United States Copyright Office
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February 24, 2012

Peter J. Vranum, Esq.
Gordon, Herlands, Randolph & Cox, LLP
355 Lexington Avenue
New York, NY 10017

Re: LEAF PRINT Fabric Design
Correspondence ID: 1-A3WKSS

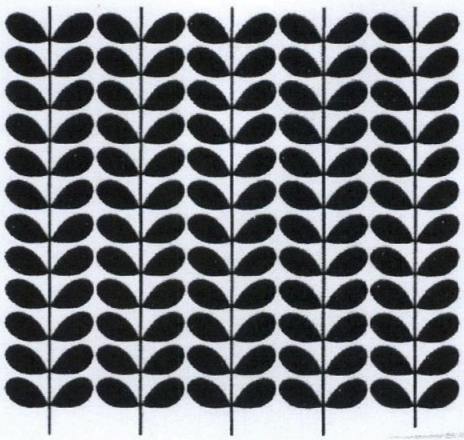
Dear Mr. Vranum:

I write on behalf of the Copyright Office Review Board ("Board") in response to your second request for reconsideration dated August 16, 2011 in which you asked the Copyright Office (the "Office") to reverse its refusal to register a two-dimensional design entitled "LEAF PRINT." The Board has carefully examined the application, the deposit and all correspondence concerning this application, and affirms the denial of registration of this work.

I. DESCRIPTION OF THE WORK

LEAF PRINT is a two-dimensional work of the visual arts. It consists of two identical tear drop shapes that are bisected by a straight line. In the Applicant's first and second request for reconsideration you explained that these tear drop shapes represent leaves and the straight line represents a stem. These elements are reproduced both vertically and horizontally in a repetitive manner. The resulting pattern features 5 vertical lines with 12 identical tear drops positioned on either side of each line. All of these elements share the same dimensions, and all of them are evenly spaced in relation to each other. Moreover, all of these elements are presented in a uniform black color and they are superimposed on a uniform white background.

A photographic image of LEAF PRINT appears below:



II. ADMINISTRATIVE RECORD

A. The Application and the Office's Refusal to Register

On July 22, 2010 the Office received an application to register a work entitled "LEAF PRINT" along with the required deposit and fee. The application was filed by William Cox of your firm on behalf of your client, Orla Kiely.

In a letter dated October 19, 2010, Registration Specialist Robin Jones refused to register the work, because it lacks sufficient authorship to support a copyright claim. Letter from Robin Jones to William Cox at Gordon, Herlands, Randolph & Cox.

Ms. Jones explained that copyright protects original works of authorship, and that a work of the visual arts only satisfies this requirement if it contains at least a minimal degree of creativity. *Id.* (citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)). Ms. Jones noted that copyright does not protect familiar symbols or designs, basic geometric shapes, or mere variations of coloring which may be embodied in a work. *Id.* (citing 37 C.F.R. § 202.1 (2004)). She noted that copyright does not extend to any idea, concept, system, or process which may be embodied in a work. *Id.* (citing 17 U.S.C. § 102(b)). She also noted that the aesthetic appeal or the commercial value of a work, or the amount of time and effort expended to create the work is not relevant to this analysis. *Id.* (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)).

Applying these standards, the Registration Specialist concluded that LEAF PRINT does not contain sufficient creative authorship within the meaning of the copyright statute or the settled case law to support a claim to copyright. *Id.*

B. The First Request for Reconsideration

On January 20, 2011 the Copyright Office received a request for reconsideration concerning the refusal to register LEAF PRINT.[1] First Request dated 1/14/2011. In this request, you argued that the work satisfies the minimum threshold for creative authorship, because it was independently created and contains some modicum of creativity.

You noted that the Registration Specialist cited *Feist Publications v. Rural Telephone Service Co.* in support of the refusal to register LEAF PRINT. After summarizing the facts and

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[1] Copyright Office Regulation 202.5(b)(3) states that a "first request for reconsideration and the applicable fee must be received by the Copyright Office no later than three months from the date that appears in the Registration Program written notice of its initial decision to refuse registration." As discussed above, the refusal to register LEAF PRINT was dated October 19, 2010, which means that the deadline for submitting a first request for reconsideration was January 19, 2011. Although the Applicant's first request was received by the Copyright Office on January 20, 2011 the request was timely because January 19, 2011 fell on a Sunday. *See* 37 C.F.R. § 202.5(b)(3) ("When the ending date for the three-month time period falls on a weekend of a Federal holiday, the ending day of the three-month period shall be extended to the next Federal work day.").

