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April 1, 2010

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RE: CD/DVD Label & Insert Sheet #5696 and 6 others
Control No. 61-316-6553(C)
Control No. 61-223-3859(G)

Dear Mr. Kauth:

I am writing on behalf of the Copyright Office Review Board in response to your letters dated August 25, 2006, requesting reconsideration of refusals to register works summarily titled "CD/DVD Label & Insert Sheet and six others" as two-dimensional artworks in the form of label sheet layout designs on behalf of your client, Avery Dennison Corporation ("Avery"). We apologize for the delay in our response. The Board has carefully examined the applications, the deposits, and all correspondence concerning these applications and affirms the denial of registration of the works.

I. DESCRIPTION OF THE WORKS

The descriptions of the label designs at issue are as follows:[1]

1. **CD/DVD Label and Insert Sheet #5696.** Adhesive labels for CDs or DVDs, as well as labels for "jewel case" inserts. This work features an arrangement of shapes, including circles, squares, rectangles (some with rounded corners, some not), and other shapes, all on a single sheet. The lines dividing the shapes vary from dash-type perforations, to dotted lines, which intersect each other thereby forming additional shapes.

2. **CD/DVD Label and Insert Sheet #8696.** Adhesive labels for CDs or DVDs, as well as labels for "jewel case" inserts. This work features an arrangement of shapes, including circles, squares, rectangles (some with rounded corners, some not), and other shapes, all on a single sheet. The lines dividing the

[1] Because these deposit copies are white in color, blank, and the only appearing shapes within each work are formed by perforated, or other, straight lines, we have had difficulty reproducing the deposits. We therefore describe the composition of the deposits textually.

shapes vary from dash-type perforations, to dotted lines, which intersect each other thereby forming additional shapes.

3. **CD Stomper Complete Kit #98107.** Adhesive labels for CDs or DVDs, labels for "jewel case" inserts, and other labels. This work features an arrangement of several sets of concentric circles, rectangles and other shapes, including crescent-shaped openings. All of these elements are arranged on a standard sized sheet of paper.

4. **Index Maker Easy Apply Clear Label Divider**. Label divider. This work features a selection of lines having both straight and curved portions, forming elongated, rectangular shapes with rounded corners and some also having a middle rounded indentation. The elements are arranged on a single sheet to allow printing of these multiple label dividers at a time.

5. **Style Edge Insertable Plastic Reference Dividers**. Reference dividers. This work features a series of elliptically-shaped elements, as well as a series of vertical and horizontal intersecting lines. These elements combine to form additional shapes and designs. All of the elements are arranged on a single standard-size sheet to allow for printing multiple labels on a single pass through a standard printer.

6. **Photo ID Adhesive Badge #2940.** Badge design. This work features a rectangle with rounded corners, with straight lines intersecting each other, above and below the rectangle, thereby forming other shapes, including triangles and trapezoids. All of the elements are arranged on a single sheet to allow for printing single labels and a 4" x 6" sheet size was selected for compatibility with standard-size photo paper.

7. **Photo ID Adhesive Badge #2942.** Badge design. This work features several rectangles with rounded corners, arranged such that they share a common side, and bordered above and below by horizontal lines which extend only partially across the sheet. All of the elements are arranged on a single sheet to allow for printing single labels, and a 4" x 6" sheet size was selected for compatibility with standard size photo paper.

II. ADMINISTRATIVE RECORD

A. Initial submissions

In March 2005, the Copyright Office received seven Form VA applications from your client, Avery Dennison Corporation, to register seven separate works as two-dimensional

artworks in the form of label sheet layout designs. In a letter to you, dated September 21, 2005, Visual Arts Section Examiner James Shapleigh stated that he refused registration of these works because they lacked the authorship necessary to support a copyright claim. Mr. Shapleigh explained that a visual arts work must contain a minimum amount of pictorial, graphic or sculptural authorship to be registered. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). He further stated that copyright law does not protect familiar symbols or designs, basic geometric shapes, and lettering or coloring. Mr. Shapleigh concluded that the submitted works failed to satisfy the requisite legal standards. Letter from Shapleigh to Gary J. Nelson of 9/21/2005, at 1.

