United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

June 29, 2010

Roberta Jacobs-Meadway, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

RE: EARTH AIR FIRE WATER
Copyright Control Number: 61-413-6048(J)

Dear Ms. Meadway:

I write on behalf of the Copyright Office Review Board [hereinafter "Board"] in response to your letter dated June 18, 2007, in which you requested the Copyright Office to reconsider for a second time its refusal to register the work entitled *EARTH/AIR/FIRE/WATER*. We apologize for the delay in responding.

The Board has carefully examined the application, the deposit, and all correspondence concerning this application, and affirms the denial of the registration of *EARTH/AIR/FIRE /WATER*.

I. DESCRIPTION OF WORK

The work in question is an ambigram. An ambigram, also known as an inversion, is a graphic feature that spells out a word or phrase, not only in its form as presented, but also when rotated 180 degrees in another direction or orientation. This work consists of four words "EARTH, AIR, FIRE, and WATER" that, as an ambigram, are arranged and manipulated in such a way that they are perceptible as the same four words even when the work is rotated 180° from its normal orientation. A pictorial reproduction of the work, see immediately below, best serves to indicate the composition.



II. ADMINISTRATIVE RECORD

A. Initial refusal to register and first request for reconsideration

On March 24, 2006, the Copyright Office received a Form VA application for registration along with the required deposit and fee for the work *EARTH/AIR/FIRE/WATER* [hereinafter "Work"]. You made the submission on behalf of your client, John Langdon, and you described the authorship on which copyright is being claimed in this work as 2-dimensional artwork, with the statements at space 6 of the application form being given as 'preexisting material' – "text in form of graphic design" – and the new 'material added to this work' as – "design."

In a letter dated June 27, 2006, Visual Arts Examiner Shawn Thompson refused registration of the Work. Letter from Thompson to Jacobs-Meadway of 6/27/2006, at 1. Mr. Thompson found that the Work lacked the sufficient authorship necessary to support a claim to copyright. *Id.*

In determining that the Work was not copyrightable, Mr. Thompson cited the Supreme Court's discussion of the Copyright Act's originality requirement found in *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991). Additionally, Mr. Thompson noted that copyright does not protect familiar symbols or designs; basic geometric shapes; words and short phrases such as names, titles, slogans; or mere variations of typographic ornamentation, lettering or coloring. *Id.*, citing 37 C.F.R. § 202.1. Finally, he noted that neither the aesthetic appeal, commercial value of a work, nor the amount of time and effort expended to create a work are factors considered under copyright law. Letter from Thompson of 6/27/2006, at 1, citing *Bleistein v. Donaldson*, 188 U.S. 239 (1903); *Feist Publications v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991).

In a letter dated September 19, 2006, you requested reconsideration of the Office's decision to refuse registration of the Work. Letter from Jacobs-Meadway to Thompson, of 9/19/2006, at 1. In this letter, you argued that the Work should be copyrightable because "the statutory definition of copyrightable works and the amount of original authorship contained in the Work, amply support a valid copyright registration for the Work as two dimensional artwork." *Id.* In support of your position you cited Section 101 of the Copyright Act which includes two-dimensional works of fine, graphic, and applied arts under the definition of pictorial, graphic, and sculptural works. *Id.* at 1, citing 17 U.S.C. § 101.

You further argued that the Work displays more than a sufficient level of creativity necessary for copyright protection. In particular, you assert that it contains a high level of creativity and originality because it is an ambigram and is "thus a vsisual work of art based on imaginative manipulation involving symmetry and illusion." *Id.* at 2. You describe the creativity involved in the Work as including "virtual sculpting of letter type and graphics, inserting spacing, and devising and including additional design details." *Id.* You claim there is a sufficient amount of "intellectual labor" in the shaping and assembly of the ambigram and that it represents creative and artistic decisions. *Id.* at 3.