holding in *Feist*, you argued that this case is distinguishable from the application at issue in this appeal, because *Feist* involved a compilation of facts, whereas LEAF PRINT consists of "a repetitive leaf print and stem design" which "contains a degree of creativity." *Id.* at 2. You noted that there are no underlying facts embodied in LEAF PRINT and that your client did not draw upon any facts in creating this design. *Id.* at 3. You noted that your client carefully considered, selected, and configured this design and pattern to appeal to consumers. You also noted that your client "could have adopted many possible alternative schemes and design patterns," unlike the telephone book at issue in *Feist* where listing names in alphabetical order was found to be practically inevitable. *Id.* at 2-3. Finally, you stated that your client's design "was independently created and is not copied from any other product or design." *Id.* at 3.

Citing *Feist*, you noted that the level of creativity necessary to permit copyright registration is extremely low, and that even a slight amount will suffice. *Id.* Although you acknowledge that the design is repetitive, you argued that LEAF PRINT contains "original design elements and arrangements." *Id.* at 2. However, you did not identify or discuss those alleged design elements and arrangements in your request for reconsideration. You also argued that the decisions involved in creating this "design and patterns constitute 'creativity' and 'authorship,'" but you did not identify or discuss any of those alleged decisions. *Id.* at 3.

C. The Office's Response to the Applicant's First Request for Reconsideration

In a letter dated May 19, 2011 Attorney Advisor Virginia Giroux of the Registration Program responded to your First Request for Reconsideration. Letter from Virginia Giroux-Rollow to Peter J. Vranum at Gordon, Herlands, Randolph & Cox.

Ms. Giroux-Rollow upheld the refusal to register LEAF PRINT, because the work does not contain a sufficient amount of original and creative artistic authorship to support a copyright registration, either in the treatment or arrangement of its constituent elements. *Id.* at 1.

Ms. Giroux-Rollow explained that in order to qualify for copyright protection, a work must "possess more than a de minimis quantum of creativity," which in the case of a design means that the work must contain a certain minimum amount of pictorial or graphic material that originated with the author. *Id.* (quoting *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)). As the courts have explained, this means that the design must contain more than a trivial variation or arrangement of public domain, pre-existing, or noncopyrightable elements. *Id.* (citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)). When applying these standards, Ms. Giroux-Rollow noted that the Copyright Office will consider whether a work contains elements, either alone or in combination, on which a copyright can be based. Ms. Giroux-Rollow also noted that the Copyright Office does not make aesthetic judgments. As a result, the attractiveness of the design, its uniqueness, its visual effect or appearance, the time, effort, and expense required to create the design, or its commercial success in the marketplace are irrelevant to the examining process. Instead, the Copyright Office focuses solely on whether there is a sufficient amount of original and creative artistic or graphic authorship within the meaning of the statute and settled case law. *Id.*

Ms. Giroux-Rollow found that LEAF PRINT is "repetitive in nature and simple black in coloring," consisting of "five vertical columns each containing a series of tear drop shapes representing leaves positioned on both sides of a vertical line which represents the stem." She noted that tear drops, straight lines, or any minor variation on these elements are common and familiar shapes that are in the public domain, and therefore, are not copyrightable under Copyright Office regulation 202.1. *Id.* (citing 37 C.F.R. § 202.1.) Citing the same regulation, she also noted that coloring is not a copyrightable element. Ms. Giroux-Rollow found that the treatment and arrangement of these elements in the LEAF PRINT design, coupled with its simple black coloring, do not demonstrate the originality and creativity necessary to support a copyright registration. She also found that the resulting design is de minimis, repetitive in nature, composed of two common and familiar shapes, arranged in a rather simple configuration. *Id.* at 1-2 (citing *Compendium of Copyright Office Practices II*, § 503.02(a) (1984) ("*Compendium II*")).

