United States Copyright Office
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June 8, 2012

J. Charles Dougherty, Esq.
200 West Capitol Ave., Suite 2300
Little Rock, Arkansas 72201-9442

Re: Patriots Day Flag
Control No. 61-310-1616(W)

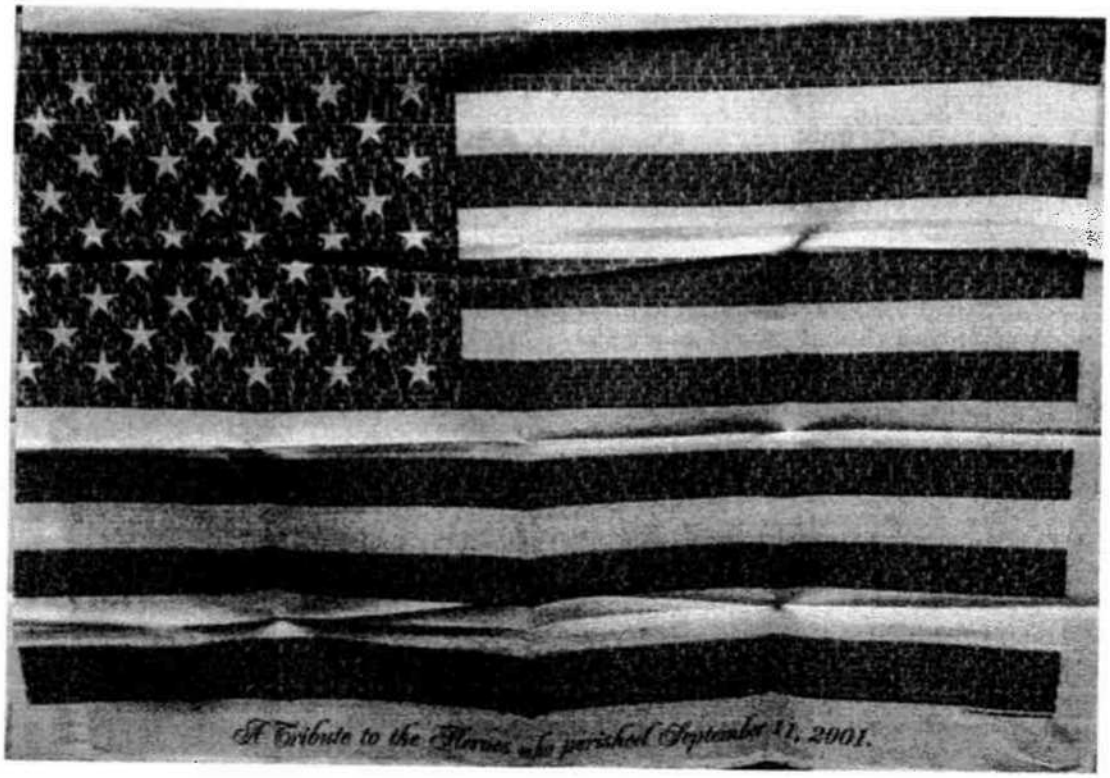
Dear Mr. Dougherty:

The Copyright Office Review Board has reviewed your second request for reconsideration as well as the application, deposit and all correspondence related to PATRIOTS DAY FLAG, by Gale Baltimore Brown. The Review Board has reviewed the administrative record, including the deposit, the additional identifying material, and your first and second appeal letters, and has determined that PATRIOTS DAY FLAG barely meets the copyright law's requirements for creativity. Accordingly, the Board has concluded that a certificate of copyright registration should be issued for PATRIOTS DAY FLAG, but cautions that the scope of protection is exceedingly thin.

