United States Copyright Office
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October 28, 2011

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Re: THREE CARD POKER LOGO
SR 1-225996242, SR 1-304068507, and SR 1-436572976
Correspondence ID: 1-4489K9

Dear Mr. Gile:

On behalf of the Copyright Office Review Board, I am responding to your request for reconsideration of the Registration and Recordation Program's refusal to register a copyright claim in a logo entitled "Three Card Poker." You have submitted this claim for your client, Shuffle Master, Inc. The Review Board has carefully examined the eService application, the identifying reproduction, and all the correspondence in this case. After careful consideration of the arguments in your letter, the Board affirms the denial of registration of this copyright claim because the work does not contain a sufficient amount of original and creative pictorial or graphic authorship in either the treatment or arrangement of the elements to support a copyright registration.

I. ADMINISTRATIVE RECORD

A. Initial submission

On August 4, 2009, the Copyright Office received from you an eService application covering "2-D artwork"and an uploaded deposit of a digital image of a logo on behalf of the Shuffle Master, Inc. By letter mailed September 23, 2009, registration specialist Sandra Ware refused registration of this work, stating that it lacked the authorship necessary to support a copyright claim. Ms. Ware stated that copyright protects original works of authorship that are fixed in some physical form. Citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, (1991), she stated that the term "original" meant that the work was independently created by the author, and that the work possessed at least a minimal degree of creativity. To satisfy the originality requirements, she indicated that original works of the visual arts must contain a minimum amount of pictorial, graphic, or sculptural authorship. She also noted the absence of protection for familiar symbols or designs, words and short phrases, ideas, concepts, or mere variations of typographic ornamentation, lettering or coloring, citing 17 U.S.C. § 102(b) and 37 C.F.R. § 202.1. She further concluded that neither the aesthetic appeal, nor commercial value of a work, nor the amount of time and effort expended to create the work were factors to be considered under the copyright law. In applying these principles, she concluded that the work could not support a copyright claim. Letter from Ware to Gile of 9/23/2009.

B. First request for reconsideration

By letter dated December 18, 2009, you filed a first request for reconsideration of the refusal to register "Three Card Poker logo," and asserted that the work satisfies the threshold of authorship necessary to support a copyright claim. Letter from Gile to Copyright Office of 12/18/2009. Your letter discussed the nature of authorship embodied in your client's work, and the case law setting out the legal standards.

You described the work as including stylized lettering for the words "Three Card Poker" appearing in a curved manner. *Id.* at 2. You stated that the design also contained an image of three cards appearing in an overlapping manner with each of the cards having a single diamond appearing on them. You elaborated in part III of the letter that the design of the words and cards was arbitrary in size, shape, and placement and exceeded the creativity threshold required for registration. *Id.* at 4 & 5.

Your discussion of the cases which you claimed supported registration began with *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991), which stated that originality means "only that the work was independently created by the author, and that it processes at least some minimal degree of creativity." After discussing *Feist,* you cited seven cases which you claimed protected works with a similar amount of authorship.

After reviewing your first request for reconsideration, Attorney Advisor Virginia Giroux-Rollow responded in a letter dated March 25, 2010. She upheld the refusal to register the work on the grounds that it did not contain a sufficient amount of original and creative artistic or textual authorship to support a copyright registration. Letter from Giroux-Rollow to Gile of 3/26/2011 at 1.

Ms. Giroux -Rollow conceded that the logo design fell within the category of works that may be subject to copyright protection. However, she explained that under the *de minimis* doctrine of copyright, not every commercial label is copyrightable; it must contain an appreciable amount of original text or pictorial expression, citing *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F. 541 (2nd Cir. 1959). She further observed that the court in *Sara Lee* affirmed the position of the Copyright Office that names, titles, words, short phrases or expressions are among works not subject to copyright protection even if they are distinctively arranged or printed. *Id.* at 1. She stated that this principle is embodied in 37 C.F.R. § 202.1. She concluded that the logo design in the instant case involved similar principles as enunciated in the *Sara Lee* case. *Id.* at 1.

