United States Copyright Office
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March 15, 2012

Via First Class Mail and Fax

David S. D'Ascenzo, Esq.
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522 S.W. 5th Ave., Suite 925
Portland, Oregon 97204

Re: Heart in New Hampshire
Heart in New York
Heart in Oregon
Heart in South Carolina
Heart in Texas
Heart in Vermont
Correspondence ID: 1-34COVW

Dear Mr. D'Ascenzo:

I am writing on behalf of the Copyright Office Review Board in response to your letter dated December 30, 2009 in which you requested that the Copyright Office reconsider its refusal to register six graphic designs with the following titles:

1. "Heart in New Hampshire"
2. "Heart in New York"
3. "Heart in Oregon"
4. "Heart in South Carolina"
5. "Heart in Texas"
6. "Heart in Vermont"

The Review Board affirms the refusal to register these works.

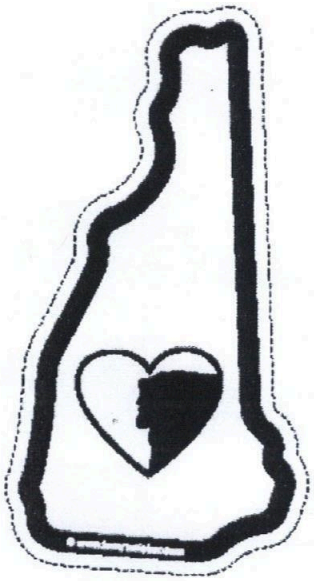
I. DESCRIPTION OF WORKS

Applicant's two-dimensional graphic designs are shown below. Except for Oregon and Vermont, each design has three components: (1) the silhouette or shape of the state identified in its title, (2) a heart shape within the silhouette and (3) graphic elements that are emblematic of each state. Oregon and Vermont only have two components since they do not have any graphic elements.

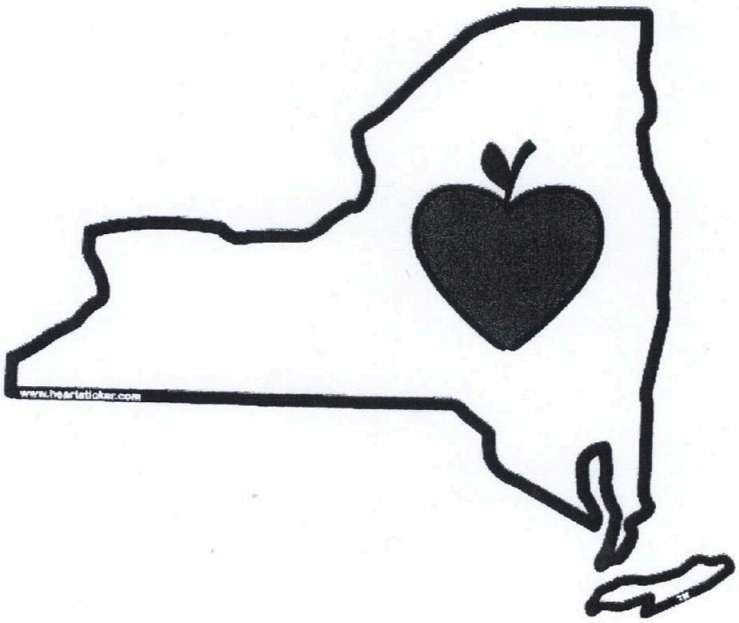
The graphic elements in each design relate to whichever state's shape is depicted. Within New Hampshire's heart is a black silhouette representing the famous "Old Man of the Mountains" rock formation that is located in the White Mountains. The New York heart also has one graphic element which is an apple stem located on top of the heart at the center point where the two halves meet as it curves in and down, resembling the location of a stem on an apple. It is also colored red,

like an apple. Within the heart for the South Carolina design are two elements from its state flag, a crescent moon and a palm tree against a blue background. The Texas heart displays a single white star against a red, white and blue color pattern that is in the Texas state flag. For Oregon and Vermont, no graphic elements were added to the heart which is solid white.

