United States Copyright Office
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July 22, 2008

Kevin P. Crosby, Esq.
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200 East Las Olas Boulevard, 19th Floor
Fort Lauderdale, FL 33301-2248

RE: (I) TECH ART II/ACES WITH LOGO/PLAYING CARD FACE LAYOUTS
(II) TECH ART II/NEW GENERATION/REVERSE ENTRY/PLAYING CARD FACE LAYOUTS
Copyright Office Control Number: 61-401-7763(B)

Dear Mr. Crosby:

I write on behalf of the Copyright Office Review Board ("Board") in response to your Second Request for Reconsideration, dated June 27, 2006, in which you request the Copyright Office ("Office") to reconsider its refusal to register two playing card face layouts entitled "Tech Art II/Aces with Logo/Playing Card Face Layouts" ("Aces with Logo") and "Tech Art II/New Generation/Reverse Entry/Playing Card Face Layouts" ("Reverse Entry"). You claim that these works are derivative works of one previously registered set of playing cards entitled "Cards for Playing Improved Game of Blackjack" registered as VAu-181-606 ("Initial Work"). The Board has carefully examined the present applications, the deposits and all correspondence concerning these applications, and affirms the denial of registration of "Aces with Logo" and "Reverse Entry."

I. DESCRIPTION OF WORKS

The present applications for registration describe the new material that has been added to the Initial Work in order to create "Aces with Logo" and "Reverse Entry" as "Revised card layouts." In your requests for reconsideration, you specify that the claimed new material is the following: (1) the positioning of the rank and suit markings (*e.g.,* Q or ♧) in "Reverse Entry" lower than the traditional positioning in public domain playing cards; (2) the positioning of the rank and suit markings in "Aces with Logo" higher than in the Initial Work; (3) the removal of a duplicate, rotated rank marking that appeared on the Initial Work but do not appear on "Aces with Logo" or "Reverse Entry;" (4) the addition of the applicant Tech Art's logo (the letters "TA" inside of a circle) on the ace card of "Aces with Logo;" and (5) the addition of an equilateral star inside of a circle on the 10-card and face cards of "Reverse Entry."[1] Examples of these features appear on Exhibit A.

[1] You actually state that the letter "P" inside a circle appears on the "Reverse Entry" 10-card and face cards, letter from Crosby to Chief Receiving and Processing of 11/23/05, at 3, but the deposit material you submitted with the original application includes a star in a circle rather than a "P" in a circle. The Board considers the work only as it

(continued...)

II. ADMINISTRATIVE RECORD

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

On April 29, 2005, the Office received from you two Form VA applications on behalf of your client Tech Art, Inc. to register two derivative works of "playing card face layouts." In a letter dated August 23, 2005, Visual Arts Section Examiner Joy Fisher Burns refused registration of these works because she concluded that the new material added to the preexisting elements does not contain a sufficient amount of original authorship. Letter from Burns to Crosby of 08/23/05, at 1.

B. First Request for Reconsideration

On November 23, 2005, you requested reconsideration of the Office's refusal to register "Aces with Logo" and "Reverse Entry." Letter from Crosby to Chief Receiving and Processing Division of 11/23/05, at 1. You stated that the necessary quantum of originality to sustain a registration for a derivative work is that of a "distinguishable variation" from the original material that is more than "merely trivial," particularly when considered as a whole, and argued that "Aces with Logo" and "Reverse Entry" satisfy this standard. *Id*. at 2 (citing *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951) and *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970)). You stated that the Initial Work contained rank and suit markings that were in lowered and/or rotated orientation than as depicted on public domain playing cards, and that the Initial Work was registered without appeal. *Id.* at 2. You claimed that the present works "include a combination of altered spatial arrangement, removal of, and addition to the preexisting material," specifically that the rank and suit markings on the 10-card and face cards are not lowered in "Aces with Logo" but are further lowered in "Reverse Entry," the duplicate rotated rank has been removed from both decks, the applicant's logo (TA in a circle) has been added to the ace cards in "Aces with Logo," and a "P" [sic] in a circle has been added to the 10-card and face cards in "Reverse Entry." *Id.* at 3.

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

In response to your first request for reconsideration, Attorney Advisor Virginia Giroux of the Examining Division reexamined the applications. She too determined that the subject works do not contain any new material that would support a copyright claim. Letter from Giroux to Crosby of 03/27/06, at 1. She concluded that the elements for which copyright is being sought, viewed alone or in combination, amount to changes in layout or format for which copyright registration is not available. *Id.* at 2-3.