Ms. Giroux-Rollow stated that a work must not only be original, but must possess more than a *de minimis* quantum of creativity, citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). She elaborated that originality, as interpreted by the courts, meant that the authorship must constitute more than a trivial variation of public domain elements, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). *Id.* at 1. She stated that in applying that standard, the Copyright Office examines a work to determine whether it contains any elements, either alone or in combination, on which a copyright can be based. She added that because the Copyright Office does not make aesthetic judgments, the attractiveness of a design, its uniqueness, its visual effect or appearance, the time, effort, and expense it took to create, or its commercial success in the marketplace, are not factors in the examining process. *Id.* at 1. The question, she said, is whether there is a <u>sufficient</u> amount of original and creative authorship within the meaning of the copyright law and settled case law. *Id.* at 1-2.

Ms. Giroux-Rollow described the work in question as a logo design consisting of three overlapping quadrilateral shapes representing three images of playing cards positioned in an angular fashion with a diamond shape placed within each image all underscored by the three words "Three Card Poker." She stated that rectangles, quadrilaterals, and diamonds, or any minor variation thereof, are common familiar geometric shapes which are in the public domain, citing the Copyright Office regulation codified at 37 C.F.R. § 202.1. *Id.* at 2. Moreover, citing the same regulation, she noted that names, titles, words, and short phrases, lettering and coloring are not copyrightable. *Id.* at 2. Finally, she stated that your client's work is *de minimis* because it consists of two familiar and common shapes, coupled with noncopyrightable text, arranged in a rather simple configuration, citing *Compendium of Copyright Office Practices II*, Ch. 500, § 503.02(a). *Id.* at 2.

Ms. Giroux-Rollow stated that the above principles have been confirmed by several judicial decisions, including *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986)(a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below lacked the minimal required creativity to support registration); *Forstmann Woolen Co. v J. W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lis held not copyrightable); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register "gothic" pattern composed of simple variations and combinations of geometric designs due to insufficient creative authorship to merit copyright protection); *Jon Woods Fashions, Inc. v. Curran,* 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(upholding refusal to register a design consisting of two inch stripes, with small grid squares superimposed upon the stripes), and *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F.Supp 959 (W.D. Pa. 1986)(envelopes printed with black stripes and a few words and lettering did not exhibit the minimal level of creativity to support a copyright registration). *Id.* at 2.

Ms. Giroux-Rollow conceded that it is true that even a slight amount of creativity will suffice to obtain copyright protection. However, she went on to cite *Nimmer* § 2.01(B), which states that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Id.* at 2. She concluded the logo at issue fell within this narrow area. In explaining this conclusion, she stated that even the low requisite level of creativity required by *Feist* was not met by the three card image, coupled with the noncopyrightable text, as well as their arrangement. Ms. Giroux-Rollow concluded by distinguishing the authorship in the works protected by the cases cited in your letter with your client's simple logo.

C. Second Request for Reconsideration

In a letter dated June 23, 2011, you requested that the Office reconsider for a second time its refusal to register the copyright claim in "Three Card Poker logo." Letter from Gile to Copyright Review Board of 6/23/2010 at 1. You argue that the work "possesses sufficient creative pictorial, graphic, and/or sculptural authorship within the meaning of the Copyright Act and applicable case law to support Applicant's claim of a copyright thereto." *Id.* at 2.

You begin by challenging the reliance of the Copyright Office on *Alfred Bell v. Catalda Fine Arts, Inc.* 191 F.2d 99 (2nd Cir. 1951) in concluding that your client's work is a trivial variation of public domain elements. Instead, you assert that *Alfred Bell* has been superseded by the Supreme Court's

decision of *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). You quote verbatim large portions of the *Feist* decision providing that compilations are copyrightable so long as the selection, coordination, or arrangement of the elements shows sufficient originality.

You follow your extensive discussion of the *Feist* decision with an argument that your client's work meets the tests of originality and creativity on the basis of arrangement of the elements. You argued the works must be viewed as a whole, citing *Atari Games Corp. v. Oman,* 888 F.2d 878 (D.C. Cir. 1992), and *Knitwaves, Inc. v. Lollytogs, Ltd,* 71 F.3d 996 (2nd Cir.. 1995). You also cite to *Roth Greeting Cards v. United Card Co.,* 429 F.2d 1106 (9th Cir. 1970), which held that the "association between the artwork and text" was copyrightable. You recite the choices made by your client in designing the logo as follows:

