United States Copyright Office
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June 19, 2012

Via First Class Mail and Fax

Michael J. McCue
Lewis and Roca LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89109

RE: VISA & BANDS DESIGN – BLUE, WHITE & GOLD
Correspondence ID: 1-5WQ2US

Dear Mr. McCue:

I am writing on behalf of the Copyright Office Review Board ("Board") in response to your letter dated February 7, 2011, requesting reconsideration of the Copyright Office's refusal to register a work of 2-dimensional art on behalf of your client, Visa International Service Association ("Visa"). The Board has carefully examined the application, the deposit, and all correspondence in this case and affirms the refusal of registration. The work in question does not contain the quantum of creativity necessary for copyrightability.

I. DESCRIPTION OF THE WORK

The "VISA & Bands Design – Blue, White & Gold" ("Design") is composed of three horizontal bands. The top band is a rectangle in blue, the middle band is a rectangle in white, and the bottom band is a rectangle in gold. The word "Visa" appears in a stylized italic font in blue against the white band, with the left portion of the letter "V" having a "winged" design element pointing to the left.



II. ADMINISTRATIVE RECORD

A. Initial Submission and Refusal to Register

On March 5, 2010, the Copyright Office ("Office") received an electronic registration application from claimant Visa, seeking to register the Design as a "2-dimensional artwork."

On March 17, 2010, William Briganti of the Visual Arts and Recordation Division of the Office sent a letter to Ms. Denise Yee of Visa stating that the Office could not register the Design because it "lacks the authorship necessary to support a copyright claim." Examiner letter at 1.

B. First Request for Reconsideration and Copyright Office Response

First Request for Reconsideration

On June 17, 2010, the Office received a letter from you requesting that we reconsider our refusal of registration for the Design. You argued that the Design meets the minimal level of creativity required for protection under copyright law. First Request Letter at 1. You also pointed out that Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991) held that the level of creativity required for protection is "extremely low" that "even a slight amount will suffice." Id citing Feist, 499 at 359. You stated that the "Supreme Court made it clear that the threshold level of creativity required for copyright protection is so low that the "vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be." Id. You added that there is only a "narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Id.

You noted that although individual elements such as familiar symbols and designs are not copyrightable, a compilation of unprotectable elements may be protectable. First Request Letter at 1 citing Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1003-04 (2d Cir. 1995), Folio Impressions, Inc. v. Byer California, 937 F.2d 759 (2d Cir. 1991). Additionally, you stated that the "arrangement of lettering and the manner of presentation, including the background, letter size and spacing, combined" may warrant copyright protection. First Request Letter at 1-2 citing Sadhu Singh Hamdad Trust v. Ajit Newspaper Advertising, Marketing and Communications, Inc., 2007 WL 6940359 (E.D.N.Y. 2007).

You argued that the Design "has at least the "extremely low" or "slight amount" of creativity required for copyright protection under Feist" and went on to describe the Design in detail. First Request Letter at 2. You asserted that while the individual elements of the Design would not be protectable, the combination and arrangement of the elements would be copyrightable. Id. You listed fourteen (14) artistic decisions that were made in creating the Design and found that "the number and nature of the artistic decisions required to create the [Design] establishes the level of creativity required." Id.

You stated that Visa is not looking for protection of the individual elements of the Design (i.e. the word "VISA," the individual colors, the individual shapes) but rather for the Design as a whole. Id. You asserted that the Office's decision implies that there is no creative spark embodied in the Design and that that conclusion is not consistent with the artistic decisions embodied in the Design. Id.

Copyright Office Response

On October 7, 2010, Ms. Virginia Giroux-Rollow, an attorney-advisor for the Office's Registration and Recordation Program, wrote to you affirming the denial of copyright registration for the Design. She concurred with Mr. Briganti that the Design did not contain sufficient original and creative authorship upon which to base a copyright registration. Giroux-Rollow letter at 1.

