United States Copyright Office
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April 2, 2012

Via First Class Mail and Fax

Jodi A. Reynolds, Esq.
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RE: MARINE CORPS AMALGAMATION
Correspondence ID: 1-7419TP

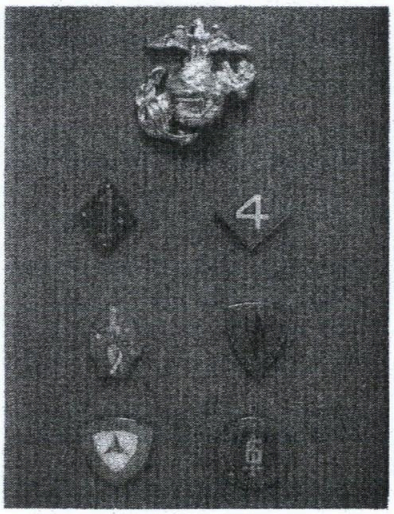
Dear Ms. Reynolds:

I am writing on behalf of the Copyright Office Review Board in response to your second request for reconsideration dated March 29, 2011 on behalf of Mr. Donald Mark. After reviewing the application from Mr. Mark and the arguments you have presented, the Board is refusing registration for Marine Corps Amalgamation because it lacks sufficient creativity to be copyrightable.

I. ADMINISTRATIVE RECORD

A. Description of work and initial refusal to register

On April 30, 2010, the Copyright Office received an application from Mr. Mark to register the Marine Corps Amalgamation work of authorship, copy of photo below. Regarding the composition of the work: the applicant has arranged the United States Marine Corps (USMC) gold emblem pin and six other USMC lapel pins on a red background that represent the six Marine Corps divisions in World War II. The six lapel pins labeled 1 to 6 are placed in two vertical columns with pins labeled 1 to 3 in the first column and the pins labeled 4 to 6 in the second column. The gold Marine emblem pin is placed above and between the two vertical columns, creating a third vertical column.



In a letter dated June 23, 2010, the Copyright Office refused registration on the basis that the new material added to preexisting elements did not contain a sufficient amount of original authorship.

B. First request for reconsideration

In a letter dated September 15, 2010, you sought reconsideration for Marine Corps Amalgamation on behalf of Mr. Clark. You argued that to be eligible for registration, a work must meet a level of creativity that is "very slight," "minimal," "modest." Letter to Copyright Office from Jodi Reynolds of 9/15/2010, at 1, citing *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989). Relying again on *Atari* (citing *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.* 490 F.2d 1092, 1094 (2d Cir. 1974), *Id.*, you asserted that "simple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded a copyright protection both by the Register and in court." Furthermore, you stated that "although the lapel pins and gold emblem pin are preexisting works, they have been combined on a red background in a distinctive manner indicating some ingenuity." *Id.*

In addition, you cite the case of *Folio et al. v. Byer, et al.*, 737 F.2d 759 (2d Cir. 1991) where the arrangement of clip art Folio Roses over an unoriginal background was found to be original. Letter from Reynolds of 9/15/2010, at 2. You emphasize that the Court found that the designer's decision to place the Folio Roses in straight rows was an artistic decision. Further, you add that although it required little creative input, the court found the arrangement of the Folio Roses to be an original work. For these reasons, you argue that the Marine Corps Amalgamation work should be registered by the Copyright Office.

C. First request for reconsideration

In response, the Registration Program's Attorney-Advisor Virginia Giroux-Rollow, in a letter dated January 13, 2011, also refused registration for Marine Corps Amalgamation on the grounds that it does not have sufficient creativity to be copyrightable. Letter to Reynolds from Giroux-Rollow of 1/13/2011, at 1. Citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S, 340 (1991), she determined that the work does not contain a sufficient amount of original and creative artistic or sculptural authorship in the treatment, selection or arrangement of its elements to support a copyright registration. Ms. Giroux-Rollow also distinguished the work from the works in cases you had previously cited, finding those works possessed "more than a *de minimis* quantum of creativity." Letter from Giroux-Rollow of 1/13/2011, at 1,3.

Ms. Giroux-Rollow further pointed out that in the case of a derivative work, as is the case here, when a work is derived from, or based on, pre-existing or previously published elements, the copyright in any subsequent work covers only the copyrightable additions or changes made for the first time. If a work contains only minor changes or material not protectible by copyright such as a minor variation in coloring or a change in layout or format, copyright registration is not possible. Letter from Giroux-Rollow of 1/13/2011, at 1.