You argued that the Work does not fall into any unprotectable categories and that it is visual art. You claim the Work is "not a familiar symbol or design, or a basic geometric shape" and "is not a mere variation of typographic orientation [sic] or lettering." *Id.* at 3. You claim the "form and presentation" of the Work "displays the requisite originality and creativity to warrant copyright protection" because "mere typography would not achieve this calculated result." *Id.*

In your letter you also referred to another work entitled "ANGELS AND DEMONS." You claim the Copyright Office's registration of "ANGELS AND DEMONS" supports the registration of the Work currently at issue before the Board as visual art because both works result from many "creative decisions in sculpting letters and short phrases into ambigrams." *Id.*

B. Examining Division's response to first request for reconsideration

After receiving your letter dated September 19, 2006, as well as your additional exhibits for reconsideration, Attorney Advisor Virginia Giroux-Rollow responded on behalf of the Registration and Recordation Program. Ms. Giroux- Rollow stated that the Work does not contain any artistic or graphic authorship upon which to support a copyright registration. Letter from Giroux-Rollow to Jacobs-Meadway of 4/9/2007, at 1.

Ms. Giroux-Rollow explained that copyright protection does not extend to an idea, process or technique regardless of the form. *Id.*, citing 17 U.S.C. § 102(b). She explained that names, titles, works, short phrases or expressions are among the works not subject to copyright protection, even if they are "distinctively arranged or printed." *Id.*, citing *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F. 541 (2d Cir 1959).

Ms. Giroux-Rollow noted that, under *Feist*, the requisite amount of creativity required to obtain a copyright is very low and that even a slight amount of original authorship will suffice. *Id.* at 1. However, she stated that, for the Work at issue here, the Board does not consider it to satisfy this low threshold because there remains a narrow area where independent efforts are deemed too trivial or insignificant to support a copyright. *Id.* at 2, citing *Nimmer on Copyright*, § 2.01(b). She reaffirmed that the Work, comprised of four words and their letter arrangement, does not contain a sufficient amount of original and creative artistic authorship to support a copyright registration. Ms. Giroux-Rollow explained that the Copyright Office examines each work independently and that a prior decision on the work entitled "ANGELS AND DEMONS" was decided on its own merits.

C. Second request for reconsideration

In a letter dated June 18, 2007, you requested that the Office reconsider its refusal to register the copyright claim in this Work. Letter from Jacobs-Meadway to R & P Division of 6/18/2007, at 1. You argue that Ms. Giroux-Rollow was incorrect to find that the Work currently before the Review Board does not represent a sufficient level of creativity and original authorship in both its delineation and form. *Id.* at 1.

You argue that when an author adds "imaginative spark" to elements that are in the public domain, creativity results, and the author is entitled to protection. *Id.*, citing *Feist* at 345. You

assert that this is true even when the author contributes only a minimal amount of creativity. Letter from Jacobs-Meadway of 6/18/2007, at 1. In your view, the Work at issue here has surpassed the "minimal amount of creativity" standard articulated in *Feist* and the Work displays an immense amount of creativity by shaping and manipulating the letters, words, and spacing, and "embellishing the outer edges" to make the Work into an ambigram. *Id.* at 2. You argue that the reasoning in *F.W. Woolworth* supports this view by holding that proportion, form, contour, configuration, and conformation were entitled to copyright protection. *Id.*, citing to *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F.2d 162 (1st Cir. 1951). You also argue that the various letters in the design are the result of artistic and creative choices. You explain that the Work employs individual design choices and modifications for each letter and that some of the elements viewed in isolation would not be identified as letters. *Id.* at 2.

In addition, you assert that although the words "earth, air, fire, water" exist in the public domain, the Work's "adaptation and manipulation to make the phrase visually appealing and capable of being viewed as an ambigram demonstrate the requisite creativity to support copyright registration." *Id.* at 3, citing *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d at 207. You further argue that the Work does not consist of basic shapes, serving directions, or ingredients and that it is arranged with original and creative care. *Id.*, citing *Kitchens of Sara Lee v. Nifty Foods, Corp.*, 266 F2d 541 (2d Cir. 1959); *generally, Feist Publ'ns, Inc. v. Rural Telephone Services Co.*

Finally, you argue that the Work is not an idea, process, or technique, but rather, that the Applicant is seeking protection for the "creative and original expression contained within the work." Letter from Jacobs-Meadway of 6/18/2007, at 3. You also contend that the Applicant is not seeking protection of any method or process for creating ambigrams. *Id.* In connection with this argument, you highlight the fact that the purpose of the copyright registration of the Work at issue here is to prevent others from copying the particular graphic characters, spacing and the effect used in the Work. *Id.*

III. DECISION AND ANALYSIS

After reviewing the application and arguments in favor of registering Applicant's Work, *EARTH/AIR/FIRE/WATER*, the Review Board affirms the Examining Division's decision to refuse registration of the Work. The Board agrees that the work does not contain the requisite minimum amount of pictorial, graphic, or sculptural authorship necessary to sustain a copyright claim.