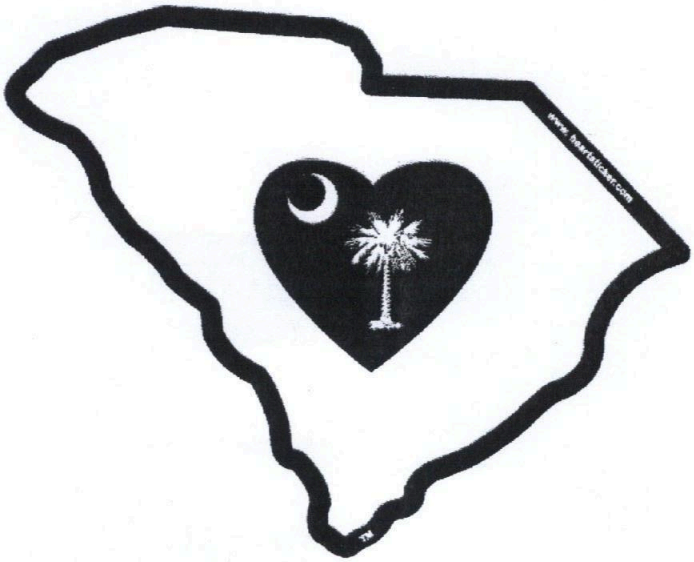
HEART IN NEW HAMPSHIRE



HEART IN NEW YORK



HEART IN SOUTH CAROLINA



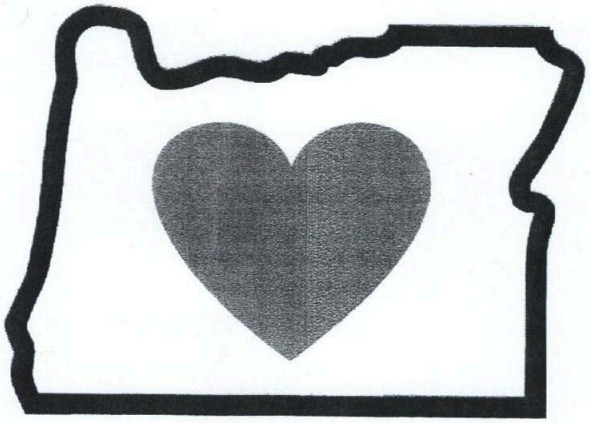
HEART IN TEXAS



HEART IN VERMONT



HEART IN OREGON



II. ADMINISTRATIVE RECORD

A. Copyright Office Refusal to Register Applications

On February 20, 2009, the Copyright Office received electronic applications from the author and claimant, Christopher R. Bucci, to register five graphic designs, entitled Heart in New York, Heart in Texas, Heart in South Carolina, Heart in Vermont and Heart in New Hampshire. In a letter dated August 8, 2009, the Copyright Office refused to register the five works on the basis that

copyright does not protect familiar symbols, designs, or minor variations. Moreover, the Registration Specialist found that the simple state outline maps coupled with a familiar, preexisting state symbol did not amount to copyrightable authorship. The Office concluded that these works lack the requisite authorship necessary to support a copyright claim. In addition, an application was received on November 6, 2008 to register a sixth graphic design, entitled Heart in Oregon which was refused registration on the same basis on February 3, 2009.

B. First Request for Reconsideration

In a letter dated July 29, 2009, you requested the first reconsideration of the Office's refusal to register the five graphic designs. You argued that the five designs have sufficient creativity to be copyrightable because each is a unique and creative expression of the idea of state pride. You pointed out that each of Applicant's expressions represent one of many ways that the idea could be expressed. You also stated that the works have sufficient creativity to be copyrightable on the basis of the selection and combination of elements. In support of your arguments, you analogized the designs to other works that were found to be copyrightable in infringement cases. You also argued that given that "the requisite level of creativity is extremely low,"applicant's works embody at least a "slight amount" of creativity to support a claim of copyright, *citing, Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991).