Ms. Giroux-Rollow based her conclusion in part on the Kitchens of Sara Lee v. Nifty Foods Corp. decision (266 F. 2d 541 (2d Cir. 1959)), which held that, to be copyrightable, a commercial label must contain "an appreciable amount of original text or pictorial expression or both." Id. The Kitchens of Sara Lee court also held that "brand names, slogans, short phrases or expressions" remain noncopyrightable even if "distinctively arranged or printed." Id at 543. Ms. Giroux-Rollow based her analysis of creativity and originality on the Feist standard, as well as on Alfred Bell v. Catalda Fine Arts, Inc., 191 F. 2d 99 (2d Cir. 1951). Ms. Giroux-Rollow noted that the Office examines the work to determine whether it contains elements, either alone or in combination, on which a copyright can be based, and does not consider its attractiveness, uniqueness, visual effect or appearance, symbolic meaning, the time, effort and expense it took to create, commercial success or the like. Giroux-Rollow Letter at 2.

Analyzing the individual elements and the resulting Design, Ms. Giroux-Rollow concluded that, under the Copyright Act's regulations, the Design and its individual elements are noncopyrightable. Id. Ms. Giroux-Rollow determined that the combination of the unprotectable elements exhibited in the Design was not sufficiently creative, describing it as a *de minimis* work "composed of three rectangular bands within a rectangular shape and the word "VISA", coupled with three colors and arranged in a rather simple configuration." Id.

Ms. Giroux-Rollow cited to the Office's Compendium of Copyright Office Practices II, § 503.02(a) as supporting her conclusion regarding the creativity of the Design's arrangement. Id. She went on to cite several federal court of appeals and district court opinions that she claimed confirmed the Compendium II's rejection of simple designs of *de minimis* creativity. Id.

She explained, in addition, that while courts have held that even a slight amount of creativity will suffice for protection and a vast majority of works make the grade easily if they possess come creative spark, "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." Giroux-Rollow Letter at 2 -3 citing Nimmer On Copyright, in Sec. 2.01(b). Ms. Giroux-Rollow concluded that the Design "which contains the noncopyrigtable word "VISA" and three public domain rectangular shapes, with just three colors, arranged in a rather simple configuration, fails to meet even the low threshold for copyrightable authorship" established in Feist. Id at 3.

Ms. Giroux-Rollow further noted that although designs are not registrable as "compilations," the Office accepts the principle articulated in Atari Games Corp. v. Oman, 888 F. 2d 878 (D.C. Cir. 1989) and Knitwaves, Inc. v. Lolltogs Ltd., 71 F.3d 996 (2d Cir. 1996) that a work should be viewed in its entirety, with noncopyrightable elements judged not separately, but rather in their overall inter-relatedness within the work as a whole." Id. However, she concluded that even under this standard of review for copyrightability, the simple treatment and arrangement of the elements embodied in the Design fail to rise to the level of creativity necessary to support registration. Giroux-Rollow Letter at 3.

Ms. Giroux-Rollow discussed two Second Circuit cases cited in your First Request for Reconsideration, Folio and Boisson v. Banian, Ltd., 273 F. 3d 262 (2d Cir. 2001), which upheld copyrightability for works that you argued are comparable to the Design. Id. Ms. Giroux-Rollow asserted that the works described in those cases are of greater complexity and extent of authorship than the Design and are therefore not comparable. Id. Additionally, Ms. Giroux-Rollow discussed the Sadhu Singh case and determined that this case was not an adjudication of copyrightability. Moreover, the work at issue in that case was not a United States work and therefore the Office did not have the opportunity to make a factual decision with respect to registration. Giroux-Rollow Letter at 4, Sadhu Singh, 503 F. Supp. 2d 577. In regards to the Design the Office did make a factual decision and determined that the Design did not meet the Feist standard of creativity. Id.

Ms. Giroux-Rollow noted that the look and feel and impression of the work goes to the mental activity of the viewer of the work, and not to the composition of the work. Id. She concluded that the inspiration of the selection of colors used in the Design does not make the work copyrightable; a sufficient amount of original and creative expression is still required. Id.

Ms. Giroux-Rollow finished her letter by stating that, while the Design is obviously the result of choices of size, shape, orientation and arrangement, it is not the possibility of choices that determines copyrightability, but the creativity and originality exhibited by the work as submitted for registration. Id.