B. First requests for reconsideration

On December 20, 2005, the Office received your requests to reconsider its refusal to register the seven works at issue.[2] You asserted that the label designs contain sufficient creativity for copyright protection. You noted that Mr. Shapleigh's letter stated that "Copyright does not protect familiar symbols or designs, basic geometric shapes. . . ." but argued that such an overbroad, *per se* rule is improper as each work must be considered on its own merits. You further argued that the examiner erred in his analysis because creative arrangements of familiar symbols or designs, or basic geometric shapes, have frequently been found to be "original works of authorship" deserving copyright protection. Letter from Kauth to Copyright Office, R & P Division, of 12/19/2005, at 2.

You stated that Avery has registered similar works with the Copyright Office. For example, you note that Avery previously registered an Optical Disc Labeling System (TX 5-068-346); Optical Disc Labels and Clip Art (VA 1-005-272); various Tab Inserts for Dividers (TX 5-094-046, TX 4-993-555); Laser Printer Labels (VA-537-159, VA 537-160); Mini Media Labels (VA 1-225-349); and Processing Guides (Txu-1-231-150, TX 6-162-983). You commented that although containing different creativity and expression from the current works, and utilizing different designs and arrangements, several of the previous works registered by Avery could be classified within the same "type"of goods. These circumstances, you stated, illustrate the error of rejecting goods based on their type or class. You asserted that the previous works registered by Avery were found to contain sufficient creativity and expression to merit copyright protection. Letter from Kauth of 12/19/2005, at 3.

You argued that the Supreme Court set a very low creativity threshold to merit copyright protection. Letter from Kauth of 12/19/2005, at 3-4, citing *Feist*. You further stated that, in other cases, courts have recognized a minimal degree of creativity necessary

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[2] Although you submitted a separate letter requesting reconsideration for each of the seven works and each letter described each of the seven as to its particular authorship composition, the letters were essentially identical in their argumentation and legal reasoning.

for copyright protection in the selection and arrangement of basic geometric shapes [in video games] as well as in the arrangement of known lines, typefaces and colors [on the cover of a periodical]. Letter from Kauth of 12/19/2005, at 4, citing *Atari Games Corp. v. Oman*, 979 F.2d 242, 245 (D.C. Cir. 1992); *Reader's Digest v. Conservative Digest*, 821 F.2d 800, 806 (D.C. Cir. 1987). You concluded that whether considered as containing new design elements, or simply a collection of preexisting materials arranged in even a slightly creative way, the works at issue are original works of authorship deserving copyright protection.

C. Examining Division's response

In a May 31, 2006, letter addressed to you, Examining Division Attorney-Advisor, Virginia Giroux-Rollow, declined to register a copyright claim in any of the seven works because she found that they did not contain any authorship that would support copyright registration. She emphasized that blank forms and similar works designed to record information cannot be copyrighted. Letter from Giroux-Rollow to Kauth of 5/31/2006, at 1, citing 37 C.F.R. § 202.1.

Ms. Giroux-Rollow further stated that to be regarded as copyrightable, a work must not only be original, but it must also "possess more than a *de minimis* quantum of creativity." *Id.* at 1, citing *Feist*. She further stated that originality, as interpreted by the courts, means that the authorship must constitute more than a trivial amount or arrangement of public domain or preexisting elements, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951). She questioned whether there was a sufficient amount of original and creative artistic, graphic, or textual expression in the works submitted for registration. Letter from Giroux-Rollow of 5/31/2006, at 1.

Ms. Giroux-Rollow explained that geometric shapes such as circles, ovals, squares, and rectangles, or any minor variation thereof, are common and familiar shapes in the public domain and are not copyrightable. She stated that other than the shapes of the works, which are not copyrightable, there are no pictorial, graphic, or textual elements on the surface of these seven works. She further added that even the simple combination and arrangement of the perforated shapes on the surface of the works would not support a copyright registration. Letter from Giroux-Rollow of 5/31/2006, at 2, citing *Compendium of Copyright Office Practices, Compendium II*, § 503.02(a) (1984)("*Compendium II*"). She also stated that *Compendium II's* principles have been confirmed by several judicial decisions, citing *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 80 F.Supp. 964 (E.D.N.Y. 1950); *The Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988). Ms. Giroux-Rollow added that she views the particular placement and arrangement of the shapes and lines on the surface of each work akin to layouts and formats that are not copyrightable, citing *Compendium II*, §§ 305.06 & 305.07 (1984).