Specifically, you claimed that each of applicant's works embody creativity as to the selection of color, the representation of the state's outline, the weight of lines, the expression of the graphics within the state's outline, and the combination of all of elements. You also argued that the outline for the states are not typical, but rather modified for applicant's intended purpose (*i.e.*, for stickers, T-shirts, posters, patches and the like).

For Heart in Oregon, you submitted a request for reconsideration in a letter dated February 25, 2009. You argued that the relaxed, cartoon like character of the Oregon silhouette and the choice of green instead of red for the color of the heart which is rendered in a particular font and color scheme are sufficiently creative to be copyrightable.

C. Refusal for First Request for Reconsideration

In a letter to you dated October 6, 2009, Attorney Advisor Virginia Giroux-Rollow stated that the five graphic designs do not have sufficient authorship to be copyrightable, either in the treatment or arrangement of the elements. For support, she cited 37 CFR § 202.1 and *Compendium of Copyright Office Practices II*, Ch. 500, § 503.02(a) (1984) [hereinafter *Compendium II*] and several legal precedents. Ms. Giroux-Rollow stated that the Copyright Office does not make aesthetic judgments; thus, the attractiveness of a design, the time, the effort, and expense it took to create, or its commercial success in the marketplace are not factors considered during the examining process. Ms. Giroux-Rollow asserted that the designs lack sufficient creativity even though the level required is very low. In support of that conclusion, she stated that the outline of a state, heart and star shapes and any minor variation are common and familiar shapes or designs that are in the public domain. Coloring per se is not a copyrightable element, and the additional graphic elements are not sufficiently creative to support a claim of copyright. These elements alone, or their selection and

arrangement in combination, do not reflect an adequate amount of original and creative authorship. Ms. Giroux-Rollow stated that it is not the possibility of choices that determines copyrightability, but rather whether the particular expression contains copyrightable authorship. In another letter dated October 27, 2009, Ms. Giroux-Rollow provided a similar response to your request for reconsideration for Heart in Oregon.

D. Second Request for Reconsideration

In a letter dated December 30, 2009, you request a second reconsideration, asserting that the five graphic designs have sufficient creativity to be copyrightable based on the combination, placement and arrangement of elements which you described in detail for each. You argue there is sufficient creativity in the selection of color, stylistic representations of states' outlines, selection and expression of graphics with the states' outlines and the format and collective expression of these characteristics. You emphasized that applicant is not seeking to claim the idea of state pride but claims protection for the unique expression of state pride. You restated the arguments you made in the first request for reconsideration with further elaboration to refute Ms. Giroux-Rollow's arguments. In a second letter dated January 11, 2010, you make a second request for reconsideration for Heart in Oregon providing the same arguments that are in your letter for the five other works.

E. Combining Second Requests for Reconsideration

For administrative economy, the Review Board will consider both second requests for reconsideration in the same decision since the works and issues involved are similar.

III. DECISION

After reviewing the applications and arguments in favor of registering Applicant's six graphic designs, the Review Board upholds the Office's decision to refuse registration. The Board finds that the creativity contained in the works is *de minimis* and is not sufficient to satisfy the requirement for copyrightability.

A. The Legal Framework

Copyright protection is only available for "original works of authorship." 17 USC § 102(a). In the field of copyright law, courts have interpreted "original" as consisting of two elements: independent creation and sufficient creativity. In *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991), the Supreme Court held that originality consists of two elements, "independent creation plus a modicum of creativity." *See also Alfred Bell & Co. v. Catalda Fine Arts, Inc.,* 191 F.2d 99, 102 (2d 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,"); *Burrow-Giles Lithography v. Sarony,* 111 U.S. 53, 58 (1884) (Court defined "author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conceptions of the author."

The Board accepts that Applicant independently created the six graphic designs. The focus of the Board's analysis here is the second prong of originality which is that a work must possess sufficient creativity. While requisite level of creativity is low, it must be more than *de minimis*.