C. Second Request for Reconsideration

On February 8, 2011, the Office received your Second Request for Reconsideration. In it, you agreed that Feist established the standard for copyrightability. Second Request Letter at 1. However, you believed that the Office "applied a standard for copyright protection that is higher than the standard set forth" in Feist. Id. You asserted that the Office characterized Feist as requiring a "*very* low" standard of creativity. Instead, you argued, the standard is "*extremely* low." Id citing Feist, 499 U.S. at 359. You claimed that the latter standard conveys a lower standard, one that is "exceedingly low." Second Request Letter at 1. You noted that Feist provides that "even a slight amount of original authorship will suffice," and that the required level of creativity is so low "that the work merely must 'possess some creative spark, no matter how crude, humble or obvious it might be.'" Id., citing Feist, 499 U.S. at 359. Based on these standards, you found that "*any* creativity should suffice, because it does not matter how crude, humble, or obvious the creativity may be." Second Request Letter at 1.

You claimed that the Office dissected the Design, concluding that the individual elements as well as the Design as a whole are not protectable under copyright law. Id. You pointed out that the Office relied on a number of cases decided prior to Feist and therefore argued that they are not good law in the extent that they do not apply the Feist standard. Id at 1-2. You asserted that the Office failed to address the courts' analysis in post-Feist cases, Folio and Boisson, in illustrating that the works at issue were of greater complexity than the Design. You concluded that "these were not close cases and, therefore, they do not define the boundary between protectable and unprotectable works." Id at 2. Further you stressed, "to conclude that the [Design] at issue in this case is not as complex as the artworks at issue in Folio and Boisson does not compel the conclusion that the [Design] is not sufficiently creative to be protected under copyright law." Id.

You stated that the Office suggested that the artistic choices made in creating the Design are irrelevant in determining copyrightability. You argued that the Office must consider the creative

decisions when making this determination. You cited SHL Imaging, Inc v. Artisan House, Inc., 117 F. Supp. 2d 301 (S.D.N.Y. 2000) as an example. Id. It holds that "the elements that combine to satisfy Feist's minimal 'spark of creativity' standard will necessarily vary depending on the photographer's creative choices" and that the analysis must begin with consideration of the description of the photographer's artistic process." Id citing SHL Imaging, 117 F. Supp. 2d at 310-11. You asserted that the court in SHL Imaging considered the artistic choices embodied in the works (photographs of mirrors) and based on those decisions found that the works contained sufficient creativity for protection. Second Request Letter at 2-3.

You claimed that the Office ignored the artistic choices reflected in the Design and made a "subjective and superficial" decision pronouncing that the Design did not meet the requisite level of creativity for protection. Id at 3. You reasserted that the consideration of the artistic choices made in creating the Design would at the least prove a "slight spark of creativity." Id. You went on to describe the Design and listed the fourteen (14) creative decisions that resulted in the Design:

> (1) the overall look and feel of the work; (2) the use of geometric elements; (3) the type of geometric elements; (4) the number of geometric elements; (5) the size of each geometric element; (6) the layout of the geometric elements; (7) the color of each geometric element; (8) the order of the colors of the geometric elements; (9) the typeface for the word "Visa"; (10) the "winged design element of the letter "V"; (11) the size of the word "Visa"; (12) the color of the word "Visa"; (13) the placement of the word "Visa"; and (14) decisions regarding what not to include in the Artwork."

Id.

III. DECISION

After reviewing the requests for reconsideration and examining the Design itself, the Review Board affirms the Registration and Recordation Program's refusal to register the "VISA & Bands Design – Blue, White & Gold" ("Design"). The Board finds that the Design does not contain a sufficient amount of original and creative authorship to support a copyright registration.

A. Legal Standard

1. Originality and Creativity

All copyrightable works, be they 2-dimensional designs or otherwise, must qualify as "original works of authorship." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. Feist, 499 U.S. at 345. First, the author must have independently created the work, *i.e.* not copied it from another work. It is the general practice of the Board not to question whether a work was independently created and consider that the first component of originality has been met. The second component requires that a work possess sufficient creativity. For the reasons set forth below, the Board has determined that the Design fails to possess the requisite quantum of creativity, and therefore is not entitled to copyright registration.