- The three card design
- The number of cards in the design
- The portrait of orientation of the cards
- The height to width ratio of the cards
- The rounded corners of the cards
- The line thickness of the lines that form the cards
- The overlapping nature of the cards with the middle card overlapping the side cards
- The degree of card overlap
- The offset angle of the two outside cards
- The choice of a diamond visual element on said card designs
- The size and orientation of the diamonds
- The line thickness for the lines that form the diamonds
- The positioning of such cards in the overall design above the letters
- The truncaton of the bottom of the cards
- The location of the truncation of the cards
- The border at the bottom of the cards
- The choice of the words "Three Card Poker"
- The font for the words "Three Card Poker"
- The words "Three Card Poker" on a single line
- The curvature of the words "Three Card Poker" and
- The positioning of the words "Three Card Poker" underneath the card designs

You assert that such selections and arrangements are not "so mechanical or routine as to require no creativity whatsoever." Letter from Gile of 6/23/2010 at 6.

You state that most of the cases relied upon by the Copyright Office in refusing registration apply obsolete standards because all but one predate the *Feist* decision. Moreover, you claim *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) did not actually review the works in question for the requisite quantum of creativity, but merely addressed whether the Copyright Office, in refusing registration, had committed an abuse of discretion. *Id.* at 6-7.

You further assert that the case law cited by you as supporting registration was unfairly distinguished by the Office in maintaining its refusal to register. You cite three cases which you claim all rest on what you characterized as the "unifying and clarifying instruction furnished by the Supreme Court

in *Feist."* The case of *Prince Group, Inc. v. MTS Prods.*, 967 F.Supp. 121 (S.D.N.Y.) protected an irregular polka dot fabric design. The case of *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759 (2nd Cir. 1991 reversed a lower court's finding that a straight line arrangement of roses could not support a copyright claim. The case of *Runstadler Studios, Inc. v. MCM Limited Partnership*, 768 F.Supp 1292 (N.D. Ill. 1991) held that a spiral glass sculpture consisting of an arrangement of glass panes was far more than a trivial amount of intellectual labor. Given the standard set by the the *Runstadlre* court, you argue that your client's humbler creation should be judged as more than trivial.

II. DECISION

A. Description of the work

The work at issue in this reconsideration consists of basically two elements. The first is an image of three playing cards, slightly overlapping, all with a single large diamond in the middle of each card. The second element consists of the words "THREE CARD POKER" appearing below the image of the cards. The cards and the words are arranged in a slightly curved fashion. A reproduction of the design appears below:



B. The Legal Framework

1. Copyrightable Subject Matter

In considering requests for second reconsideration, the Review Board conducts a de novo review which takes a fresh look at issues concerning whether the copyright claim in issue can be registered. The Board studies carefully the deposit of the work, and the arguments raised by the applicant and the two staff members who previously considered registration of the claim.

In your letter for second reconsideration, you assert your client's work contains sufficient creative pictorial, graphic, and/or sculptural authorship within the meaning of the copyright law to support registration. For the purposes of this response, the Review Board will first discuss the creativity standard, particularly as it was applied in *Feist*. After this analysis will follow a discussion of the standards applicable to copyright claims resting on compilation authorship.

All copyrightable works, be they graphic designs or otherwise, must also qualify as "original works of authorship." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991). 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 that your client, Shuffle Master, Inc. secured rights to THREE CARD POKER from an entity which had independently created the logo. Therefore, the first component of the term "original" is not at issue in the analysis set forth herein. Second, the work must possess sufficient creativity. For the reasons set forth below, the Board has determined that the subject graphic design fails to embody the requisite amount of creativity, and therefore it is not entitled to copyright registration.

2. The Creativity Threshold

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. However, the *Feist* Court also ruled that some works (such as the work at issue in that case) failed to meet the standard. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," 499 U.S. at 363, and that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also,* 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01(B) (2010) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

In refusing to register the THREE CARD POKER logo, both the registration specialist and Ms. Giroux-Rollow cited to the *Feist* decision as one of the authorities for their decision that the logo lacked sufficient creativity on which to base a registration. However, your letter of in support of your second request for reconsideration asserts that these staff members failed to apply the standards in *Feist*, but instead applied the standards appearing in earlier cases. Letter from Gile to Copyright Rview Board of 6/23/2010 at 3. This argument essentially implies that *Feist* lowered copyright standards from the standards which were applied by earlier courts. No authority is cited for this position. In fact, *Feist* rejected the lower standard of creativity provided by the *sweat of the brow* doctrine with respect to compilations which some of the Circuits had mistakenly been applying. Moreover, with respect to cases involving works other than compilations, some pre-*Feist* decisions actually applied a lower standard of creativity than was required in *Feist.*

You assert in your letter that the Copyright Office test of "too trivial to support a copyright" was "out-of-date case law" due to having been "superseded by *Feist.*" Letter to the Review Board of 6/23/2010,

at 3. Contrary to your statement, however, *Feist* specifically adopted this test when the Court stated: "There remains a narrow category of works in which the creative spark is utterly lacking or so **trivial** as to be virtually nonexistent. *Feist*, 499 U.S. at 359 (emphasis added).