1. Creativity requirement

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, 346 (1991). However, as you acknowledge, the Court also ruled in *Feist* that some works (such as the telephone directory at issue in that case) fail to meet the standard. It 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, 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 CFR § 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."); *Nimmer* § 2.01(B) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

Even prior to *Feist*, Office practices and regulations incorporated the principle that a minimum level of creativity is necessary to sustain a copyright claim which, though modest, is recognizable as creative authorship. *See Compendium II*, Ch. 200, § 202.02(a) ("Works that lack even a certain minimum amount of original authorship are not copyrightable."); *id.* § 503.02(a) ("A certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class."). In implementing this threshold, Copyright Office regulations prevent registration of "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring," 37 CFR § 202.1(a); *see also Compendium II*, § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . .") and ("Familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring, are not copyrightable.") *id.* at § 202.02(j).

Courts have upheld these regulations and practices and used them as guides in their jurisprudence. *See, e.g., Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286-87 (3d Cir. 2004) (holding that the Copyright Office's views regarding the non-copyrightability of short phrases "merits deference" and "logically extends to part numbers"); *Atari Games Corp. v. Oman*, 979 F.2d 242, 247 (D.C. Cir. 1992) ("We do not in any way question the Register's position that simple geometric shapes and coloring alone are *per se* not copyrightable.") (internal quotation marks omitted); *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (concluding that the Office's regulatory bars to registering short phrases and typographic ornamentation was "a fair summary of the law"). These bars to registration are not based on the subject works being "commonplace" or "expected as a matter of course," but rather, on their failure to possess more than a minimum amount of creativity.

Moreover, making trivial alterations to otherwise standard shapes or familiar designs will not inject the requisite level of creativity. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03. ("[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.'"); *Compendium II*, § 503.02(a) (Registration cannot be based upon "a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

2. Selection, coordination or arrangement of public domain elements

However, unprotectable elements may be arranged or combined in a work so that they exhibit sufficient creativity. Merely combining unprotectable elements does not automatically establish creativity. *See, e.g.*, *Feist*, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of selection, coordination or arrangement). In *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) the Ninth Circuit ruled that the combination of unprotectable elements in the work before it was not copyrightable, stating, "It is true, of course that a *combination* of unprotectable elements may qualify for copyright protection. . . . But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. . . . [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.") (emphasis in original).

Reviewing courts have upheld the Register's decisions in cases where the Copyright Office refused registration for combinations of uncopyrightable elements on the basis that they lacked sufficient creativity to be copyrightable. For example, in *Jon Woods Fashions, Inc. v. Curran*, the district court upheld the Register of Copyrights' refusal to register a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctly arranged and printed. Similarly, 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*, at 990.

3. Comparisons to other works and commercial success

The originality requirement for copyright law does not include a requirement for uniqueness or novelty in comparison to similar works. Each individual work of authorship is considered on its own merits, *i.e.*, the particular expression of authorship, viewed as a whole, without regard to any other specific work. Therefore, comparison to works previously registered is not a part of the Office's determination of copyrightability. While the U.S. Patent Office is statutorily required to examine "prior art" in order to substantiate non-obviousness and novelty, the Copyright Act does not impose a comparable a requirement. The Office examines each claim of registration without comparing it to other works to determine whether the deposit satisfies the requirements for registrability. Indeed, two different authors may independently register an identical work as long as the works were original and sufficiently creative. As Judge Learned Hand stated, "if by some magic a man who had never known [Keats's work] were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author'" of that work. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936). The

originality requirement entails only that a work was not copied and that it is sufficiently creative. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991).

Also, Copyright Office examination procedures do not evaluate the aesthetic or commercial merits of works. *Compendium II*, § 503.02(a) instructs examiners that the aesthetic, commercial or symbolic merit of a work is not relevant to an examination for originality. A work may be highly valued for its aesthetic appeal or for its artistic merit and, yet, not be copyrightable, and *vice versa*. It is not relevant that a work may be commercially successful, valuable or unique. *Id.* Nor is evidence of a third party's assessment of the worth or value of a work relevant to the determination of a work's copyrightability.