Ms. Giroux-Rollow also stated that the Office follows the principle enunciated in *Atari Games Corp. v. Oman*, 898 F.2d 878 (D.C. Cir. 1989) that a work should be viewed in its entirety, with individual non-copyrightable elements judged in their overall inter-relatedness within the work as a whole. She concluded that even under the *Atari* standard of review for copyrightability, however, the arrangement and combination of the few public domain elements embodied on the surface of each of the seven works failed to rise to the level of copyrightable authorship necessary to support registration. With regard to your reliance on *Reader's Digest v. Conservative Digest, Inc.*, 821 F.2d 800 (D.C. Cir. 1989), Ms. Giroux-Rollow found that the combination of elements referred to by the court in that case was more complex that the elements in the instant case. She reiterated that in *Reader's Digest* the work involved a graphic pattern of multiple elements, shapes, and colors combined with textual elements juxtaposed in an overall design that resulted in a distinctive arrangement and layout. She found that this was not the case for the works you submitted for registration. Letter from Giroux-Rollow of 5/31/2006, at 3.

With regard to your argument that the Office has registered works similar to the ones in contention, Ms. Giroux-Rollow stated that the Office does not compare works that have already been registered or refused registration and that each work is examined independently and on its own merits. She concluded, however, that because there were no artistic, graphic and/or textual elements or features in the seven works at issue, taken either alone or in combination, that could form the basis of copyrightable authorship, copyright registration must be denied. *Id.* at 3-4.

D. Second requests for reconsideration

In letters dated August 25, 2006 (see fn.1, above, concerning the essential sameness as to their legal reasoning), you requested reconsideration of the Office's second refusal to register the seven works as two-dimensional artworks in the form of label sheet layout designs. In support of your August 25, 2006 requests, you essentially reiterate the arguments you made in your first requests of December 2005, and emphasize that your seven submissions to the Office are original works of authorship that merit registration. You argue that each work must be considered on its own merits and that creative arrangements of familiar symbols or designs, or basic geometric shapes, have frequently been found to be "original works of authorship." Letter from Kauth to Copyright Office, R & P Division, of 8/25/2006, at 3. You state that the Office has previously registered similar works and that registrations should issue on this basis. You explain the allegedly creative arrangements of shapes and lines on the labels at issue and argue that there is sufficient originality in each, worthy of copyright protection. You again rely upon *Atari* and *Reader's Digest* to support your position. Letter from Kauth of 8/25/2006, at 4-5. You complain that the works were "generically" rejected by a single rejection letter, and all seven works were rejected again upon reconsideration, again by a single "generic" letter, which does not address the specific characteristics of each work. *Id.* at 7. You believe that the creativity inherent in the seven

works has been overlooked, both in the original rejection letter as well as in the rejection upon reconsideration, and conclude that the rejections should be reversed and the works registered. *Id.* at 6-7.

III. DECISION

After reviewing the applications and the arguments you presented, the Copyright Office Review Board affirms the Examining Division's initial refusal to register the seven label sheet layout designs as two-dimensional artworks because they lack the necessary creativity required for registration.

The Review Board has also considered the single work, MINI MEDIA LABEL SHEET LAYOUT DESIGN NO. 1, registered in March, 2004; we consider this decision to have been made in error and are proposing to cancel this registration. We will address our cancellation proposal at the end of this letter and explain the timeframe in which you may reply.

A. Feist and creativity

In determining whether a work has a sufficient amount of creative authorship necessary 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. However, the Court also held 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 a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. While "the standard of originality is low, . . . it does exist." *Id.* at 362.