D. Second request for reconsideration

On March 29, 2011, the Copyright Office received a second request for reconsideration from you for the Marine Corps Amalgamation work. In addition to your previous arguments, you discussed the case law relied on by Ms. Giroux-Rollow and refuted her arguments. You countered

that the telephone directory (white pages) in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S, 340 (1991), did not meet constitutional or statutory requirements for copyright protection because the information was not selected, coordinated or arranged in an original way. Letter to Copyright Office from Reynolds of 3/29/2011, at 2. You also cited the *Folio et al. v. Byer et al.*, 737 F.2d 759 (2d Cir. 1991) case that, as previously mentioned, discusses the copyrightability of the arrangement of Folio Roses against a non-original background. Letter from Reynolds of 3/29/2011, at 3. Lastly, you countered that in *Boisson v. Banian Ltd.*, 272 F.3d 262 (2d Cir. 2001), the layout on a quilt, including the color of square blocks containing the capital letters of the alphabet displayed in five-by-six block format, was found to be original. Thus, you have concluded that the work at issue here is registrable as a copyrightable work.

II. DECISION

After carefully reviewing the application and your arguments, the Review Board has confirmed that the Marine Corps Amalgamation work does not exhibit sufficient creative authorship to be copyrightable.

The Review Board recognizes that the selection or arrangement of pre-existing elements that displays some minimal level of creativity may be copyrighted because it falls within the statutory classes of subject matter amenable to copyright. 17 U.S.C. § 102(a)(5) – pictorial, graphic and sculptural works. *Feist*'s articulation of originality as a constitutional requirement lays the groundwork for the principle that "copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." 499 U.S. at 340, 363. However, these conclusions do not mandate that every selection or arrangement found in a work submitted for registration render that work copyrightable. *Feist* says that, in order to be copyrightable, individual elements [sometimes protectible in themselves, sometimes not] "must be selected, coordinated, or arranged 'in such a way' as to render the work as a whole original. This implies that some ways will trigger copyright, but that others will not." *Feist* at 377, in turn citing *Patry, Copyright in Compilation of Facts, 12 Com. & Law* 57 (Dec. 1990).

A. Originality analysis

Copyright protection is only available for "original works of authorship." 17 USC §102(a). Courts have interpreted "original" as consisting of two elements: (1) independent creation and (2) sufficient creativity. In *Feist* at 346, 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 Review Board accepts the fact that Mr. Mark independently selected and arranged the USMC lapel pins. Thus, our analysis will focus only on the second prong of originality which requires that a work must possess sufficient creativity. While only a minimum level of creativity is sufficient, it must be more than *de minimis*. Even prior to *Feist*, courts interpreted the creativity prong of "original" to be very low, easily satisfied. Any "distinguishable variation" of a work constituted sufficient originality as long as it was the product of an author's independent efforts, and was "more than a 'merely trivial' variation." *Catalda*, at 102-103. *Bleistein v. Donaldson*

Lithographing Co., 188 U.S. 239, 250-251 (1903): "... a very modest grade of art has in it something irreducible, which is one man's alone."

As you have stated, a low level of creativity is needed to satisfy the originality requirement. Letter from Reynolds of 3/29/2011, at 2-3. However, the *Feist* Court stressed that there are works, such as the white-pages telephone directory which the Supreme Court held not protectible, in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist*, at 359. The Court ruled that the white-pages listing of telephone numbers in alphabetical order by name of resident did not meet the minimum standards for copyright protection. *Id.* at 363. It characterized the arrangement as "typical," "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a manner of course." *Id.* Such works are incapable of sustaining copyright protection. *Id.* at 359 (citing *Nimmer on Copyright*, § 2.01[B]). A work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Feist* at 362-363.

Although written before 1991, *Feist's* date of issuance, practices and guidelines for the Copyright Office incorporate the principles for originality elucidated by the Supreme Court in *Feist*. These guideposts are found in *Compendium II; see, e.g.*, § 202.02(a), (detailed guidelines for examination procedures[1]). With respect to pictorial, graphic and sculptural works, *Compendium II* further states that:

> A certain minimal amount of original creative authorship is essential for registration. . . . Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value. Thus, 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, 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. For example, it is not possible to copyright a new version of a textile design 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.
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> *Compendium II*, § 503.02(a)

Copyright Office regulations provide examples of works which are not the subject of copyright; these include "[w]ords and short phrases such as names, titles, and slogans; familiar

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[1] *Compendium of Copyright Office Practices, Compendium II* (1984), sets forth Copyright Office principles and practices for examining and registering works of authorship and also for processing documents relating to copyright which are recorded. *See also* 37 C.F.R. § 201.2(b)(7).

symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents." 37 C.F.R. § 202.1(a). These are exceptions to copyright protection because they may be termed basic building blocks for creative works and, so, must remain in the public domain, available to all. Permitting them to be copyrighted would impede the constitutional goals that underlie congressional authority to establish copyright protection. art. I, § 8, cl. 8: "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" *Feist* at 349.