On motion for a new trial, the plaintiff in *Paul Morelli Design, Inc. v. Tiffany and Co.*, 200 F. Supp. 2d 482 (E.D. Pa. 2002), argued that the court erroneously refused to instruct the jury to consider the commercial success of the jewelry in question. The District Court upheld the refusal on the basis that the court had "properly charged 'attractiveness, commercial success and substantial efforts are not factors to be considered in deciding whether a work is original.'" 200 F. Supp. 2d at 487. After quoting Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), the District Court stated that "Holmes was simply reminding the reader that copyright protection is available to the mundane as well as to works that would find their way into... libraries of the erudite" and rejected the argument that "commercial success is an element of originality." 200 F. Supp. 2d at 488. *Feist* expressly rejected the "sweat of the brow" or "industrious collection" doctrine that made copyright protection a "reward for the hard work," effort, or expertise that went into producing a work. 499 U.S. at 352. Again, *Morelli*, interpreting *Feist*, opines that neither sweat of the brow nor commercial success "has anything to do with whether an author's work is original." 200 F. Supp. 2d at 488. *See also Homer Laughlin China Co. v. Oman*, at 1076 (rejecting commercial success as relevant factor).

B. Analysis of the Six Graphic Designs

You argue that the six works, Heart in New Hampshire, Heart in New York, Heart in Oregon, Heart in South Carolina, Heart in Texas and Heart in Vermont, have the required minimal amount of creativity necessary to sustain a copyright registration. Although the Board agrees that the *Feist* standard for creativity is very low, it has determined that these graphic designs contain insufficient creativity.

1. Works contain insufficient creativity

All six designs have two basic elements, a heart shape within the outline of a state. The graphic designs can be divided into two categories. One category includes those that have only the two basic elements of a heart shape within a state silhouette which are the Oregon and Vermont designs. The second category includes the other four designs which have a third, graphic element added to their heart shapes. The graphic elements are ones commonly associated with each state. For color, the silhouettes for five of the works is black and Vermont's is white. In each design, except Vermont, the heart is shown against a solid white background. Vermont's background is green. For the heart shapes, each has a minimal amount of color. One color is used in Oregon's and

Vermont's hearts, two in New Hampshire's, New York's and South Carolina and three for Texas' heart.

You state that each of the graphic works "embody creativity as to the selection of color, as to the stylistic representation of a state's outline, as to the selection of and specific expression of the graphics depicted within a state's outline, etc., and more importantly, as to the format and collective expression of these characteristics." Letter from D'Ascenzo to Copyright R&P Division of 12/30/2009, at 2. In support of registration, you write that these characteristics collectively embody the creativity of Applicant's works and specifically embody the requisite expression necessary ... that readily *expresses* the *idea* of state pride to viewers." *Id.* (emphasis in original) You identify the creative aspects of Heart in Vermont and Heart in Oregon as the selection of color, representation of the state boundaries, the weight of lines used and the heart's shape and position within the state's silhouette. *Id.* at 3. For Heart in New Hampshire, Heart in New York, Heart in South Carolina and Heart in Texas, reviewing the graphics combined with the heart shape in each, you assert that those additional elements increases their creativity. *Id.*

The Copyright Office accepts the principle of *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989) that a work should be viewed in its entirety, judging it as a whole. So, for each graphic design, the Board evaluated the creativity of both the individual elements and their creativity as a whole, considering their selection, combination or arrangement.

Evaluating individual elements. For each work, first, the Review Board evaluated the creativity for each individual element alone, independent of the whole. The Board concluded for each work that none of the individual elements are copyrightable because they are all either common shapes or symbols that are in the public domain or are minor variations of public domain shapes or symbols. *See* 37 CFR § 202.1.