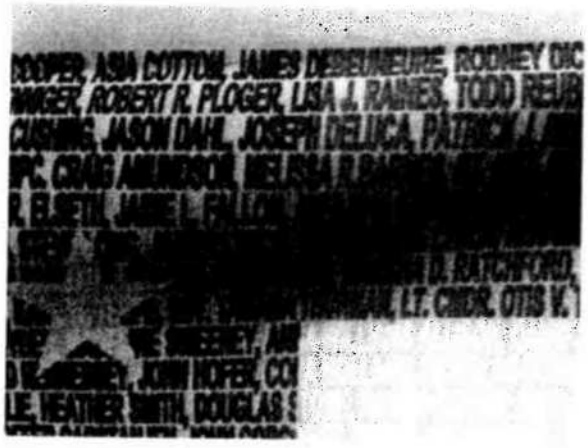
ADMINISTRATIVE RECORD

On January 16, 2004, you submitted an application for registration for the 2-Dimensional artwork entitled " Patriots Day Flag" on behalf of your client, Gale Baltimore Brown. The deposit consists of the names of the persons killed on September 11th with the letters of the names printed on a grey background in three colors: red, white and blue. By varying the colors of the names, the work creates the illusion of the United States flag with 7 red stripes, 6 grey stripes and 50 white stars on a blue background. The names are alphabetically ordered in accordance with the flight or location (*e.g.*, "AMERICAN AIRLINES FLIGHT 77," "PENTAGON," and WORLD TRADE CENTER") in which they died, and are listed after each flight or location. In the bottom red stripe, at the conclusion of the list of names is the recurring phrase: "GOD BLESS AMERICA." Underneath the representation of the flag is the phrase: "A Tribute to the Heroes who perished September 11, 2001." Images of the flag appear on the following page.

By letter dated March 10, 2004, Visual Arts Examiner Colleen Kearney refused registration of the PATRIOTS DAY FLAG, stating that the work lacked the authorship necessary to support a copyright claim. Ms. Kearney further stated that copyright does not protect familiar symbols nor does it protect ideas, concepts, systems, or processes embodied in the work.



Entire Flag





Close-ups of Portions of Flag

In a letter dated June 17, 2004, you requested reconsideration of the Examiner's decision to refuse registration. You stated that the Examiner appeared to find that the work was a familiar symbol or that it consisted entirely of public domain material without original authorship. Letter from Dougherty to Chief, Receiving and Processing Division of 6/17/2004, at 1. You stated that in addition to the requisite level of creativity being low, the simple fact that a work of art calls to mind a familiar design is not sufficient to support a refusal to register copyright in the work, so long as the minimal creativity and originality are present. *Id.* You also pointed out that although the work calls to mind the American flag, a careful examination reveals differences. You noted that the background is gray, unlike the actual American flag background, and that there actually are not any stars and stripes in the work, but rather the colors of the names create the appearance of stars and stripes. It is the mental activity of the viewer that creates the American Flag even though no American flag is present in the image. *Id.*, at 2.

You further pointed out that the work includes a number of creative choices, such as the repeating phrase "God Bless America" and the phrase chosen at the very bottom of the flag design. You argued that these are expressive choices and that there were many other choices that the author could have made instead. *Id.* You concluded that the creative choices together with the creative illusion of the work are sufficient to meet the requisite level of creative authorship and that the work should be registered.

By letter dated August 31, 2004, Attorney-Advisor Virginia Giroux responded to your request and explained that after a careful review of the work and the record, the Examining Division did not find a sufficient amount of original, creative artistic or graphic authorship to support a claim of copyright. She noted that while the idea of combining names in different colors to conjure up the flag is novel, that idea is not copyrightable, but rather only the particular expression may be examined for sufficient creative authorship. Letter from Giroux to Dougherty of 8/31/2004, at 1.

In your letter of December 20, 2004, you requested reconsideration of the refusal to register the PATRIOTS DAY FLAG by the Copyright Office Review Board.

In support of registration, you argue that the work is not, in fact a flag or a familiar symbol, but that it "is a carefully crafted optical illusion." Letter from Dougherty to the Review Board of 12/20/2004, at 2. In particular, you note that the illusion of stars and stripes results from the coloring of the names and words appearing on the work gray background. This "creative use of color in the lettering of the [9/11] victims' names creates the illusion of a flag." *Id.* You argue that the more closely the work is inspected, the more the illusion of the American flag fades, whereas, from a distance, the illusion of the American flag become stronger.

You note the low level of creativity necessary to support a claim of copyright, and recognize that familiar symbols or designs are not copyrightable. However, you maintain that the work is not a familiar symbol with names imprinted on it, but rather the manner of placing and coloring the names creates an illusion of a familiar symbol. *Id.* at 3. You also argue that this work is not a mere variation of coloring that simply alters the colors of the

American flag. You state that the work does not even contain the same colors as the American flag, since it uses a gray background color in addition to the red, white, and blue of the work's lettering. *Id.*

You also argue that the Copyright Office "routinely grants copyright registrations to works that create optical illusions that include familiar shapes, symbols, or designs." *Id.* You infer that in those cases, the examination focuses on the underlying design of the work itself rather than the illusion created by the design. Applying that reasoning to the PATRIOTS DAY FLAG, you conclude that the work itself is sufficiently creative and not a familiar symbol.

