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

January 30, 2012

Charles C. Garvey, Jr., Esq.
Garvey, Smith, Nehrbass & North, L.L.C.
Three Lakeway Center, Suite 3290
3838 North Causeway Boulevard
Metairie, LA 70002

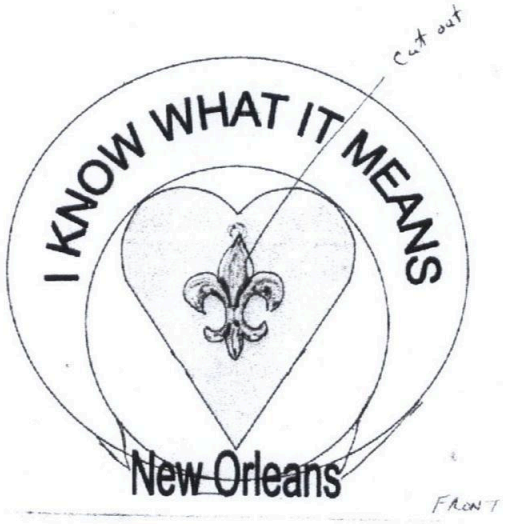
RE: NO LA BADGE
Control No. 61-412-707.(G)

Dear Mr. Garvey:

I am writing on behalf of the Copyright Office Review Board in response to your letter dated October 26, 2006, requesting a second reconsideration of a refusal to register a work entitled "NO LA Badge" on behalf of your client, Anne F. Dale. We apologize for the long delay in getting back to you. The Board has carefully examined the application, the deposit, and all correspondence in this case and affirms the denial of registration of this work.

I. DESCRIPTION OF THE WORK

The subject jewelry design consists of a fleur-de-lis inside a heart, which, in turn, appears inside a circle, somewhat off-center. Above that circle is the text "I KNOW WHAT IT MEANS," which appears inside yet a larger circle, in which the smaller circle is off-center. At bottom, intersecting with the bottom of both circles, forming a crescent shape, is the text "New Orleans." The back of the work replaces the top text with "Katrina 2005" and "Anne Dale." The design is nearly identical to the front, except the fleur-de-lis does not appear. The design is reproduced here.



II. ADMINISTRATIVE RECORD

A. Initial submission of claim; Office refusal to register; first request for reconsideration

On September 23, 2005, the Copyright Office received a Form VA application from your client, Anne F. Dale, to register a jewelry design. In a letter dated January 31, 2006, Visual Arts Examiner James L. Shapleigh refused registration of this work because it lacked the authorship necessary to support a copyright claim. Mr. Shapleigh explained that to support copyright protection, a work must contain at least a minimum amount of original artistic material. He also noted that copyright does not protect familiar symbols and designs, minor variations of basic geometric shapes, lettering, typography, or words and short phrases. Letter from Shapleigh to Ann F. Dale of 1/31/2006, at 1.

On April 5, 2006, you asked that the Office reconsider Ms. Dale's request concerning the original refusal to register the NO LA Badge. You asserted that the design at issue here contains the requisite modicum of creativity. In support of your request, you argued that Feist found even a slight amount of authorship sufficient to carry copyright protection. Feist, 499 U.S. 345, 348 (1991). Letter from Garvey to Examiner Shapleigh of 4/5/2006, at 1-2, citing Prince Group, Inc. b/d/a/ Princess Fabrics v. MTS Products and K Mart, 967 F.Supp 121 (S.D.N.Y 1997) (modified polka dot design found protectible). You also attached a letter from your client "explaining her thought process...." Id. In further support of this assertion, you stated that the selection and arrangement of the elements present in the design are unique, pleasing, and creatively sufficient to support copyright registration. Letter from Garvey of 4/5/2006, at 2.

B. Office refusal of first request for reconsideration

In a letter dated July 31, 2006, Attorney Advisor Virginia Giroux-Rollow of the Registration Program replied that she had reviewed your client's work in light of the points raised in your request for reconsideration dated April 5, 2006, and determined that no copyright registration could be made because the work "does not contain a sufficient amount of original and creative artistic, textual, or sculptural authorship...." Letter from Giroux-Rollow to Garvey of 7/31/2006, at 1. Ms. Giroux-Rollow explained that "a work must not only be original, but it must also 'possess more than a de minimis quantum of creativity'." Id. (citing Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991)). She noted that examiners do not make aesthetic judgments and do not consider the design's attractiveness, uniqueness or its look or feel, and the like.