The *Compendium of Copyright Office Practices,* (hereinafter, Compendium II) has long recognized this principle stating that "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a)(1). With respect to pictorial, graphic, and sculptural works, the class within which the labels at issue fall (*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). The *Compendium* recognizes that it is 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 . . . A simple

> combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations [also cannot support a copyright].

Id. See also 37 C.F.R. § 202.1(a) ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained.").

Case law and copyright scholars confirm these principles. *See, e.g., Forstmann,* 89 F. Supp. 964 (label with words "Forstmann 100% Virgin Wool" interwoven with standard *fleur-de-lis* could not support a copyright claim due to lack of authorship); *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*, 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); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable); 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.").

We do not dispute that a substantial amount of time and effort went into creating the labels at issue. However, as you know, *Feist* struck down the "sweat of the brow" doctrine. *Feist*, 499 U.S. at 353-354. Therefore, factors such as the labels' commercial success, the expense of creating it, the human effort expended in creating it, the professional skills and expertise of the designer[s], and the artistic recognition of the design are not relevant to the Board's determination of the copyrightability of the seven labels. *See, e.g., Homer Laughlin China Co.*, 22 U.S.P.Q.2d at 1076.

B. Blank forms; other case law

While blank forms and general formats or layouts are not copyrightable under the Office's regulations and practices, *see* 37 C.F.R. § 202.1. and *Compendium II* at §§ 305.05, 305.06, certain graphic label designs are eligible for copyright protection as two-dimensional artworks. *See* 17 U.S.C. § 102(a)(5); *Compendium II* at § 502. However, the fact that some graphic designs can qualify for copyright protection does not mean that all graphic designs necessarily will. We have carefully reviewed each one of your seven submissions. The Board agrees that there is no creative authorship in any of the label designs at issue.

Section 102(b) of Title 17 is a codification of the early case of Baker v. Selden, 101 U.S. 99, 102 (1879), where the Court explained that a bookkeeping system including blank forms with ruled lines and headings did not preclude another from publishing a book containing similar forms to achieve the same result. The court reasoned that:

> To give the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud.

Under Baker and its progeny, the Copyright Office has followed a longstanding practice of denying registration of a claim in a form designed merely to record information if that form contains less than a *de minimis* amount of original literary or artistic expression. Moreover, it is doubtful whether the selection of the boxes and shapes appearing on the label designs which you have submitted creates an expression that conveys information. We again describe the following labels designs:

CD/DVD LABEL & INSERT SHEET #5696– a sheet containing a circle on the top-half of the sheet with a center hole meant to represent the shape of a CD or DVD; this circle is surrounded by a square, the size of the circle with very short, angled portions touching four points of the circle. The rest of the page has a second empty square shape beneath the top square, with two empty rectangle shapes, one on top of the other, as margins on both sides of the square; the top-placed square is margined on the left with two thin, rounded-edged rectanges.

CD/DVD LABEL & INSERT SHEET #8696– a sheet which contains the exact empty shapes as those appearing in #5696, with the exception that the circle with a center hole meant to represent the shape of a CD or DVD appears on the bottom-half of the sheet, or paper, and the top half of the sheet contains the empty square shape with two empty rectangle shapes, one on top of the other, as margins on both sides of the empty square. In opposite placement to #5696, the bottom-placed square is margined on the left with two thin, rounded-edged rectanges.

CD STOMPER COMPLETE KIT #98107– a sheet containing the identical configuration of a circle with a center hole meant to represent a CD or DVD, with the exception that the outer circle shape has two touching, rounded rectangular shapes as if they are meant to be tab shapes to the circular disk. Next to the large center-hole circle are two smaller, exact replicas of this shape, margined by two thin, vertical rectangular shapes.

PHOTO ID ADHESIVE BADGE #2940– a smaller sheet of paper with a center round-edged rectangular shape with the top and bottom of this simple shape showing two X-shaped lines cutting through a horizontal straight line. The horizonal line, cutting through the "X" above and below the center rectangle, produces a shape of a triangle.

PHOTO ID BADGE INSERT #2942– a smaller sheet of paper with two round-edged rectangular shapes toughing each other. The top and bottom of this simple shape does NOT show two X-shaped lines cutting through a horizontal straight line. Only a straight horizontal line appears above and below the two rectangles.