Finally, you argue that the Copyright Office also "routinely grants copyright registrations for works whose only original and creative element is the addition of color," citing the example of colorized motion pictures originally filmed in black-and-white. You argue that "[s]o long as the use of color is original and creative, copyright protection and registration is appropriate." *Id.*

DISCUSSION

Copyright law offers protection only for "original works of authorship." 17 U.S.C. §102. The Supreme Court has interpreted original as including two elements, "independent creation plus a modicum of creativity." Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 346 (1991). *Accord,* Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102 (2nd Cir. 1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary."). Originality in the copyright sense consists of independent creation plus some modicum of creative contribution from the author. The Board has serious questions about the extent to which PATRIOTS DAY FLAG satisfies either prong of this originality requirement. For example, Ms. Brown did not independently create the general configuration of the American Flag, nor did she independently create the alphabetical lists of 9/11 victims or the phrase "God Bless America." The Board does, however, accept that Ms. Brown independently created the overall configuration of PATRIOTS DAY FLAG, including the placement and coloring of the names of the 9/11 victims and the phrase "God Bless America" in such a fashion as to create the appearance of an American Flag, and the creation of the phrase "A Tribute to the Heroes who perished September 11, 2001" and the placement of that phrase beneath the image of the flag.

The Board also believes that it is at best a close question whether PATRIOTS DAY FLAG exhibits sufficient creativity to satisfy the second prong. The individual components of the work are either facts (names of 9/11 victims arranged in alphabetical order) or simple, minor variations on common shapes or symbols, arranged in an obvious manner.

In making its determination, 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 Court also ruled 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 work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359.

The Compendium of Copyright Office Practices, Compendium II (1984)("Compendium II") has long recognized this principle, stating that "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable. Such works are often described as '*de minimis*,' in reference to the principle embodied in the Latin maxim '*de minimis non curat lex*.'" Compendium II, § 202.02 (a)(1984). With respect to pictorial, graphic, and sculptural works, Compendium II states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Compendium II, § 503.02(a) (1984). The Compendium recognizes that it is not aesthetic merit, commercial appeal or symbolic value, but the presence of creative expression that determines the copyrightability of a work, and that "registration 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, copyright does not protect 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. For example, a new version of a textile design is not copyrightable merely because the colors of red and blue appearing in the design have been replaced by green and yellow, respectively. 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." *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."). Similarly, "[w]ords and short phrases such as names, titles, and slogans" are not copyrightable. 37 C.F.R. § 202.1(a).

The crux of your argument in your first and second requests for reconsideration is that the work is not a flag and that it does not contain any stars or stripes of any color. Rather, you maintain that the flag appearance is merely an optical illusion and thus, that the work is not a "familiar symbol." Letter of December 20, 2004, from Dougherty to the Review Board, at 2. You maintain that the original and creative authorship is established in "the way in which those colors are used . . . which leads to the American flag illusion from what would otherwise be a listing of 9/11 victims' names." *Id.*, at 3. You also state that "it is not the mere selection of colors in the subject work, but rather the arrangement and placement of colors that is creative and original." *Id.*

The Review Board has considered your arguments but finds that the deposited work does not support the conclusions set forth in the immediately preceding paragraph for the following reasons. In order to examine whether sufficient creative authorship exists, the

Board looks at the individual elements present in the work to see whether any are individually copyrightable. Finding insufficient authorship in the component parts, the Board then examines the selection and arrangement of those individual elements to determine the combination of elements is capable of supporting a claim of copyright.

The elements contained in the PATRIOTS DAY FLAG are:

1. The upper-case listing names of the 9/11 victims in alphabetical order according to the flight (*e.g.*, "AMERICAN AIRLINES FLIGHT 77") or location ("WORLD TRADE CENTER"). These categories are also in alphabetical order;
2. The phrase: "A Tribute to the Heroes who perished September 11, 2001;"
3. The phrase: "GOD BLESS AMERICA," repeated in such a way at the end of the names as to complete the remainder of the last red stripe (concluding with "GOD BLESS AM"); and
4. The red, white and blue coloring of the letters on a gray background following the standard color pattern of the American flag.

None of these elements are individually copyrightable. The names of the 9/11 victims are facts that are precluded from protection under section 102(b). 17 U.S.C. §102(b). The alphabetical listing of all of the 9/11 victims is insufficient selection and arrangement of these facts to support a claim of authorship. Feist Publications Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). The alphabetical listing of the names by flight or location is also an unoriginal selection and arrangement of the names into standard groupings. There is no originality displayed in the alphabetical listing of 9/11 victims' names or the alphabetical listing of the flights and locations.