Ms. Giroux-Rollow explained that names, words, and short phrases are not copyrightable. Id. at 2 (citing 37 C.F.R. §202.1). She also explained that "[c]ircles, rectangles, semi-circles, crescents, hearts, the fleur-de-lys design, or any minor variation thereof, are common and familiar geometric shapes or designs, in the public domain." Id. She also noted

that the placement and arrangement of the elements of the design are in the nature of layout and format, and therefore not copyrightable. Id. (citing Compendium II, Copyright Office Practices, §§ 305.06, 305.07). Finally, Ms. Giroux-Rollow distinguished the Prince Group case by explaining, in that case, the Court believed that the shadows, different colors and apparently random pattern of the dots were more than a trivial variation from a standard, generic polka dot design. Letter from Giroux-Rollow of 7/31/2006, at 3.

C. Second request for reconsideration

In a letter dated October 26, 2006, you again requested reconsideration of the Office's refusal to register the design. To assist the Board in its examination, you provided the declaration of Gail Levine, Executive Director of the National Association of Jewelry Appraisers. You acknowledge that creativity is required for copyrightability and disclaim any desire to protect items in the public domain. Rather, you argue that "[p]rotection is sought for the Artist's *expression*, as shown by her choice, selection and arrangement of the variety of shapes as used in the Work." Letter from Garvey of 10/26/2006, at 2 (emphasis in original). In support of this contention, you cite Feist for the proposition that the particular selection and arrangement of familiar symbols and design shows "at least a minimum amount of originality and creativity in their placement and use." Id. You also cite the Prince Group decision and disagree with the Copyright Office's statement in its response to your first request for reconsideration [Letter from Giroux-Rollow of 7/31/2006, at 3] that the work at issue here, NO LA BADGE, is distinguishable from the work in the Prince Group litigation; in addition, you have sent the Office the Declaration of Gail Levine, asserting that the work at issue here, NO LA BADGE, has unique characteristics and you also incorporate by reference your first request for reconsideration.

III. DECISION

After reviewing the application and the arguments you have presented, the Copyright Office Review Board affirms the Registration Program's refusal to register the NO LA BADGE because it does not contain a sufficient amount of original and creative authorship to support a copyright registration, either with respect to its individual design elements or in its selection and arrangement of constituent elements.

A. Copyrightability standard

As you acknowledge, and as the courts have held, originality has two components: 1) independent creation by the author and 2) a modicum of creativity. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991). The Review Board does not dispute that the overall design, *i.e.*, the NO LA Badge in its entirety, was independently authored by your client, Anne F. Dale; thus, the sole issue left for the Board to decide is whether the elements contain the necessary modicum of creativity to sustain copyright registration.

In determining whether a work has a sufficient amount of original artistic authorship necessary 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. 499 U.S. at 345. 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. While "the standard of originality is low, . . . it does exist." Id. at 362.

The Compendium of Copyright Office Practices, Compendium II (1984) ("Compendium II") has long recognized this principle: "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." Compendium II, § 202.02(a). Compendium II 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 confirms these principles. See, e.g., 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 standard *fleur-de-lis* could not support a copyright claim without further original authorship); Baile 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 protection); Tompkins Graphics, Inc. v. Zipatone, Inc., 222 U.S.P.Q. 49 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable).

B. Analysis: discrete design elements AND design considered as a whole

Given the considerable case law sustaining Copyright Office decisions of refusal to register 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. v. Catalda Fine Arts, 191 F.2d 99, 103 (1951);

see Compendium II, § 503.02(a). The Board applies this standard by examining a work to determine whether it contains elements, either alone or taken as a whole, on which a copyright can be based.

The Work at issue here consists of a circle having a slightly off-center, incorporated, smaller circle. The larger "outer" circle contains the words I KNOW WHAT IT MEANS and NEW ORLEANS at the bottom of the outer circle. The outer circle is slightly modified at the bottom portion to form a crescent. The smaller, inner circle contains a simple heart outline with a fleur-de-lis centered in it. The back of the badge carries a copyright notice in the name of Ann Dale and the word "Katrina 2005." The jewelry piece is obviously designed with public domain elements– circles and elementary outline heart shape– as well as a commonplace fleur-de-lis symbol. The commonplace elements are not, in themselves, protectible. Even if the design were intended to be symbolic, such intentions or meanings are, as Ms. Giroux-Rollow mentioned in her July 31, 2006 Letter, at 3, not relevant to copyright protection. What is important is whether the resulting, overall expression of presentation of the design elements contains copyrightable authorship.