Your second request for reconsideration further states that most of the cases relied upon by Ms. Giroux-Rollow were prior to *Feist.* Letter to the Review Board of 6/23/2010, at 6.. Since *Feist* did not lower the creativity standard of the copyright law, it makes little difference whether cited authorities are pre-*Feist*, or post-*Feist.* A recent case relying on *Feist* as well as a number of pre-*Feist* cases is *Coach, Inc. v. Peters*, 386 F.Supp.2d 495 (S.D.N.Y. 2005) where the Southern District of New York upheld the Register of Copyrights' decision to refuse registration of a handbag designer's fabric pattern consisting of variations and arrangements of the letter "C." The District Court cited *Feist*, as among the cases supporting the decision to refuse registration. The Court stated as follows.

> Having determined that the works were essentially arrangements of the letter "C", [the Copyright Office] noted that letters, mere variations of letters, and familiar symbols can not be copyrighted [Citations ommitted]. [The Copyright Office] cited a number of cases which held that simple arrangements of such items are similarly uncopyrightable. *See. e.g., Feist Publications, Inc. v. Rural Tel. Service Co.,* 499 U.S. 340, 111S.Ct. 1282, 113 L.Ed2d 358 (1991); *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.,* 802 F.2d 989 (8th Cir. 1986); *The Homer Laughlin China Co. v.* [*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); *Magic Mktg. Inc. v. Mailing Serv. of Pittsburgh, Inc.*, 634 F.Supp. 769 (W.D.Pa. 1986); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F.Supp 964 (E.D.N.Y. 1950).....Plaintiffs fail to argue persuasively that [the Copyright Office] incorrectly relied on these cases, much less that this reliance was so improper as to amount to an abuse of discretion. *Id.* at 498-99.

All of the above cases cited by the Southern District of New York involved works which in their simplicity were comparable to THREE CARD POKER logo. These works were a white page telephone directory (*Feist*); a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, (*John Muller*); a chinaware design pattern composed of simple variations or combinations of geometric designs (*Homer Laughlin China Co.*); a fabric design consisting of striped cloth over which a grid of 3/16-inch squares was superimposed (*Jon Woods Fashions,*); envelopes with black lines and words "gift check" or "priority message" (*Magic Mktg*); and a label with the words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lys (*Forstmann Woolen Co.*). To this list could have been added *Tompkins Graphics, Inc. v. Zipatone, Inc.,* 222 U.S.P.Q. 49 (E.D. Pa. 1983) ("basic geometric shapes have long been in the public domain and therefore cannot be regulated by copyrights."); *Past Pluto Productions Corp. v. Dana*, 627 F. Supp. 1435 (S.D.N.Y. 1986) (hat entitled "Crown of Liberty" consisting of seven identical, evenly spaced foam spikes that radiate from the hat's arcuate perimeter), and *Bailie v. Fisher,* 258 F.2d 425 (D.C. Cir. 1958) (a cardboard star with two flaps which, when folded back, enabled it to serve as a stand for a display). To this list can be added post-*Feist* cases of *Banzai, Inc. v. Broder Bros.*, 91 U.S.P.Q.2d 1062, 1064 (E,D, Pa, 2009)(citing *Magic Mktg*, the court stated: "t]he 'author' must contribute more than a trivial variation of a previous work."); and *Siegel v. Time Warner Inc.*, 496

F.Supp2d 1111, 1152 (C.D. Cal. 2007)("The applicable standard in determining the necessary quantum of originality is that of a 'distinguishable variation' that is more than 'merely trivial'.") Moreover, Nimmer also states that: "Any 'distinguishable variation' of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts, *and it is more than merely trivial.*" [emphasis added] Nimmer § 2.01[B](2010).