2. Quantum of Creativity

In determining whether a work possesses a sufficient amount of original artistic authorship necessary to sustain a copyright claim, the Board adheres to the standard announced in the Feist decision. There, the Supreme Court held that only a modicum of creativity is necessary to support a copyright. 499 U.S. at 345. You correctly pointed out that "[t]he requisite level of creativity is *extremely* low; even a slight amount will suffice." Second Request Letter at 1 citing Feist, 499 U.S. at 345. You argued that the Office characterized the Feist standard as *very* low and claimed that that standard is higher than *extremely* low; a standard that is *exceedingly* low. Second Request Letter at 1. While it is true that Ms. Giroux-Rollow paraphrased the standard as *very* low, Giroux-Rollow Letter at 3, the Board does not find the distinction between the meaning of the words *very* and *extremely* to be significant enough to affect the matter of copyrightability in this case. Whether the standard is *very* low or *extremely* low, the Design does not meet either.

You properly stated that Feist further held that a work merely must "possess some creative spark, no matter how crude, humble or obvious it might be." Second Request Letter at 1 citing Feist, 499 U.S. at 345. You argued that based on this standard *any* creativity should suffice. Second Request Letter at 1. However, the Feist Court also ruled that some works (such as the phone book at issue in Feist), although containing a trivial amount of creativity, fail to meet this 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 a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Id. at 359; see also 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 2.01[B] (2008) ("there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.") While "the standard of originality is low . . . it does exist." Feist, 499 U.S. at 362.

Feist did not articulate a test for determining how much of a creative spark is required to distinguish an uncopyrightable work with a "trivial" amount of creativity from an original work that is copyrightable despite its "crude, humble, or obvious" amount of creativity. The Court did observe, however, that "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course," id. at 363 (describing the alphabetical ordering of names within a telephone directory), would fall within the narrow range of works containing insufficient creativity to merit a copyright. It did not preclude other types of works from falling into this uncopyrightable range. Indeed, the Court suggested that other types of unoriginal creations *do* fit into the *de minimis* range; its reference to the alphabetically arranged directory as being "not only unoriginal, [but] practically inevitable," id., indicates that there are other "unoriginal" works that may not be as "inevitable," but nevertheless fail to meet the minimal level of creative authorship necessary to sustain a claim of copyright.

You argued that Office's reliance on cases decided prior to Feist to support the conclusion that the work as a whole does not possess a sufficient amount of creativity "are not good law to the extent that they do not apply the standard for originality as explained by the Supreme Court in 1991." Second Request Letter at 2. Because Feist does not specifically define a test for determining whether a particular work meets the requisite creativity threshold, it does not invalidate prior cases evaluating this threshold. The principle that the Office may exercise its discretion in determining whether a specific work contains this minimum amount of creativity was similarly left undisturbed.

See Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) ("[D]etermining creativity . . . requires the exercise of informed discretion, and the Register . . . is generally recognized to possess considerable expertise over such matters"). Therefore, your argument that the Office relies on outdated case law to justify its refusal to register the Design, simply because many of the cases that Ms. Giroux-Rollow cited were decided before Feist, is incorrect. See Second Request Letter at 1-2.

Even prior to the Feist decision, the Office recognized that the level of creativity necessary to sustain a copyright claim is modest, but existent. See Compendium of Copyright Office Practices II, Ch. 200, § 202.02(a) (1984) [hereinafter Compendium II] ("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, the 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 C.F.R. § 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). These regulations have been upheld by the courts in many instances and have served 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 (2d Cir. 1951) ("[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."). While the Board will not register works where only trivial authorship is added to familiar or public domain elements, it does recognize that the selection, coordination, and arrangement of such elements can result in a copyrightable work as long as the overall resulting design or overall pattern constitutes recognizable creative authorship. See Alfred Bell & Co., 191 F. 2d at 103.

However, the Board cannot agree with your conclusion that the Design meets the relatively low threshold of creativity necessary to sustain a copyright, either by virtue of its constituent elements or their combination.

B. Analysis

1. Elements of the Design

Section 202.1(a) of the Copyright Office regulations states that "applications for registration [of the following works] cannot be entertained":

> Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents.