We approach the analysis of any given work of authorship by judging it 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 may, however, 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) (emphasis in original). 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*, 499 U.S. 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 Review Board does not dispute that a large amount of time and effort went into creating the NO LA Badge. However, as you know, Feist struck down the "sweat of the brow" doctrine. 499 U.S. at 353-354. Therefore, factors such as the NO LA Badge's symbolic importance, commercial success, the expense of creating it, the human effort expended in creating it, the professional skills and expertise of the designer or artistic recognition of the design are not relevant to the Board's determination of the NO LA Badge's copyrightability. See, e.g., Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074, 1076 (D.D.C. 1991); Letter from Giroux-Rollow of 7/31/2006, at 2-3. Thus, neither the letter from Anne Dale submitted

previously nor the Declaration of Gail Levine submitted here aids the Board in its consideration of the copyrightability of the NO LA Badge.

You describe the selection and arrangement of the elements of the NO LA Badge as copyrightable because "the particular selection and arrangement of familiar symbols and designs... shows at least a minimum amount of originality and creativity in their placement and use." Letter from Cohen of 10/26/2006, at 3. Again, the Board concurs with Ms. Giroux-Rollow and finds that the NO LA Badge consists of common and familiar geometric shapes: simple circles, an elementary heart shape, a crescent, and a fleur-de-lis. The overall pattern results from a mere bringing together of standard shapes with minor variations thereof; such a combination fails to rise to the level of creativity required to support a copyright registration. 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." The Board concludes that the NO LA Badge at issue here, upon its examination of the design elementally and as a whole, does not contain a sufficient amount of original and creative authorship to sustain a copyright claim.

The NO LA Badge consists of simple variations of standard shapes and simple arrangements, which while aesthetically pleasing and of particular significance to the residents of the Gulf Coast and survivors of Hurricane Katrina, do not contain the minimal amount of original artistic authorship to support a copyright registration; the courts have consistently upheld the Office's refusal to register such works. John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986)(logo consisting of four angled lines forming an arrow, with the word "Arrows" in cursive script below, found not copyrightable); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1879 (S.D.N.Y. 1988)(upholding Copyright Office's refusal to register design consisting of striped cloth over which was superimposed a grid of 3/16" squares); and Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991)(upholding Copyright Office's refusal to register chinaware design pattern).

Again, the Board accepts the principle that consideration of a work's eligibility for copyright protection should not be limited to constituent parts, but, rather, should be based on the work's composition as a whole. You have argued that the "particular selection and arrangement of familiar symbols and designs is registrable because it shows at least a minimum amount of originality and creativity in their placement and use." Letter from Garvey of 10/26/2006, at 2. It is this very question– whether a work manifests the necessary minimum quantum of authorship with respect to the selection and placement of the design elements– that determines its copyrightability. We point out, for example, Boisson v. Banian Ltd., 273 F.3d 262 (2d Cir. 2001), in which a quilt design consisted of alphabet letter shapes with the incorporation of different colors in the Boisson quilt. Although the Boisson Court found the letter shapes themselves lay in the public domain, the use of the letter shapes in the particular layout of the quilt combined with "the author's choice in incorporating color with other elements may be copyrighted." 273 F.3d at 271. This lesson is in accord with the holding of Feist at 499 U.S. at 348. The overall design met the Feist standard. This is not the case in the

simple jewelry design at issue here in the NO LA BADGE; the design consists of very few elements arranged in a commonplace way, *i.e.*, circle within a circle with a heart outline centered in the inner circle and a fleur-de-lis basically centered within that element.[1]

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the NO LA BADGE. This decision constitutes final agency action in this matter.

Sincerely,

/s/

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

[1] The case you have cited in both requests for reconsideration, 4/5/2006 and 10/26/2006, does not compel a different conclusion. In The Prince Group, the Court found that the color, shading, irregular shapes, and arrangement of the polka dots there was more than a slight variation on a commonplace, generic polka dot design; thus the Court found the design at issue there copyrightable. 967 F. Supp. at 125. As noted above, the Board's examination of the jewelry work design at issue here is not a similar example of copyrightability.