A. Legal framework

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. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991). However, the *Feist* court also ruled that some works (such as a telephone directory 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." *Id.* at 363. There can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be nonexistent."

Id. at 359; *see also* 37 C.F.R. § 202.10(a) ("In order to be acceptable as pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); *Nimmer* § 2.01(B) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

In your second request for reconsideration, you argue that "refusing registration of Applicant's work is contrary to the teachings of *Feist* which instructs that the originality requirement for copyright is not particularly stringent." Letter from Jacobs-Meadway of 6/18/2007, at 3. The Board accepts and applies to claims to copyright registration that "even a slight amount [of creativity] will suffice" to merit copyright protection." *Feist* at 345. On the one hand, "the vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be" *Id.*, quoting *Nimmer* § 1.08. On the other hand, in some works, "the creative spark is utterly lacking or so trivial as to be virtually nonexistent" and thus such works lack the "minimal creative spark required by the Copyright Act and the Constitution." *Feist* at 359, 363. In the *Feist* decision, the Supreme Court stated that some arrangements or combinations of unprotectable elements can embody sufficient creativity to support a copyright registration. *Id.* at 358. However, merely combining unprotectable elements where the combination or arrangement is itself simplistic will not automatically establish sufficient creativity. Such is the case here.

Of course, some combinations of common or standard design elements may contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See, Feist*, at 358 (the Copyright Act "implies that some 'ways' [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not." The determination of copyrightability rests on whether the selection, coordination, or arrangement was done in "such a way" as to result in copyrightable authorship). However, not every combination or arrangement will be sufficient to meet this grade. For example, 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 R.2d 989 (8th Cir. 1986). *See also, 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. But it is not true that any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that 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.") (citations omitted) (emphasis in original)

Even prior to the Court's decision in *Feist*, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a). With respect to pictorial, graphic and sculptural works, 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). In implementing this threshhold, Copyright Office regulations prevent registration of "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring" 37

C.F.R. 202.1(a); *Compendium II* § 503.02(a). In *Kitchens of Sara Lee v. Nifty Foods, Corp.*, the Court concluded that the Office's regulatory bars to registering short phrases and typographic ornamentation was "a fair summary of the law." 266 F.2d 541, 544. The Copyright Office and courts have consistently found that making trivial alterations will not inject the requisite level of creativity. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) ("[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.'" *Id.* at 102-03. Thus the court in *Catalda* held that the distinguishable variation in a work of authorship for which copyright protection is sought must be more than trivial.

Copyright examiners [now called 'registration specialists'] do not make aesthetic judgments; nor are they influenced by the attractiveness of a design, its uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art." *Compendium II*, § 505.05, states that the fact that a design is aesthetically pleasing or could have been designed differently is not a relevant consideration in the Office's determination of copyrightability.

B. Analysis of the work EARTH/AIR/FIRE/WATER

You have described the work at issue here, "*EARTH/AIR/FIRE/WATER*," as a "two-dimensional artwork" which "displays a high level of creativity and original authorship in both its delineation and form." Letter from Jacobs-Meadway of 6/18/2007, at 1. More specifically, you identify Applicant's Work as an ambigram resulting from "shaping and manipulating the letters, words, and spacing, and including additional design details like those embellishing the outer edges of the design, so that the Work is an ambigram that can be viewed the same regardless of the angle from which it is read and is visually pleasing to the viewer." *Id.* at 2. You also acknowledge that Applicant's Work features a common short phrase "that may exist in the public domain," – "earth, air, fire, water" – yet, you take the position that the Applicant's graphic choices of typeface are "unique and individual, striking and distinctive and evidence the creative spark necessary to support a copyright registration." *Id.* at 3.

We again point out, as we indicated in the response to your first request for reconsideration, that names, titles, words, short phrases, or expressions, as well as lettering, typographic ornamentation, and coloring are not copyrightable. Letter from Giroux-Rollow, of 4/9/2007, at 2, citing 37 C.F.R § 202.1. The fundamental aspects of the Applicant's work easily fit into these categories of uncopyrightable material.