INDEX MAKER EASY APPLY CLEAR LABEL DIVIDER– a sheet containing ten horizontally placed, thin rectangles with rounded edges, and a rounded indentation approximately every several inches along the length of the rectangle, meant for label dividers.

STYLE EDGE INSERTABLE PLASTIC REFERENCE DIVIDERS– a sheet containing a center design of four vertically placed ovals, two-by-two, each two ovals touching each other and the point of touching flattened by a vertical line which also appears at the outer margin of each oval and flattens it. The two sets of four ovals are vertically placed on top of each other and divided by a horizontal line. Although the sheet also contains instructional and copyrightable text [appearing in large rectangles as the outer edge of the sheet], the registration application form gives only '2-dimensional artwork' as the authorship statement.

You have described the nature of these works on the registration applications as 'label sheet layout designs'and it is clear that these forms are meant to be placed– the designs themselves are placed on adhesive backing– on other objects and, in some instances, information may be written or typed on the labels themselves. The labels are not the traditional blank forms which are meant to record information; like blank forms, however, they lack the information or expression which generally informs. We point out that the intended use does not disqualify a work from being considered copyrightable when it possesses the necessary quantum of authorship. As we noted in our 1980 termination of the inquiry regarding Blank Forms, "Our blank form regulation does not preclude registration of any genre of works *per se*; we examine each form on the basis of whether or not it contains a sufficient amount of original literary or artistic expression to be entitled to copyright protection." 45 Fed. Reg. 63297 (September 24, 1980). Avery Dennison Corp. has not claimed copyright in the forms per se but, rather, in the 2-dimensional artwork [or "layout design" as you have entered as a description of the nature of the work at issue here] appearing on each sheet of paper submitted.

The artwork consists, in each case, of a few designs and those designs are simple, outline forms with no embellishment. As we have stated previously, common shapes such as circles, ovals, rectangles, straight lines, or concentric circles, or minor variations of such commonplace shapes, are not protectible under a long history of case law, *see above*. We realize that your position concerning registrability is that an "author's selection and arrangement may entail the minimal degree of creativity needed to bring the work within the protection of the copyright laws." Letter from Hauth of 8/25/2006, citing *Atari*, 979 F.2d at 245. Using this principle, you argue that the overall arrangement of "[A] plethora of circles, rectangles, and other designs, including two crescent-shaped holes," ".... of circles,squares, rececctangles, other shapes and intersecting line designs creatively arranged on as satandard size sheet," ".... of rectangles, having rounded corners, and other lines, are creatively arranged on an insert sheet for identification badges," ".... of a plethora of elliptical

elements, horizontal and intersecting line designs, and other resultant shapes and designs are creatively arranged on a single sheet for divider labels." Letters from Hauth, all dated 8/29/2006, at various pages.

You have described the authorship in the seven works at issue in terms of common or geometric shapes and familiar graphic elements such as straight lines. We agree that a work must be judged in its entirety, with analysis of the combination of the constituent elements of a work of authorship as well as the relationship of such elements to each other. The selection and arrangement of individual design elements that are *de minimis* in themselves, *i.e.*, they carry no copyright protection as such, within an overall design, be it 2-, or 3-dimensional, may be protected, depending on the use of such elements and whether the chosen elements are sufficient in quantity within the design as a whole. The Ninth Circuit said it well: "But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable 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." *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The Ninth Circuit quoted *Feist* to bolster its explanation: "[T]he principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection." 323 F.3d at 811, *citing Feist*, at 358. The focus, therefore, must be on the overall design that fairly may be said to be synonymous with the selection, coordination, or arrangement of individual (possibly) trivial elements, brought together to form a more-than-trivial, copyrightable overall design.