Such bars to registration are based on the subject work's failure to possess more than a minimum amount of creativity. Again, while a low, minimal level of creativity is sufficient to satisfy the creativity standard, trivial alterations to otherwise standard shapes or familiar designs may not inject the requisite level of creativity. *Catalda* at 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").

B. Selection, coordination, arrangement of public domain elements

It is an accepted principle of copyright law that unprotectible elements may be arranged or combined in a work so that the resulting work may exhibit sufficient creativity. *Feist at* 345, 363. *Feist* is particularly instructive in its elucidation of the appropriate standard of analysis for determining whether compilations or combinations of public domain, standard, or trivial elements satisfy the requirement for creative authorship. Under the *Feist* standard for compilations, works based on public domain, standard or commonplace, or trivial elements may be copyrightable if there is some distinguishable element in their selection, coordination, arrangement or overall combination that reflects choice and that results in authorship that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent" for the resulting work as a whole. *Id.* at 358-359. *See also* 17 U.S.C. § 101 (definitions of "compilation" and "derivative work"). In any examining analysis of a work of the visual arts, the Copyright Office considers the organization, arrangement, selection, or combination of elements or features *as a whole* rather than focusing on individual elements in themselves. *Compendium II*, § 625.02.

However, merely combining unprotectible elements does not automatically establish creativity. *See, e.g.*, *Feist* 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 unprotectible 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 the resulting works lacked sufficient creativity to be copyrightable. For example, in *Jon Woods Fashions, Inc. v. Curran*, 1988 WL 38585 (S.D.N.Y), 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*, 802 F.2d 989 (8th Cir. 1986) at 990.

C. Comparisons to other works

In addition, uniqueness or novelty in comparison to similar works is not an aspect of the originality requirement in copyright law. 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 relevant part of the Copyright Office's determination of copyrightability. While the Patent & Trademark Office may examine "prior art" in order to substantiate non-obviousness and novelty, the Copyright Office does not have a similar examining requirement. The Copyright Office examines each claim of registration without comparing it to other works to determine whether the entire submission satisfies the requirements for registrability. Indeed, two different authors may independently register an identical work as long as the works are original and sufficiently creative. As Judge Learned Hand has 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). *See also* Compendium II, § 108.03 which states that "[T]he Copyright Office does not generally make comparisons of copyright deposits to determine whether or not particular material has already been registered." In addition to this axiom, we point out section 410(a) of Title 17: the Register must determine whether the "material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met." Deposit materials submitted under the requirements of 17 U.S.C. § 408 allow the Copyright Office to examine the authorship for which registration is sought.

D. Other relevant case law

In your second request for reconsideration, you cite as helpful to Mr. Mark's case, *Folio et al. v. Byer et al.*, 737 F.2d 759 (2d Cir. 1991). You explain that the *Folio* court took into account several factors including the background, the roses themselves and the arrangement of the Folio Roses in making its determination. Moreover, you emphasize that the Court concluded that the background was not original, nor were the roses themselves, but that the arrangement of the Folio Roses over the background was original. The Court found that the designer's decision to place the Folio Roses in straight rows was an artistic decision, reasoning that "although the arrangement [of the roses and the background] may have required little creative input", it, nevertheless, was copyrightable. 737F.2d at 763-765.

Similarly, you have argued that the USMC emblem pin and six lapel pins as components of the work at issue here are equivalent to the Folio Roses in that they are arranged in straight rows. Additionally, you state that, "similar to the Folio Roses against a background, Applicant's design is more than a trivial variation or arrangement and Applicant has selected and arranged the pins on a red background in a creative manner. If the arrangement in *Folio* is copyrightable, the Marine Corps Amalgamation should be entitled to equal treatment and therefore, copyrightable." Letter from Reynolds of 03/29/2011, at 3. Again, we agree that an original combination of elements, each of which individually is unoriginal, may be copyrightable if that combination as an

entirety meets the minimal standards of creativity. *Satava* at 811. However, the Review Board does not find more than *de minimis* creativity in the particular combination of elements presented here where the 6 USMC lapel pins are arranged by ordinal number with the gold emblem pin of the eagle, globe and anchor placed above the six lapel pins. *See Compendium II*, § 503.02(a) ("simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations" not copyrightable); § 503.02(b) ("mere bringing together of two or three standard forms or shapes with minor linear or spatial variations" not copyrightable).