D. Second Request for Reconsideration

In a letter dated June 27, 2006, you request the Office to reconsider for a second time its refusal to register the copyright claims in "Aces with Logo" and "Reverse Entry." Letter from Crosby to Board of 06/27/06, at 2. You incorporate by reference your arguments set forth in your first request for reconsideration. *Id.* You state that "a variation from one work to the next that is sufficient to render the derivative work distinguishable from its prior work in any meaningful manner

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[1](...continued)
appears in the deposit material.

will be sufficient to support copyrightability." *Id.* You note that the Copyright Office confirmed that works should be viewed in their entirety, but posit that the Office ignored this principle in its examination of "Aces with Logo" and "Reverse Entry." *Id.* at 3. You state that the Office's rejection is at odds with *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), because the Office did not compare the overall impression of the Initial Work to that of the subject works, and because *Fiest* does not address the noncopyrightability of general format and layout. *Id.* at 3-4.

III. DECISION

A. The Legal Framework

1. Copyrightable Subject Matter

Two dimensional designs and other visual artwork are eligible for copyright protection pursuant to 17 U.S.C. § 102(a)(5). However, the fact that some visual material can qualify for copyright protection does not mean that all material necessarily will. All copyrightable works must also qualify as "original works of authorship." 17 U.S.C. § 102(a). When copyright is claimed in a derivative work, the new material that has been added to pre-existing matter must itself qualify as an original work of authorship in order to receive copyright protection. 17 U.S.C. § 103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.") The originality called for in a derivative work "lies in the manner in which a pre-existing work is transformed." 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 3.02(B) (2002) ("*Nimmer on Copyright*").

As you correctly noted, the term "original" as used with respect to copyright consists of two components: independent creation and sufficient creativity. Letter from Crosby to Board of 06/27/06, at 4 and Letter from Crosby to Chief Receiving and Processing Division of 11/23/05, at 3 (citing *Feist*, 499 U.S. at 358). 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 applications for registration that your client Tech Art, Inc. is the author of the new material that has been added to create "Aces with Logo" and "Reverse Entry." 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 new material fails to embody the requisite amount of creativity, and therefore is not entitled to derivative work 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*, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. As you noted, this threshold is "not particularly stringent." Letter from Crosby to Board of 06/27/06, at 4. The Court explained that the "requisite level of creativity is extremely low; even a slight amount will suffice." *Feist*, 499 U.S. at 345.

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."); *Nimmer on Copyright* § 2.01(B) ("[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 of Copyright Office Practices II,* § 202.02(a) (1984) (("*Compendium II*") states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." 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." *Id.* § 503.02(a). 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.'" *Catalda Fine Arts, Inc.*, 191 F.2d at 102-03. In implementing this threshold, the Office and courts have consistently found that geometric shapes, such as a circle or a star, and lettering are not sufficiently creative to sustain a copyright claim. *Compendium II*, § 503.02(a) ("[[I]t is not possible to copyright common geometric figures or shapes . . .."); 37 C.F.R. § 202.1(a) ("[F]amiliar symbols or designs . . . [and] lettering" "are examples of works not subject to copyright and applications for registration of such works cannot be entertained.").

3. Selection, Coordination and Arrangement

It is true that some combinations of unprotectible elements can embody sufficient creativity with respect to how the elements are selected, coordinated and 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 arranging non-protectible elements does not automatically establish creativity where the arrangement itself is simplistic. For example, in *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988), 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 printed, did not contain the minimal amount of original artistic material to merit copyright protection. Similarly, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986). *See also, Compendium II*, § 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."). As a practical matter, general formatting or layout on a page or other printed material, such as numerical or alphabetical markings on playing cards, does not in and of themselves afford the opportunity for an author to express a sufficient amount of creativity to warrant copyright protection. *Compendium*

II, § 305.06 ("Copyright does not protect either the general format or layout, or the idea expressed by either of these.")[2]

B. Analysis of the Works

You argue that given the minimal amount of creativity necessary to sustain a copyright registration, the new material added to create "Aces with Logo" and "Reverse Entry," particularly when the playing cards are viewed in their entirety, meets the applicable threshold. Letter from Crosby to Board of 06/27/06, at 3-4. Although the Board agrees that the creativity standard is very low, the Board disagrees with your conclusion that these works satisfy this standard.