Although you describe the Work as featuring letters and words that have been shaped and manipulated and further embellished with details, your description essentially says that the letters of the four single words, *EARTH/AIR/FIRE/WATER* constituting the ambigram, are variations and embellishments on lettering or typographic ornamentation. The fact that a short phrase, consisting of common words, makes up such an integral part of the Work at issue here also plays a significant part in the Board's view that the Work is uncopyrightable. We point out that Congress did not

consider the design of typeface to be copyrightable pictorial, graphic or sculptural authorship. Indeed, in its considerations of the provisions of the 1976 Act, Congress took the time to define what it meant by typeface: "a set of letters, numbers or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system and are intended to be embodied in articles whose intrinsic utilitarian function is for use in composing text or other cognizable combinations of characters." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976). Although you have not indicated that the work at issue here, the ambigram, *EARTH/AIR/FIRE/WATER*, is to be embodied in utilitarian articles for the composing or printing of these text terms or any other text, this work is, nevertheless, a pictorial representation of four single words, on their face related by repeating alphabetic-letter design elements with a creativity that, you emphasize, lies not in the basic shape of the letters of the four words but in the "manipulated art that creates an aesthetic effect." Letter from Jacobs-Meadway of 6/18/2007, at 3.

You have asserted that some of the letters of the four words making up the ambigram may not be recognized as letters as such if they were viewed independently [Letter from Jacobs-Meadway of 6/18/2007, at 2]; this point does not bolster your argument for copyrightability. Even if it were true – and we do not agree that it is – the variations on particular letters are used *qua* letter forms in this Work. The fact that the letters were crafted in such a way as to represent different letters when viewed from a different orientation does not change the fact that the symbols themselves function as letters. Moreover, placed in the overall context of the work, each of the symbols must depict specific letters in order for the meaning of the words to be comprehensible. None of the individual depictions of letters are independently copyrightable, both because they function as letters, and because they are mere variations on unprotectible symbols.

You stated in your June 18, 2007 Letter, at 2, that artistic and creative choices can be seen in the letters as they are placed within the ambigram at issue here – the shaping and manipulating of the letters constituting the four words, the spacing between the letters, and the design details at the outer edge of the entire ambigram design. Because an ambigram must consist of expression, positioned on paper or a computer or other screen, that is understandable by a viewer as being the same word, words, or pictorial representation[s] from whatever angle or point the expression is viewed, there exists a degree of restriction on such expression. The creator, having chosen an initial space or field, must – in your words – manipulate the elements which constitute the ambigram so that the "ambigram can be viewed the same regardless of the angle from which it is read and is visually pleasing to the viewer. Without carefully devised and selected creative manipulations, it would be impossible to create the symmetry and illusion that allows the phrase [at issue here] to succeed as an ambigram..." Letter from Jacobs-Meadway of 6/18/2007, at 2. The elements of the four printed words – earth, air, fire, and water – which the creator has chosen here are mere minor variations [and we use the term "minor" because the variations still allow the reading of the four words so that the ambigram "works," *i.e.*, the same four words can successfully be recognized from a number of different positions of the viewer.] The lettering or typefont for the words is created with minor differences of loops, sharpened endings where a letter may ordinarily not possess such, and stylized and sharp-ended dots for the letter "i."

Although we realize that the Applicant is not seeking to register the idea or concept of an ambigram [17 U.S.C. § 102(b): copyright does not 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..."], the work of authorship for which registration is sought is essentially four common words, fit together within a given field or space, in such a way and written or presented using typeface which slightly alters common, public domain letter-shapes, so that the four words can be read and identified as the self-same four words from any perspective or angle which the reader/viewer takes. The putative creativity in this work of authorship is the use of the necessary sub-shapes and parts of standard letter-forms in order to make the words appear the same from any viewpoint. This may fairly be said to be the equivalent of the concept or procedure for printing these four words, arranged and written with minor variations of standard lettering, so that an ambigram results. The expression is *de minimis* in its extent– four single words whose letter-shapes have been reproduced in slightly altered typeface so that they fit within a given spatial field and so that they read the same no matter the point or angle of viewing of the reader. The latter aspect is also reflective of an idea or procedure, neither of which sustains a copyright registration. Because the success of fitting together the lettering of the four selected words depends upon the manner of presenting the letter forms so that the lettering variations are not so 'varied' or so different from the common letter shapes that they cannot be identified, the authorship constituting this ambigram is, again, restricted and confined by the necessity of making the ambigram successful as an ambigram. The Review Board, thus, does not find in this Work the necessary minimum quantum of creative authorship required by *Feist.*