The designs that have been submitted for these works – e.g., the bare-bones representation of a CD or DVD circular disk bordered by outlines of two rectangles, one atop the other; a plain square, again,bordered by two bare-bones rectangles, one atop the other; the same outline of the circular CD bordered by two smaller identical representations of the CD; a barebones outline of elongated, horizontal rectangular squares that can be used for filing. All of these designs contain few [or very few] elements that are organized or laid out in a simple manner and, in some instances such as the rounded empty rectangular shape or the elongated empty rectangles, the 'design' can fairly be said to be determined by the use of the adhesive paper shapes which constitute the designs.[3]

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[3] *Useful Articles*. While not specifically raised either in your submissions or the letters generated by the Examining Division, it must be recognized that the forms at issue here likely could be considered useful articles that are not subject to copyright protection. A useful article is defined as having "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101 (definition of "useful article"). Also, any article that is "normally a part of a useful article is considered a useful article." *Id.* Based on that statutory definition, the Avery labels are useful articles because they are mere forms by which end-users cut and paste onto another object. They serve as media which consumers make useful through their own handiwork or insertion of data or information. That is, the labels are intentionally left blank so that others can make their own unique and useful creations. As useful articles, without any separable

C. Public domain elements within a work of authorship

We point out, again, that the Office does indeed follow in its examining practices the principle of *Atari:* works should be judged in their entirety of composition and not in terms of the protectibility of individual elements within the work. As an example of case law explanation for this examining principle of viewing a work submitted for registration in a holistic, unified approach which takes into account not only individual constituent elements within the work but the relationship of those elements, the manner in which they are configured as well as the number of such elements, we cite *Compaq Computer Corp. v. Ergonome, Inc.*, 137 F.Supp. 2d 768, 775 (S.D. Tex. 2001) for the principle that the combination of elements and their relationship to each other should be examined for originality: "atomistic parsing is inappropriate in this copyright inquiry; copyrightability of text [*note– the Copyright Office believes it may be added here "of any category of authorship elements"*] turns not on the number of letters in its component words, or on the words themselves (for no common word may be copyrighted...) but rather, on whether the relationship of the words evinces a modicum of creativity by the author."

The Review Board agrees with this principle that the use of public domain elements may satisfy the requirement for copyrightable authorship of a work as a compilation, through their selection, *coordination*, or arrangement. Works based on public domain elements may be copyrightable if there is some distinguishable variation in their selection, arrangement, or modification that reflects choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist* at 359. *See also* 17 U.S.C. §101 (definitions of "compilation" and "derivative work"). You have cited in your support of these claims the *Reader's Digest* case. We note that the work in that case, a magazine cover design, consisted of elements that were not individually copyrightable. However, the D.C. Circuit ruled that the specific layout of lines, typefaces, and colors had been combined and arranged in the cover design so that it was a unique graphic design and layout. *Reader's Digest*, 821 F.2d at 806. Whereas the Court in that case found the layout and arrangement sufficiently distinctive to be entitled to protection, there is nothing distinctive about the arrangement or positioning of public domain elements in the design of the labels comprising the seven works at issue here. In light of *Compendium II's* instructions, the Copyright Office's regulations, and extant case law, we conclude that the design elements of the works at issue here are so few, so commonmplace, and so bare that, taken as a unified design, they cannot constitute more than *de minimis* authorship. As such, none of the works can be considered copyrightable.

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creative elements, they cannot be registered for copyright protection. Our analysis, however, is based on the *de minimis* composition of the 2-dimensional designs in their entireties.

Given the considerable case law sustaining Copyright Office decisions refusing the registration of simple designs, the Office, nevertheless, recognizes that the use of public domain elements and/or commonly known shapes can result in a copyrightable work as long as the overall resulting design or overall pattern, taken in its entirety, constitutes more than a trivial variation of such elements. *Alfred Bell & Co.*, 191 F.2d at 103; *Atari Games Corp.*, 979 F.2d at 244 - 245; *Compendium II*, § 503.02(a). Again, we apply this standard by examining a work to determine whether it contains elements, considered either alone or taken as a whole, on which a copyright can be based. *See also* 17 U.S.C. 101 (definitions of "compilation" and "derivative work"). This principle underlying the bringing together of public domain elements does not, of course, mean that *all* combinations and arrangements of commonplace, simple, or unprotected-in-themselves elements will rise to the level of copyrightable authorship. Again, see *Satava*, 323 F.3d at 811. As stated in *Compendium II*, § 503.02(a): "It is not possible to copyright . . . a simple combination of a few standard symbols such as a circle, a star, and a triangle with minor linear or spatial variations."