For pictorial and graphic works, the Compendium II of Copyright Office Practices elaborates:

> Minimal standards: pictorial or graphic material. A certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class. 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.

Compendium II, § 503.02(b).

You argued that the Office "dissected" the Design instead of directly applying the Feist standard to the Design as a whole. Second Request Letter at 1. Furthermore, you asserted that registration of the Design is not being sought to preclude anyone else from using the individual elements, the word "VISA," the individual colors or the individual shapes, but only to protect the original expression in the Design as a whole. Second Request Letter at 2. The Review Board agrees that a holistic approach is proper for works such as the Design that seek copyright registration on the basis of selection, coordination, and arrangement of non-copyrightable elements. The Board further agrees that if there were any copyright protection for the Design, it would only apply to the expression or manner in which the elements were arranged and selected. However, it is not inappropriate to note that the individual elements making up a work are themselves non-copyrightable. Such an observation is particularly germane when, as in the case of the Design, the individual elements do not cohere into a new, copyrightable design, but remain uncopyrightable both separately and in combination.

With that said, the individual elements in the Design include: three horizontal bands or rectangles, one blue, one white, and one gold, and the word "VISA" where the left portion of the

letter "V" has a "winged" design element pointing to the left. The bands qualify as either a "familiar symbol or design" or "common shape." And "VISA" qualifies as a "word... such as a name, title or slogan." Additionally, the appearance of the word "VISA" is a "mere variation of typographic ornamentation" (37 CFR 202.1(a)), notwithstanding the "winged" design element. In short, none of the individual elements are copyrightable and, therefore, there is absolutely no creativity in the expression found in the individual blue, white and gold bands or the word "VISA."

2. Selection, Coordination, and Arrangement

The Copyright Act expressly permits the protection of compilations, which are defined as works

> [f]ormed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

17 U.S.C. § 101. It is well settled that 2-dimensional artworks such as the Design may be protected because of the way in which they select, coordinate, and arrange public domain elements. See, e.g., Atari Games Corp. v. Oman, 979 F.2d 242, 245 (D.C. Cir. 1992); Roth Greeting Cards v. United Card Co., 429 F.2d 1006, 1009 (9th Cir. 1970). Of course, merely combining unprotectable elements does not automatically establish creativity where the combination or arrangement itself is simplistic. As the Ninth Circuit announced,

> 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. The Board finds that the selection, coordination, and arrangement of the Design are not sufficient to render it a copyrightable work of authorship. To reiterate what was previously said, the Board considered the Design as a whole and not based solely on its component parts. The Board agrees with the Roth Greeting Cards court and other courts that the overall expression of a work, and not the expression (or lack thereof) of each discrete element, is the true measure of its creativity. 429 F.2d 1006, 1009.

The Design as a whole is a simple configuration of common shapes and colors and the word "VISA." The combination and arrangement of the individual elements result in a familiar rectangular shape mimicking a flag. Accordingly, as a compilation of unprotectable elements demonstrating only a *de minimis* amount of creativity the Design remains uncopyrightable.

3. Creative Decisions Not Determinative of Original Authorship

You argued that the artistic decisions that the artist made in creating the Design demonstrate at least a slight degree of creativity. See Second Request Letter at 2. However, the number of choices or decisions made in creating a design is not determinative of copyrightability; rather, the question is whether the resulting expression meets the requisite level of original authorship. See Giroux-Rollow Letter at 4. All designs involve creative choices and selections whether the subsequent amount of originality is copyrightable or not. And the fact that you were able to describe at least fourteen (14)

decisions does not make it any more likely that a work is protectable. The Feist standard is based on the level of original authorship in the resulting work, not in the process of how the work was created or in the creativity of the author in describing the process of creation by breaking it down into a sequence of micro-choices.

Additionally, as Ms. Giroux-Rollow pointed out, the decisions made with respect to the look and feel of the work do not so much go to the composition of the Design as to the effect produced in the mind of the viewer. Giroux-Rollow Letter at 4. The decisions made concerning what shapes, what colors, what sizes, and how many shapes, colors and sizes, may go to production of one cohesive Design. But regardless of the decisions made leading up to the Design, if the resulting work as a whole does not have sufficient original creativity it will not be copyrightable.