The phrases "God Bless America" and "A Tribute to the Heroes who perished September 11, 2001" are both short phrases that lack the creative spark necessary to sustain a claim of authorship and which fall outside of copyright protection under Copyright Office regulation. 37 CFR 202.1(a). The inclusion of these two phrases along with the names reflect de minimis creativity.

The combination of all of these elements in such a way as to create the illusion of the American flag fails to transform these public domain elements into copyrightable expression, since the resulting graphic representation or illusion is also an uncopyrightable familiar symbol. 37 CFR 202.1(a). Although the idea of this combination of names and colors may be original, *i.e.*, not copied from another source, original *ideas* are not copyrightable. 17 U.S.C. 102(b). The idea of creating an image of the American flag, constructed by using the names of the victims of 9/11 in alphabetical order and arranged in colors that convey a depiction of the American flag, a familiar symbol, is not protected by copyright. Only original and sufficiently creative expression is protectible.

Your argument that the Copyright Office routinely grants copyright registration in works that create optical illusions misses a critical distinction. The Copyright Office registers original creative authorship whether or not the work creates an optical illusion. For instance, names arranged in such a way to produce the effect of a portrait of a person would be copyrightable, not due to the illusion created, but rather due to the resulting portrait demonstrating sufficient creative pictorial authorship. The Copyright Office does not register works consisting of uncopyrightable facts or short phrases that are arranged and colored to create a familiar symbol. Although you argue that the work is not a design of an American flag, what the observer sees is an image of the American flag, and that image is not copyrightable.[1]

Moreover, the fact that creative activity takes place in the mind of the viewer is not a copyrightable consideration, since mental processes cannot provide the basis of sufficient authorship. The deposit's expression must stand on its own to represent sufficient creative authorship.

However, the Board was able to find a modicum of creative expression in the precise configuration of the words that, in combination, conveyed the image of the American flag. Specifically, although the idea of creating a depiction of the flag consisting of the names of the 9/11 victims in alphabetical order, and colored in such a manner as to convey the image of the flag, is not copyrightable, the Board accepts the possibility that in this case, the particular placement of those names does cross the border between the uncopyrightable and the copyrightable. Specifically, the placing of the first and last name on each line of text, culminating in the name of the last of the victims, Andrew Zucker, three and one-half lines before the end of the thirteenth stripe on the flag, and the population of the remainder of the thirteenth stripe with three and one-half lines of the repeated phrase, "God Bless America," may represent that modicum of creative expression required for copyright protection. Had the lists of names been arranged in such a fashion that Mr. Zucker's name appeared at the very end of the thirteenth stripe, the Board would not have been able to discern any protectible expression. To be sure, the Board does not view the present case as a clear case of copyrightable expression, but the Board cannot state conclusively that it does not make the grade. Therefore, the Board has concluded that a copyright in PATRIOTS DAY FLAG should be registered.

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[1] The analogy to the colorization of films is also unfounded in this case. The colorization of a black and white film typically involves an extraordinary amount of creative selection, coordination and arrangement of many colors and shades of color in each frame. This process is repeated in thousands of frames in order to colorize a motion picture. The colorization of the letters in the PATRIOT DAY FLAG consists of three primary colors, and even the choice of these colors is not the result of originality or creativity, but is in fact dictated by the design that the creator intended to depict. Once the author chose to depict, or create the illusion of, the American flag, there ceased to be any creative choice in the selection and arrangement of the red, white, and blue contained in the design. Moreover, the slight variation from white to light gray as the background color can hardly be considered anything more than a minor tonal variation of color. The arrangement and placement of colors lacks any creative spark and is entirely typical.

The necessary conclusion, however, is that the copyright in PATRIOTS DAY FLAG would not offer any protection against a flag that looked very similar to Ms. Brown's creation, if the thirteen stripes on the latter flag consisted only of the names of the 9/11 victims in alphabetical order but did not copy the the specific expressions that the Board has identified as being potentially copyrightable. In effect, the copyright (if any) PATRIOTS DAY FLAG is incredibly thin.

CONCLUSION

Based on the foregoing, the Review Board has concluded that a certificate of registration shall be issued for PATRIOTS DAY FLAG. This letter constitutes final agency action.

Sincerely,

/s/

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