You claim that the subject works "include a combination of altered spatial arrangement, removal of, and addition to the preexisting material." Letter from Crosby to Chief Receiving and Processing Division of 11/23/05, at 3. Specifically, you identify the following elements as providing a basis for copyright protection: (1) the positioning of the rank and suit markings (*e.g.,* Q or ♧) in "Reverse Entry" lower than the traditional positioning in public domain playing cards; (2) the positioning of the rank and suit markings in "Aces with Logo" higher than in the Initial Work; (3) the removal of a duplicate, rotated rank marking that appeared on the Initial Work but do not appear on "Aces with Logo" or "Reverse Entry;" (4) the addition of the applicant Tech Art's logo (the letters "TA" inside of a circle) on the ace card of "Aces with Logo;" and (5) the addition of an equilateral star inside of a circle on the 10-card and face cards of "Reverse Entry."

These elements, which the Board has evaluated both individually and in their totality as they appear on the cards, simply do not possess the requisite amount of creativity. There is at most *de minimis* artistic expression, if indeed any, in the slightly lowered or raised placement of a "Q" or a "3", for example, on "Reverse Entry" and "Aces with Logo" cards. In fact, your statements indicate that there is no possible copyright protection for the raised placement in "Aces with Logo." You state that the Initial Work lowered the placement from the traditional public domain placement, letter from Crosby to Chief Receiving and Processing of 11/23/05, at 2, but that "Aces with Logo" raised the placement for the 10-card and face cards from the Initial Work's placement. *Id*. at 3. Logic therefore dictates that this revised placement in "Aces with Logo" is actually the same as the public domain placement, negating any possibility for copyright to arise.

The removal of the duplicate, rotated rank markings similarly has no ability to contribute to the copyrightability of these works. While it may be true that the applicant chose to "remove" this marking from the Initial Work in order to create the subject works, the process in which an artist

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[2] Although "Aces with Logo" and "Reverse Entry" are not books, Section 305.07 of *Compendium II* provides some context to explain why mere graphic layout is not protectible:

> Book designs may include choice of style and size of typeface, leading (space between lines of type), placement of folio (page numbers), arrangement of type on pages, and placement, spacing, and juxtaposition of text and illustrative matter - - in short, all the physical and visual attributes of a book. After having issued a notice of proposed rulemaking and having held a hearing, the Copyright Office decided not to change its long-standing practice of not registering claims to copyright in book design. The Office concluded that "the arrangement, spacing, or juxtaposition of text matter which is involved in book design falls within the realm of uncopyrightable ideas or concepts." *See* 46 Fed. Reg. 30651 (1981).

engages is not subject to copyright protection. 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.") Moreover, copyright protects only what is actually expressed in the work, not that which is not expressed.

The "TA" in a circle and the equilateral star in a circle are also unable to support a copyright claim because copyright is not available for letters and standard geometric shapes. The fact that one is placed inside of the other or that the "T" is slightly lower than the "A" evidences minimal creativity, less than what is statutorily required for protection.

The Board agrees that the individual elements of a work should be evaluated in their specific combination in determining potential copyrightability. In these instances, however, the totality of the selection, coordination and arrangement of the above-described elements is nothing appreciably more than the individual elements themselves. The public domain and removed elements are not at issue as explained above. Therefore, the only elements you have identified as possibly contributing to copyright protection in the purported derivative works are the lowered/raised rank and suit markings and the "TA" or star in a circle. The Board simply can find no minimal amount of artistic expression in the combination of these elements. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("It is true, of course, that a *combination* of unprotectible elements may qualify for copyright protection. [Citations omitted.] But it is not true that *any* combination of unprotectible elements automatically qualifies for copyright protection. A combination of unprotectible elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.") (emphasis in the original). Moreover, the placement of the rank and suit markings, the logo and the encircled start on the card is tantamount to general format and layout of printed matter, which itself is not copyrightable.