For the individual element of the state outline, you argue that each is copyrightable because of the author's stylistic representations, which include slight modifications to the shapes and to the selected weight for the lines used along the edges. However, those are very minor variations on the factual shape of a state's borders, which is a commonly used and recognizable shape. Using an outline to draw a state silhouette is a typical way to symbolically depict a state. Without more, there is little or no creativity in making a slight adjustment that increases the thickness of a silhouette's outline, particularly when done in a uniform, consistent manner around the entire silhouette. You point out that the author changed the proportions of the state's shapes in a few designs, but that detail is also a minor variation in each shape. For example, shortening the lower proportion is a minor adjustment in California's silhouette that does not change its overall shape. The outlines in all the designs lack geographic precision. Yet, these modifications are minor variations on the common, factual shapes of easily recognized state borders. This conclusion is supported by the basic purpose of the designs which is to depict the particular state identified in the title of the design. If not, they would fail to express the idea of state pride. The minor variations you identify in the outline for each state are too few and have too little authorship to satisfy the creativity requirement when considered separately from the whole.

A recent appellate court decision reviewed the application of this analysis in another case. In *Darden v. Peters*, 488 F.3d 277 (4th Cir. 2007), plaintiff unsuccessfully challenged the Copyright Office's refusal to register a work based on state maps. Registration was refused because, similar to the works here, the changes and additions plaintiff made to standard census maps were not sufficiently original or creative to be copyrightable which the Court upheld. *Id.* at 287 ("Additions to the preexisting maps such as color, shading, and labels using standard fonts and shapes fall within the narrow category of works that lack even a minimum level of creativity... .")

Similar considerations apply to the heart shape, which is the same standard heart shape in each of the graphic designs. It is a common public domain shape. Also, each of the individual graphic elements added to the heart shape, without more, are unprotectible common shapes or symbols. The crescent moon, and palm tree for South Carolina, the state flag pattern for Texas, the Old Man of the Mountain granite silhouette for New Hampshire and the apple stem for New York are, likewise, common and ordinary shapes or symbols that are in the public domain. The author's particular renditions of each of these elements are minor variations on common and familiar public domain shapes or symbols. By itself, each element contains insufficient creativity. Moreover, the addition of color does not alter that conclusion; mere coloring of a common shape or symbol is not copyrightable. 37 CFR § 202.1(a).

Evaluating combination of elements. The only means by which the elements in the designs could possibly sustain a copyright would be if their particular combination or arrangement exhibited a sufficient level of creativity. Therefore, the Board evaluated the creativity in the selection, coordination or arrangement of the uncopyrightable elements in each graphic design. It has determined that the combination of elements in each design does not support a copyright. There is virtually no creativity in selecting a state, indicating its boundaries with a continuous thick line and symmetrically placing a heart shape within the state. Even with the addition of commonplace graphic elements in some of the designs, they do not rise to the requisite level of creativity necessary to support a claim of copyright.

In the South Carolina design, the shape of the state is white with a thick, dark line outlining the edge. A blue heart is centrally placed within the state silhouette. In the heart is a white crescent moon and a white palm tree. These additional graphic elements in the heart are arranged the same way that they appear on the South Carolina flag and are entirely typical as indicators of this state. Merely placing this state symbol in a heart and placing the heart in an outline of the state involves *de minimis* creativity. Although you assert that the elements selected do not replicate the state flag in its entirety, the flag design is merely enveloped in the heart shape rather than a rectangle. Even the blue and white colors are identical to the flag. Not only are the additional graphic elements in the public domain and arranged in an obvious manner, the selection of those elements in connection with South Carolina are entirely typical. The entire combination is predictable in connection with expressing the idea of state pride for South Carolina, particularly in light of the "I Heart New York" or "I Love New York" slogans that have become part of popular culture as expressions of state pride. Considering the selection, coordination or arrangement of public domain elements in Heart in South Carolina, as a whole, there are too few artistic choices to sustain a claim of copyright.