You attempted to bolster your case by citing to SHL Imaging, 117 F.Supp.2d at 310-11 ("the elements that combine to satisfy Feist's minimal 'spark of creativity' standard will necessarily vary depending on the photographer's creative choices") where the court determined that "the analysis must begin with consideration of the description of the photographer's artistic process." Second Request Letter at 2. The SHL Imaging court, however, based its judgment not upon the number of or nature of choices made by the photographer, as you imply, but upon the *result* of those choices. See, e.g., SHL Imaging, 117 F.Supp 2d at 311 ("What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens, and filter selection."). In fact, the SHL Imaging court took pains to note that it is not the number of choices that matters, but the final product of those choices, quoting from a 1985 Seventh Circuit case: "The copyright laws protect the work, not the effort expended . . . The input is irrelevant." Id., quoting Rockford Map Publishers, Inc. v. Directory Serv. Co., 768 F.2d 145, 148 (7th Cir. 1985).

4. Comparison to Other Works

You cited to Folio Impressions and Boisson as circuit court cases that correctly apply Feist in holding that the works at issue met the minimum level of creativity for copyright protection. You argued that for the Office "to conclude that the [Design] at issue in this case is not as complex as the artworks at issue in Folio Impressions and Boisson does not compel the conclusion that the [Design] is not sufficiently creative to be protected under copyright law." Id. The Board does not maintain that a comparison of the Design to the row of roses in Folio Impressions and/or to the alphabetical arrangement of blocks in Boisson "compels" a conclusion of insufficient creativity. However, it does observe that, to the extent Folio Impressions and Boisson are cited to compel the opposite conclusion – that of sufficient creativity on the part of the Design – they fail in that task.

The Second Circuit's decision in Folio Impressions was expressly based in part on its deference to the Copyright Office, which by issuing a certificate of registration provided prima facie evidence of the validity of the copyright. 937 F.2d at 763. Moreover, the discussion in Folio Impressions offered only a brief justification for its decision for that case to serve as a reliable guide as to what may or may not cross the creativity threshold in other cases. While it stated that the author's "decision to place the roses in straight rows was an artistic decision," 937 F.2d at 765, it did not address the question of the quantum of creativity expressed by that decision, which is what a Feist analysis requires. Simply stating that a decision is "artistic" is not enough. Furthermore, in concluding that "[a]lthough the arrangement may have required little creative input, it was still Sadjan's original work and, as such, copyrightable," the court suggested that it was over-relying on the "independent creation" prong of originality, short-changing the "sufficient creativity" prong. Id.; see also Feist, 499 U.S. at 345. The Board also notes that the court described the arrangement of the

roses as consisting not just of their placement in a straight line, but also of the fact that they faced in different directions.

In Boisson, the court also observed that because the Copyright Office had issued a certificate of registration, "we must presume [the plaintiff] holds valid copyrights." 273 F.3d at 267; see also id. at 268. Moreover, the decision that the "alphabetical arrangement of the letters in the five-by-six block format" is sufficiently creative was not supported by any analysis, but was based simply on (1) the certificates of registration, (2) the unsupported assertion that the arrangement of letters in a five-by-six block format "required some minimal degree of creativity," and (3) the fact that "no federal regulation establishes that the use of this layout is unprotectible." While the court concluded that the arrangement was original to the author, see 273 F.3d at 269-270, it did not explain why such an arrangement consists of more than *de minimis* creativity.

Thus, Boisson and in Folio Impressions, with their dearth of analysis, offer little useful guidance as to how to determine whether a work meets the creativity requirement. The Board can say that the works found by the Second Circuit to be copyrightable in those cases fall, at best, barely over the requisite creativity threshold. In contrast, the Visa loga, consisting of three horizontal bands (one blue, one white and one gold) with the word *"VISA"* in the middle band in plain italic script, does not cross that threshold.

After considering the Design as a whole, the Board concludes that the configuration of unprotectable elements into a simple and "flag-like" design with the word "VISA" in the middle does not rise to a level of creativity above *de minimis*.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the "VISA & Bands Design – Blue, White & Gold." This decision constitutes final agency action in this matter.

Sincerely,

/s/

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