Even prior to *Feist*, Copyright Office registration practices, following settled precedent that remains valid after *Feist*, recognized that works with only a *de minimis* amount of authorship are not copyrightable. *See Compendium of Copyright Office Practices II,* § 202.02(a) (1984). *Compendium II* also states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.* at § 503.02(a). *Compendium II* recognizes that it is not aesthetic merit but the presence of creative expression that is determinative of copyrightability. *Id.* Section 503.02(a) states that:

> [R]egistration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. ... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations."

3. The works in their entirety -compilation, selection, and arrangement.

Consistent with your arguments, the Copyright Office follows the principle that works should be considered as a whole. Therefore, the Board agrees that it is possible for the selection and combination of commonplace elements or simple designs to rise to the level of copyrightability, even though individual elements in a work, taken alone, would not be copyrightable. Works based on public domain elements may be copyrightable if there is some distinguishable aspect 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*, 499 U.S. at 359; *see also* 17 U.S.C. 101 (definitions of "compilation" and "derivative work"). Nevertheless, it is the conclusion of the Board that Applicant's simple logo considered in its entirety do not "possess more than a de minimis quantum of creativity." *Feist*, 499 U.S. at 363.

In your letter to the Review Board, you assert that the choices made by your client are not "so mechanical or routine as to require no creativity whatsoever." Letter from Gile of 6/23/2010 at 6. The Board notes 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 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). The fact that an author had many choices does not

necessarily mean that the choice the author made meets even the modest creativity requirement of the copyright law. The choices made in this instance are essentially "garden variety," devoid of creativity. *Feist*, 499 U.S. at 362.

Another recent case, *Darden v. Peters*, 402. F.Supp.2d 638 (E.D. N.C. 2006), *aff'd* 488 F.3d 277 (4th Cir. 2007), specifically dealt with the arguments you raise on the issue of selection and arrangement of standard elements. *Darden* involved a copyright claim in a website providing an online referral service allowing consumers to located real estate appraisers throughout the United States. The copyright claimant used preexisting census maps, and asserted copyright protection in the "overall design, his special combination of font and color selection and arrangement of geographic locations, such as counties, visual effects such as relief, shadowing, and shading, labeling, and call-outs". 488 F.3d at 281. The courts affirmed the refusal of the Copyright Office to register the copyright claim.

Likewise, in *Satava v. Lowry*, the Ninth Circuit held unprotectible sculptural arrangements which combined elements not copyrightable in themselves. 323 F.3d 805 (9th Cir. 2003). The court explained that not "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." 323 F.3d at 811. A similar result was reached in *Lamp Plus, Inc. v. Dolan*, 345 F.3d 1140 (9th Cir. 2003), where the Ninth Circuit held that the mechanical combination of four preexisting ceiling lamp elements with a preexisting lamp base did not constitute original authorship

On pages 5 and 6 of your letter for second reconsideration you list a series of choices which you contend prove the creativity of your client's work. These choices include thickness of lines; height to width ratio of the cards, selection of the words "Three Card Poker, selection of the font, rounded corners on the cards, the offset angle of the two outside cards, etc., etc,, etc. These are precisely the trivial decisions that have been declared not copyrightable time and time again by the courts and copyright law experts. In a recent post-*Feist* case, *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25 (1st Cir. 2001), the Court stated as follows to a similar delineation of trivial "choices":

> The district court determined that the "rectangular, gold-bordered name plate, [the] full-bleed photos, and [the use of] similarly sized labels" were "crude physical elements [that] do not enjoy copyright protection," and therefore only evaluated the photographic images on the labels for infringement. Yankee contends that its choices to use such elements were "discretionary," and must be protected by copyright because other choices were possible. We agree with the district court. The "discretion" claimed by Yankee involves (i) the use of a rectangular "title plate" with block lettering on a white background; (ii) the imposition of that title plate, centered, on a photographic representation of the candle fragrance; and (iii) a rectangular border around the photograph. This collection of common geometric shapes with a particular photographic technique is not sufficiently original to qualify for copyright protection. [citations omitted] *Id.* at 34-35.

C. Analysis of the Work

Your client's logo consists basically of only two elements: the name "THREE CARD POKER", and an image of three slightly overlapping playing cards, all with a single diamond in the middle. The image of the cards appears above the "THREE CARD POKER" name, and both the cards and words are slightly curved. This arrangement is precisely the kind of "routine" and "garden-variety" arrangement that *Feist* tells us is uncopyrightable. *See* 499 U.S. at 362. The Review Board also finds the two elements fall squarely within 37 C.F.R. § 202.1(a) (identifying material not subject to copyright as "Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents").