Similar considerations apply to the other graphic designs. For Heart in Texas, the shape of the state is white with a thick, dark line outlining the edge. A heart is centrally placed within the state silhouette. Like South Carolina, the selection and arrangement of the additional graphic elements on the Texas heart merely copy the Texas state flag within a heart shape. The arrangement of red, white and blue shapes and the single white star against a blue background is the same as the Texas flag. So there is no creativity in copying the Texas flag and the choice of those elements is routine for references to a state.

For Heart in New York, the shape of the state is also white with a thick, dark line outlining the edge. A red heart is symmetrically placed within the state silhouette. The one graphic element added to Heart in New York is a commonplace shape that is predictable in connection with New York. The choice of adding a stem to the heart to represent an apple in connection with New York is obvious given the common reference to New York City as "the Big Apple." Furthermore, combining so few elements, without more, to create an apple displays little creativity. There is no creativity involved in coloring a heart or an apple red, and adding an apple stem is a trivial, garden variety variation. The creativity is too slight to sustain a claim of copyright.

A similar lack of creativity exists in the Heart in New Hampshire design. Again, Heart in New Hampshire's shape is white with a thick, dark line outlining the edge. A white heart is centrally placed within the state silhouette. On the heart is the silhouette of the Old Man of the Mountain. New Hampshire is known as the granite state and the Old Man of the Mountain represents the granite mountains. That silhouette has long been a symbol of New Hampshire. So much so, that, like the Heart in New Hampshire design, the Old Man of the Mountain is the only symbol used in the New Hampshire design for the recent U.S. Mint State Quarters Program. This design, combining the shape of the state, a heart and an obvious state symbol, without more, is not sufficiently creative for copyright protection because there are too few artistic choices and the authorship is *de minimis*.

The Heart in Vermont design has a green background with a heavy white line forming the silhouette and a symmetrically placed, solid white heart shape. The Heart in Oregon design has a white background with a heavy black line forming the silhouette and a centrally placed, solid green heart shape. These two designs contain even less creative authorship than the other graphic designs because they arrange only two uncopyrightable elements, a heart shape symmetrically placed within a state silhouette, without any additional graphics or colors. The two elements present are minor variations on common shapes or symbols. The variations are so minor that the creativity present in the combination of these two public domain elements is incapable of supporting a claim of copyright.

2. Case law does not compel registration

To support registration for the six works at issue here, you cite three infringement cases, arguing that Applicant's graphic designs have as much creativity as the registered works at issue in those cases. The work in *Arthur v. American Broadcasting Companies*, 633 F.Supp.146 (S.D. NY 1985) was a sculpture that combined the Olympic logo with the letters "abc" from the defendant's logo. *Kellman v. Coca-Cola Company*, 280 F.Supp.2d 670 (E.D. Mich. 2003) involved a three-dimensional work, a hat designed to look like an ordinary piece of hardware, a wing nut. You also

cite *Runstadler Studios, Inc. v. MCM Ltd. Partnership*, 768 F.Supp. 1292 (N.D. Ill. 1991) which, again, involved a three-dimensional work, a sculpture made of panes of glass.

The Board does not agree that these cases support registration for the six graphic designs. All three involved three-dimensional works. As the court pointed out in *Arthur v. American Broadcasting Companies*, the Copyright Office refused registration for a two-dimensional representation of the plaintiff's sculpture. A sculpture inherently has creative aspects that are not present in a two-dimensional work, which the court recognized. *Arthur v. American Broadcasting Companies*, at 148 (finding that the Copyright Office correctly rejected the sketches as lacking originality and properly did accept the sculpture). Different considerations are inherently involved with works that are three-dimensional sculptural works. Although the Copyright Office does not compare works in assessing registrability, the Review Board concurs with Ms. Giroux-Rollow's conclusion that the works at issue in the cases that you cite do not support the copyrightability of applicant's works.

IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register Heart in New Hampshire, Heart in New York, Heart in Oregon, Heart in South Carolina, Heart in Texas and Heart in Vermont. This decision constitutes final agency action in this matter.

Sincerely,

TSL

Robert Kasunic
Deputy General Counsel
for the Review Board
United States Copyright Office