We note that in theory an author creating any work has an unlimited choice of alternatives. However, it is not the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See, e.g., Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (an "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright). Here, we conclude that the seven works, upon examination of the simple geometric designs appearing in each work, considered elementally and as unified wholes, do not contain a sufficient amount of creative authorship to sustain copyright claims.

D. Comparison to other works

The Office's examination procedure for copyrightability does not include a comparison with other works– whether those works have been registered or have been refused registration. This differs from the law of patents and trademarks where the registration process requires a comparison to prior works. Following *Compendium II*, § 108.03, the Office is not required to make comparisons of copyright deposits to determine whether or not a similar work has already been registered. *See, e.g., The Homer Laughlin China Co.*, 22 U.S.P.Q.2d at 1076 (where the Court stated that it was "not aware of any authority which provides that the Register must compare works when determining whether a submission is copyrightable."); *accord, Coach, Inc. v. Peters*, 386 F. Supp.2d 495, 499 (S.D.N.Y. 2005) (the Copyright Office "does not compare works that have gone through the registration process.").

Again, each work submitted for registration is evaluated on its own merits, with the Office applying the relevant statutory and regulatory guidelines as well as its examining practices set forth in *Compendium II*. The fact that an individual examiner might have, perhaps erroneously, accepted for registration a work that arguably is not more creative than

the labels at issue here does not require the registration of the latter works which we find have *de minimis* authorship and, thus, not copyrightable.

E. Proposed cancellation

We come now to the possible cancellation of the one work registered– MINI MEDIA LABEL SHEET LAYOUT DESIGN # 1– which was registered upon first reconsideration. Prior in time to the rest of the seven works appearing before the Review Board, the Examining Division registered MINI MEDIA LABEL. VA 1-225-349, effective date of registration October 22, 2003. Letter from Giroux-Rollow to Clark of Greenberg Traurig LLP of 3/15/004. Ms. Giroux stated that registration was made on the basis of the work as a whole which, she said, contains a combination and arrangement of shapes, the entirety copyrightable within the standard of *Feist*.

MINI MEDIA LABEL SHEET LAYOUT DESIGN # 1 was considered by the Review Board because the registration was referenced in the 8/25/2006 letters from the law firm of Christie Parker Hale, asking for second reconsideration of the seven other works. Upon examination and review of the MINI MEDIA work, the Board has determined that the work does not contain sufficient copyrightable authorship to sustain a claim. The work itself consists of the identical placement of shapes, one set of constituent shapes atop the other; the blank sheet on which the shapes appear is divided by a straight, perforated line. The design consists of ten [10] blank, barebones outlines of four small rectangles, placed at the upper left and lower right position (diagonal), two larger vertical rectangles, placed at upper right and lower left positions; two horizontal mid-sized rectangles on each side of the half-sheet; and two large rectangles, positioned at top and bottom of the overall design.

The October 20, 2003 Letter from Terence Clark of the law firm Squire Sanders and his February 17, 2004 Letter argued for registration of this particular work. In the October 20, 2003 Letter, he argued that this work "represents an original and artistically creative way of selecting, combining and arranging ten mini media labels of four different shapes and sizes on a single sheet." Mr. Clark argued that the varying shapes and sizes of the labels were selected and arranged on a single sheet *"in order to create ease of print enablement and the ability to print data on randomly fixed labels."* Letter from Clark of 10/20/2003, at 1. The placement or layout of these shapes which Mr. Clark argues constitute a copyrightable design or 2-dimensional artwork, is, in his words, determined by and arranged for a practical reason– printing needs. Because this design does not reflect authorial choice and selectivity as that phrase is meant to mean creativity and any "creativity" is undermined by practical or useful objectives [see above, fn 2], we do not see in the design, i.e., the selection and, here, the pictorial, arrangement of the shapes themselves, meant to serve as useful when they are attached to an adhesive backing, the necessary independent choice of expression which *Feist* supposes; the layout– not protectible in istelf as we have explained

above – may be said to be akin to an idea, concept, or method for allowing the printing of such labels. 17 U.S.C. §102(b)