You have also cited *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 205 (3d Cir. 2005), in arguing that the work at issue here is at least comparable to the public domain inspirational poem selected and adapted to make it appealing as it was cast on a sculptural work. *Kay Berry* involved the registration of its Garden Accent Rocks Catalog, one of which garden rocks was the work at issue. 421 F.3d at 203-206. Citing *Compendium II*, the Court declared the Catalog itself a 'compilation' or 'collective work' and decided that this fact "does not preclude protection for the material therein contributed by the author;" the Court then analyzed the particular Garden Rock to find it constituted a copyrightable work in itself. 421 F.3d at 207. The Board does not consider the Work at issue before it, *EARTH/AIR/FIRE/WATER*, to be comparable to the Kay Berry work.[1] The Third Circuit, in holding that the work at issue there was copyrightable, "concluded that this quantum of creativity is sufficient to qualify for copyright protection." 421 F.3d at 207, citing *Feist,* 499 U.S. at 348; *Reader's Digest Ass'n*, 821 F.2d at 806: "a selection of an inspirational poem from the public domain, adapted... to make it visually and rhythmically appealing, and then cast it on its own sculptural work" – the garden rock.

The ambigram for which you wish registration is composed of four words whose typeface is altered in order to make the words fit within a given spatial field so that they also fit the requirement that the words read the same, no matter the angle from which the viewer sees them. This compostion is not analogous to the *Reader's Digest* "distinctive arrangement of ordinary lines, typefaces, and colors" that the Third Circuit used as a description in *Kay Berry* to describe the

[1] We point out that, although the Copyright Office did register the Kay Berry Catalog, the Office's current practices require the registration specialist to examine the Catalog for the presence of *some but not all* copyrightable works appearing therein.

magazine cover in Reader's Digest or to the inspirational poem selected and adapted in its printed lines and combined with a sculptural work.[2]

Nor are the letters of the ambigram at issue here copyrightable as a result of their overall selection and arrangement. Similarly, the selection and arrangement of four words that constitute a grouping based on their conceptual relationship is also not a copyrightable selection and arrangement. Nor does placing this combination of four uncopyrightable words into a common square-like or diamond-like overall ambigram shape constitute copyrightable authorship. Although selection, coordination, or arrangement in such a way that the resulting work constitutes a copyrightable work of authorship is protectible, this work fails to rise to this level. *See Satava* above. From the component parts to the overall selection, coordination, and arrangement, the Work does no more than depict letters and words, combined into a simple, short phrase, and layout/ physically place the letters of the words so that it may be said that an ambigram is created.

The Review Board recognizes a degree of ingenuity in the design of the letters. However, that ingenuity does not alter the Board's analysis that the Work is uncopyrightable. As with calligraphy, writing may be ornate and beautiful, but such aesthetic appeal does not render a work copyrightable without the existence of sufficient original authorship. And, the effort or time put into the creation of the work has been declared not a basis for copyright protection. *Feist*, at 353 - 356: "... the 'sweat of the brow' doctrine flouted basic copyright principles." *Id.* at 354. Finally, a previous registration for a given work does not guarantee a subsequent registration for a similar work. Each work of authorship is examined and analyzed on its own merits. *See Compendium II*, § 108.03: the Copyright Office does not generally compare registration deposits to look for similarities or differences.

IV. CONCLUSION

The Review Board finds that this ambigram work fails to contain the requisite level of creative authorship needed to support a claim for 2-dimensional artwork.

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the graphic design entitled "*EARTH/AIR/FIRE/WATER*." This decision constitutes a final agency action in this matter.

Sincerely,

/S/

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

[2] Again, the Copyright Office did not examine and state the copyrightability *vel non* of this particular sculpture; the sculpture was one of many appearing in the collective work Catalog.