § 102(a)(5); *Compendium II, supra,* § 502. However, the fact that some graphic designs can qualify for copyright protection does not mean that all graphic designs necessarily will.

All copyrightable works, be they graphic designs or otherwise, must also qualify as "original works of authorship." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, *i.e.*, not copied from another work. The Copyright Office accepts at face value your assertion on the subject application for registration that your client Graceland College is the author and copyright claimant of this work. Therefore, the first component of the term "original" is not at issue in the analysis set forth herein. Second, the work must possess sufficient creativity. For the reasons set forth below, the Board has determined that the subject graphic design fails to embody the requisite amount of creativity, and, therefore, it is not entitled to copyright registration.

2. The Creativity Threshold

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, 499 U.S. at 345, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. The Court noted that the "requisite level of creativity is extremely low; even a slight amount will suffice." (*Id.*)

However, the *Feist* Court also ruled that some works (such as the work at issue in that case) fail to meet the standard. 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," 499 U.S. at 363, and that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also,* 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."); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01(B) (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

Even prior to the *Feist* Court's decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, *supra*, § 202.02(a). With respect to pictorial, graphic and sculptural works, *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*, *supra*, § 503.02(a).

In implementing this threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes, such as a square, are not sufficiently creative to sustain a copyright claim. *Compendium II*, *supra*, § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . ."); *Id.* § 202.02(j) ("Familiar symbols or designs . . . or coloring, are not copyrightable."). *See also, Id.* § 503.03(b) and 37 C.F.R. § 202.1(a).

Moreover, making simple alterations to otherwise standard shapes or familiar designs will not inject the requisite level of creativity. *Catalda Fine Arts*, 191 F.2d at 102-03 (What "is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"); *Compendium II*, *supra*, § 503.02(a) ("[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

3. Selection, Coordination and Arrangement

It is true that some combinations of common or standard shapes or other unprotectible elements can embody sufficient creativity with respect to how the elements are combined or arranged to support a copyright. *See, Feist*, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination or arrangement). However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. For example, in *Jon Woods Fashions*, 8 U.S.P.Q.2d 1870, the district court upheld the Register of Copyrights' decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctly arranged and

arrangement original enough that their combination constitutes an original work of authorship.") (emphasis in the original). The totality of this simplistic combination of public domain and non-protectible elements, even with the "S" superimposed on the square, is simply not sufficiently creative to support a copyright registration.

You argue that the "three-dimensional effect" of the "path" suggested by the "S" evidences the work's sufficient creativity. (Letter from Lewis to Board rec'd 02/11/05, at 5.) The Board disagrees. A three-dimensional illusion does not automatically warrant copyright protection for a two-dimensional work that otherwise has insufficient creativity to sustain a registration. The tapering of the top of the "S" simply does not inject sufficient creativity into this letter of the alphabet, regardless if by doing so it appears to be three-dimensional.

You also argue that "[i]f the mere fact that Applicant's illustration allegedly includes two public domain shapes is enough to render its illustration uncopyrightable, the same could be said of the Superman logo which was merely an 'S' in a pentagon." (Letter from Lewis to Board rec'd 02/11/05, at 5.) First, as stated above, the mere incorporation of public domain elements does not render a work uncopyrightable. Provided that it also includes copyrightable expression, either by virtue of other elements or the sufficiently creative combination and arrangement of public domain elements, copyright protection would indeed be available. Second, whether or not the "Superman logo" was registered for copyright protection, and we note that you decline to provide any authority to support this implication, has no bearing upon the copyrightability of the subject work. The Office must independently evaluate each work submitted for registration to determine if it meets the minimal, but existent, statutory requirements. It is simply not the Copyright Office's role to compare and contrast works submitted for registration.

C. Other Considerations

Several other arguments that you make, while perhaps important on personal or commercial levels, have no bearing on the determination of whether or not copyright registration is available for this work. For example, you state that the work "demonstrates more than minimal independent effort and artistry." (Letter from Lewis to Chief, Receiving and Processing rec'd 04/22/04, at 4.) However, the Supreme Court made clear in *Feist* that effort or "sweat of the brow" itself, regardless of the amount or result, is simply not an element to be considered in determining the copyrightability of a work. *Feist*, 499 U.S. at 353-54. To the extent your reference to "artistry" refers to the aesthetic value of the work, as both this Office and you have noted in the prior correspondence, aesthetic value cannot and should not be a factor in this determination. (Letter from Lewis to Chief, Receiving and Processing rec'd 04/22/04, at 2.)

You also argue that the graphic design "creates a suggestion of infiniteness," suggests "a path of discovery that leads to the source of knowledge," and has "a three-dimensional effect" that creates "the abstract illusion of the infinite path." (Letter from Lewis to Chief, Receiving and Processing rec'd 04/22/04, at 4; Letter from Lewis to Board rec'd 02/11/05, at 5.) Whether or not this is true (a judgment which is in the eye of the beholder), the Office can consider only those graphic elements actually expressed in the two-dimensional design, not the mental or emotional impression it may have upon certain viewers.

Finally, you note that the applicant made "an aesthetic choice" in creating the logo. (Letter from Lewis to Board rec'd 02/11/05, at 5.) Besides the fact that aesthetics are not relevant to the determination of copyrightability, all designs involve choices. The Copyright Office must evaluate those elements actually embodied in the work submitted for registration, not the other elements that could have been selected. Here, the elements that were expressed, a square and a tapered "S," are simply not sufficiently creative in and of themselves or in their particular combination to sustain a copyright registration.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the graphic design entitled "Source of Knowledge." This decision constitutes final agency action on this matter.

Sincerely,

/s/

Marybeth Peters
Register of Copyrights
for the Review Board
United States Copyright Office