Your second request for reconsideration cites a number of cases which you contend support registration of the logo. You cite *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C.Dir. 1992) and *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996 (2nd Cir. 1995) for the proposition that visual works should be viewed as a whole. To these cases you add *Roth Greeting Cards v. United Card Company*, 429 F.2d 1106, 1109 (9th Cir. 1970) requiring "that all elements of each card, including text, arrangement of text, art work, art work, and association between art work and text, be considered as a whole."

The Review Board agrees that works must be viewed as a whole. However, applying that principle to this logo reveals that there is very little to the whole. The entire work is just two elements, a simple image of three playing cards, and the words "THREE CARD POKER." Neither of these elements alone can support a copyright claim.

The image of the three playing cards with a single diamond in the middle consists merely of familiar symbols which are not capable of supporting a copyright claim. Likewise, the term "THREE CARD POKER" is a uncopyrightable name. The arrangement in this instance of the image appearing directly above the three words is routine, similar to white page listings found uncopyrightable in *Feist,* and the features of the label found uncopyrightable in *Yankee Candle.* As the Ninth Circuit recently clarified, not "any combination of unprotectible elements automatically qualifies for copyright protection." *Satava*, 323 F.3d at 811.

Another case you relied on is *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991), involving roses that were "turned so that the roses faced in various directions" 937 F.2d at 764. While the *Folio* court protected a straight line arrangement of these "turning" roses, you acknowledge that the court also stated that "the copyright umbrella does not cover the idea of arranging roses generally in a straight line pattern." *Folio,* 937 F.2d at 765. With respect to THREE CARD POKER logo, there is no arrangement remotely similar to the turning rose arrangement, differing in both the original artwork of roses, and the arrangement of a pattern whereby the roses are viewed as turning.

The last two cases, *Prince Group, Inc. v. MTS Prods.* 967 F.Supp. 121 (S.D.N.Y. 1997) and *Runstadler Studios, Inc. v. MCM Limited Partnership*, 768 F.Supp. 1292 (N.D. Ill. 1991) are both district court decisions involving works far more complex than the THREE CARD POKER logo. In *Prince Group*, you note that the court's stated with respect to the fabric design at issue that "the decision to place the polka dots in imperfect and conflicting diagonal lines at varying distances from each other giving the appearance of randomness, distinguishes this arrangement from the regularity of the generic polka dot

design...." 967 F.Supp. at 125. From this passage it appears fairly clear that a generic polka dot design would be uncopyrightable due to the "regularity" of the arrangement of the dots. The particular design was found copyrightable in *Prince Group* because of its irregularity, with "imperfect and conflicting diagonal lines at varying distances from each other." The originality of the design rested on the irregularity of the arrangement of the dots. The THREE CARD POKER logo design is distinguishable both on the small number of elements (two), and the regularity of the arrangement.

In *Runstadler Studios*, the plaintiff's work was a glass sculpture consisting of 39 clear glass rectangles, overlapping each other to form a spiral with an approximately 405 degrees arc. The Copyright Office registered the sculpture. The *Runstadler* court described the sculpture as containing "far more" than a trivial amount of intellectual labor. Given the standard set by the court, you argue that your client's humbler creation should be judged as more than trivial, and that to meet the "more than trivial" standard a work "does not need to rise to the level of the *Runstadler Studios* work." Letter of 6/23/2010 at 9. However, the Board has already concluded that the alleged authorship in THREE CARD POKER is merely trivial, and there is no utility served by comparing your client's work with works that you appear to acknowledge are more creative. Your client's work compares closely with the logo in *John Muller*; the commercial label in *Forstmann*; the "garden-variety" white page listing in *Feist*, the labels in *Yankee Candle*, and all the other cases cited in section II.B(2) above.

III. CONCLUSION

The Board has reviewed this design in its entirety and as to its individual elements and has determined that the work cannot be registered because the work does not contain a sufficient amount of original and creative pictorial or graphic authorship in either the creation or arrangement of the elements to support a copyright registration. Accordingly, for the reasons stated above, the Review Board affirms the refusal to register this design. This decision constitutes final agency action.

Sincerely,

/s/

David O. Carson
General Counsel
for the Review Board
United States Copyright Office