Copyright may protect the combination of preexisting and/or unprotected materials. However, not every such combination, compilation or decision on selection or arrangement is sufficiently creative to be protected. "The creative spark is missing where: ... the author made obvious, garden-variety, or routine selections." *Feist* at 362. Thus, we must again state that the "selection and arrangement of facts *[NB – the Review Board adds 'or of any preexisting or public domain compositional elements']* cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist." *Feist* at 362.

You have also extensively cited *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir 2001) in support of registration for the Amalgamation work. You argue that the Court there found the "use of the alphabet, the layouts of the alphabet, and the color" to result in a copyrightable work. Letter from Reynolds of 3/29/2011, at 3, citing *Boisson* at 271. The *Boisson* Court found that the quilts at issue were sufficiently creative because of the presence of: 1] use of the alphabet (in itself, obviously, in the public domain) 2] arrangement of the alphabet-letter shapes in a five-by-six block format and 3] use of colors within the quilt design. These elements were held by the Second Circuit to constitute an overall work that sustained copyright in its entirety. The Board does not see a sufficient comparison between the *Boisson* quilts with their block-format layout, 273 F3d at 269, and their use of colors [note plural].[2]

The layout in the Amalgamation work at issue here consists of a simple two-column placement of the preexisting lapel pins. The pins themselves are "the six lapel pins that represent the six Marine Corps divisions in World War II; they are evenly spaced within two columns and three rows." Letter from Reynolds of 9/15/2010, at 1. Although you have further stated that "the author's choice in incorporating color with other elements may be copyrighted" [Letter from Reynolds of 9/15/2010, at 2], we the Review Board add that the inclusion of all six Marine units which served in World War II, showing no authorial choice since **all** are present, with a simple and uniform one-color background, and, in-between the two evenly-spaced columns the Marine emblem sitting at the top of the two columns (evenly-positioned between the columns) does not evidence sufficient creativity to support a registration. This art presentation is commonplace, having very few, pre-existing elements – the lapel pin elements are almost universal in their representing <u>all</u> WWII Marine units – appended to a one-color background. The resulting work fails to meet the *Feist* standard.

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[2] Copyright regulations, C.F.R. §202.1, refers to material not subject to copyright; among the materials– coloration. *Boisson* refers to this regulation but further notes that color may be considered as an element in an overall visual work that contributes to that work's copyrightability. Citing *Nimmer*, § 2.14, at 2-178.4, the Court accepts that "an original combination or arrangement of colors should be regarded as an artistic creation capable of copyright protection." The *Boisson* Court also noted that, in finding infringement, it credited the plaintiff with "arranging all the design elements and colors into an original pattern...." *Boisson*, 273 F.3d at 271

Your March 29, 2011 Letter alludes to the principle stated in *CCC Info. Services v. MacLean Hunter Mkt. Reports,* 44 F.3d 61, 66 (2d Cir. 1994), in which the Second Circuit stated that *Feist's* intent was "not to erect a high barrier of originality requirement. .... The policy embodied into law is to encourage authors ...not to threaten them ...if their works of authorship are found insufficiently imaginative." The Review Board understands this principle and, thus, considered the work at issue here in its entirety rather than dissecting the work into individual components. By regarding the Amalgamation work as a whole, *i.e.*, a unitary work, the Board has concluded that the resultant work of choosing all relevant Marine WWII lapel pins, placing them in a vertical two-row order, with the overarching Marine emblem sitting atop such listing, all against a simple red [no shading variations] backdrop results in what *Feist* termed a garden variety presentation.

III. MARINE CORPS AMALGAMATION HAS *DE MINIMIS* AUTHORSHIP

As we have explained, the Copyright Office considers a work in its entirety. Our examination of Marine Corps Amalgamation does not focus on its individual design elements. Rather, our examination of the Marine Corps Amalgamation work of authorship approaches it in its entirety. You have cited *Folio* for the proposition that, "The level of originality...is *[i.e., need be]* minimal, only an "unmistakable dash of originality need be demonstrated, high standards of uniqueness in creativity are dispensed with." Letter from Reynolds 03/29/2011, at 3. We state, again, that this principle should not be interpreted to mean that all combinations and arrangements of commonplace, simple, or unprotected-in-themselves elements will rise to the level of copyrightable authorship. See above, *Satava*. The Marine Corps Amalgamation work consists of Marine Corps pins that are evenly spaced within two columns and three rows, set against a solid, single color. The preexisting pins are combined in an ordinary and even logical way, *i.e.*, in a numeric order. Consequently, the Review Board finds that the design components of the Amalgamation work, few in number, have been selected, arranged or coordinated in an ordinary, rather commonplace manner that lacks the required minimal creativity which warrants copyright protection.

CONCLUSION

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register Marine Corps Amalgamation. This decision constitutes final agency action in this matter.

Sincerely,

/s/

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