You seem to argue that *any* distinguishable variation from a copyrighted work is itself copyrightable, and contend that the elements discussed above render "Aces with Logo" and "Reverse Entry" distinguishable from the Initial Work and therefore copyrightable. Letter from Crosby to Board of 06/27/06, at 2. Unfortunately, such an argument would misinterpret the law. Just because a later version can be identified from an earlier, copyrighted version does not mean that the later version is necessarily entitled to copyright protection. Any elements appearing in both the later and earlier version would already be protected by the earlier version's copyright. Therefore, any copyright in the later version would protect only the new material that appears only in the later version. It is for this reason that the new material itself must embody a threshold amount of creativity. If not, there simply is no reason for a second registration to exist. The string of cases that you cite to support your truncated reading of the law comes from footnotes 22 and 22.1 of *Nimmer on Copyright*, § 3.03[A]. However, the additional text and footnotes in that section make clear that "Any variation will not suffice . . .," and provides a litany of examples in which the courts found that the variations were too minor, trivial or otherwise not meaningful enough to be able to embody sufficient creativity. *Nimmer on Copyright* succinctly explains, "[A]ny work based in whole, or in substantial part, upon a pre-existing (or 'underlying') work, *if it satisfies the requirements of originality* . . . will be separately copyrightable." *Nimmer on Copyright* § 3.01 (emphasis added). "A derivative work consists of a contribution of *original* material to a pre-existing work . . .." *Id.* § 3.03[A] (emphasis added.) As previously discussed, the term originality requires a certain degree of creativity. The Board does not dispute that "Aces with Logo" and "Reverse Entry" contain a

number (albeit a small number) of elements and even arguably an arrangement not present in the Initial Work. The fatal defect in these later works in terms of copyrightability is that the new material does not consist of sufficiently *creative* elements or embody a sufficiently *creative* arrangement.

C. Other Considerations

Several other points that you make have no bearing on whether or not copyright protection is available for these purported derivative works. For example, you state that the "Applicant utilized its own artistic judgment to create unique works of applied art." Letter from Crosby to Chief Receiving and Processing Division of 11/23/05, at 2. All creations require judgment; it is only the resulting expression that is evaluated for copyrightability, not the number or character of the decisions an artist may make in creating a particular work. Furthermore, while uniqueness may bear on the availability of patent protection for a work, it is immaterial to its copyrightability. In fact, two identical works may both be afforded copyright protection provided that there were independently created and possess the necessary quantum of creativity.

Similarly, the fact that the Initial Work was registered without appeal is immaterial to whether or not these later versions embody new material that itself is subject to copyright protection. Letter from Crosby to Chief Receiving and Processing Division of 11/23/05, at 2. The Board does not dispute that the playing cards as a whole contain copyrightable subject matter. You point out that the rank and suit markings on the Initial Work were lower and in some cases in a rotated orientation from the traditional placement, and imply that since these playing cards which contained altered rank and suit markings were registered, then the later versions which also contain altered rank and suit orientation should also be registered. *Id.* at 2. However, the fact that registration is available for a work that contains some copyrightable subject matter does not mean that all parts of the registered work are necessarily copyrightable. Uncopyrightable elements themselves do not secure copyrightable status simply because they are incorporated into an otherwise copyrightable work.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the two derivative work playing card face layouts entitled "Tech Art II/Aces with Logo/Playing Card Face Layouts" and "Tech Art II/New Generation/Reverse Entry/Playing Card Face Layouts." This decision constitutes final agency action on this matter.

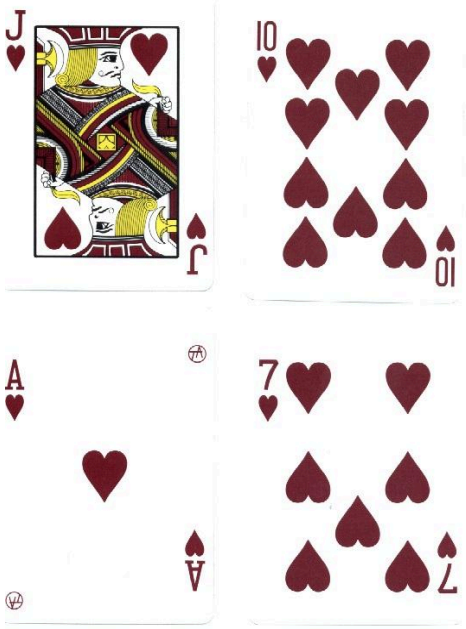
Sincerely,

/s/

Tanya M. Sandros
General Counsel,
for the Review Board
United States Copyright Office

EXHIBIT A

“ACES WITH LOGO”



“REVERSE ENTRY”