We had initially refused registration for this work in an October 27, 2003 Letter from Examiner Sandra Ware; she had explained the refusal in terms of the non-protectibility of familiar shapes and symbols as well as the Office's position on layout and format. Letter from Ware to Clark of 10/27/2003, at 1. Mr. Clark's first request for reconsideration argued that the work MINI MEDIA LABEL SHEET meets the minimal requirement for creativity and also cited many of the cases that were cited in the reconsideration requests for the other seven works at issue here. Letter from Clark of 2/17/2004, at 2, 4-6. We have already addressed much of the case law [see above] but we particularly here address *Trebonik v. Rossman Music Corp.*, 305 F. Supp. 339, 346 (N.D. Ohio 1969). *Trebonik* included a question of the copyright protection of an instructional book about guitar chords as well as the infringement defense of fair use. In its analysis of the plaintiff's depiction of the guitar chords in the book in question, the Court noted that "[T]o be copyrightable, the work need only be creative or original. Citing *Pantone, Inc. v. A.I. Friedman, Inc.*, 294 F. Supp. 545 (S.D.N.Y. 1968), it remarked that a work "need not be strikingly unique or novel as long as its contribution is more than a trivial variation." *Trebonik,* 305 F. Supp. at 346, citing *Pantone*, 294 F. Supp. at 547, in turn citing the hallmark *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951), speaking to the minimal, very low quantum of authorship required for copyright protection. In a predictive echo of what *Feist* would say 20-some years later, the *Trebonik* Court stated that "although the material assembled may itself be in the public domain, an arrangement may be copyrighted if the arrangement, expression, and manner of presentation are not in the public domain." 305 F. Supp. at 346, referring to *Flick-Feedy Corp. V. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965).

We do not read *Trebonik* or any of the cases cited in Mr. Clark's first request for reconsideration as sufficient support for registration: MINI MEDIA LABEL SHEET consists of a design of four sizes of barebone, outline rectangles, slightly rounded at the edges. The pictorial arrangement of the rectangles is in three vertical columns and the identical rectangles are repeated in a diagonal position so that what appears at upper left also appears at bottom right. There is no "inner" design within these rectangles and Mr. Clark has admitted that the very placement or arrangement of the designs on the physical sheet of paper, was determined, at least in part, by the desire to facilitate printing using these labels.

As such, the placement of the labels on blank paper, few in absolute number and few as representing only four different-sized rectangular shapes, is not sufficient to sustain registration. In the words of *Satava*, this layout or placement of features (rectangles) within the design does not represent a combination of unprotectable elements eligible as a whole for copyright protection because those constituent elements are not numerous enough and their selection and arrangement not original enough that their combination constitutes an original work of authorship. *Satava,* 323 F.3d at 811. Here, the Review Board does not find the

selection, coordination, and arrangement of shapes or elements, like the other works at isue here, sufficiently original to merit protection. *Satava*, 323 F.3d at 811, *citing Feist*, at 358.

Within our normal practice for works already registered for which we are proposing cancellation, we give the claimant of record, Avery Dennison Corporation, 60 days to reply, in order to explain why the registration should not be cancelled. Any letter addressing this should be sent to:

U.S. Copyright Office
Review Board
Copyright GC/I&R
P. O. Box 70400
Southwest Station
Washington, DC 20024

IV. CONCLUSION

In conclusion, the total of seven label sheet layout designs, consisting of simple variations of standard shapes and arrangements, do not contain the minimal amount of original artistic authorship to support a copyright registration. For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the seven works as label sheet layout designs and proposes cancellation of the eighth work MINI MEDIA LABEL DESIGN.

This decision constitutes final agency action in this matter with the exception that you may argue the proposed cancellation of MINI MEDIA LABEL DESIGN.

Sincerely,

Nanette Petruzzelli
Associate Register,
Registration & Recordation Program
for the Review Board
United States Copyright Office

cc: Terence J. Clark, Esq.
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