Ms. Giroux-Rollow cited several judicial decisions which held that simple arrangements of common geometric shapes are not copyrightable. *Id.* at 2. For example, *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) held that a logo consisting of four angled lines forming an arrow, combined with the word "arrows" in cursive script below the design was not eligible for copyright protection. *Id.* at 990. The Court explained that a "pictorial, graphic, or sculptural work . . . must embody some creative authorship in its delineation of form" and that this design lacked the minimal creativity necessary to support a registration. *Id.* Ms. Giroux-Rollow also cited *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) where a label with a short phrase and three fleur-de-lis designs was deemed uncopyrightable; *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) which upheld a refusal to register chinaware with a "gothic" pattern composed of simple variations on, and combinations of, geometric designs; *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) which upheld a refusal to register a design consisting of two-inch stripes with small grid squares superimposed on the stripes; and *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) which held that a collection of various geometric shapes was uncopyrightable. *Id.* at 2.

In your first request for reconsideration you noted that the Supreme Court has held that the level of creativity required for copyright protection is very low, and that even a slight amount of original authorship will suffice. First Request at 3 (citing *Feist*). Ms. Giroux-Rollow explained that the Copyright Office considers *Feist* to be a controlling precedent on the issue of copyrightability, and she noted that courts have held that the vast majority of works will make the grade if they possess some creative spark. However, courts and legal commentators have recognized that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Id.* (quoting *Nimmer on Copyright* § 2.01(b)). Ms. Giroux-Rollow explained that LEAF PRINT failed to meet even the low threshold for copyrightable authorship set forth in the *Feist* decision, because it is a "repetitive simple design, composed of two common and familiar shapes, coupled with only one color." *Id.*

Although works of the visual arts are not registerable as compilations, Ms. Giroux-Rollow agreed that the work should be viewed in its entirety, with individual non-copyrightable

elements judged not separately, but rather in their overall inter-relatedness within the work as a whole. *Id.* at 2 (citing *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989)). But even under this standard of review, Ms. Giroux-Rollow concluded that the simple treatment and arrangement of the few elements embodied in the LEAF PRINT design does not contain a sufficient amount of copyrightable authorship.

Ms. Giroux-Rollow acknowledged that there may be other ways in which the elements of this work could have been presented, including their relative size, shape, coloring, spacing, and arrangement. However, copyrightability is not based on the number of design alternatives that may have been available to the author, because any work of the visual arts requires design choices. Instead, the relevant question is whether the particular work that has been submitted to the Office contains copyrightable authorship.

Ms. Giroux-Rollow concluded that the elements embodied in this work and the arrangement of those elements does not contain a sufficient amount of original and creative artistic authorship to support a copyright registration.

D. Second Request for Reconsideration

On August 19, 2011 the Copyright Office received a second request for reconsideration concerning the refusal to register LEAF PRINT. Second Request dated 8/19/2011.

You began by noting that Ms. Giroux-Rollow cited *Feist* in support of the refusal to register LEAF PRINT. You reiterated that *Feist* is distinguishable because the telephone book at issue in that case was a compilation of facts, whereas your client's work "is a two dimensional artistic work created by the author." *Id.* at 2.

You noted that the Office correctly cited *Feist* for the proposition that the level of creativity required is very low, and you argued that the "repetitive leaf and stem design" at issue in this appeal clearly satisfies this requirement. *Id.* at 2. You also quoted similar language from *Nimmer on Copyright,* which stated that "the creativity required to constitute a work of art may be of a most humble and minimal nature" and that "courts are rightly inclined to accept as a work of art any work which by the most generous standard may arguably be said to evince creativity." *Id.* (quoting 1 M.B. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.01[B] at 2-12 (2011)).

You argued that the refusal to register was improper, in part, because the Office focused on the constituent elements of the design, such as "the repetitive nature, simple black coloring, and basic vertical lines and leaf shapes in the work." *Id.* You also argued that the work should not be dissected, and that it must be viewed and considered in its entirety. *Id.* (citing *Atari*

Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir 1989)). You asserted that when the elements of LEAF PRINT are viewed in this manner, "the work displays the creativity necessary to support a claim of copyright." *Id.*

While acknowledging that some portion of the design may "arguably appear to be similar to previous or other known designs," you argued that this is not a bar to registration. *Id.* at 2-3. Quoting *Nimmer on Copyright,* you asserted that "virtually any distinguishable variation created by an author in an otherwise unoriginal work of art will constitute sufficient originality to support a copyright" and "[t]herefore a very modest quantum of originality will suffice." *Id.* at 3 (quoting *Nimmer on Copyright* § 208(b)).

You then cited four cases where a relatively simple design was found to be sufficiently original to warrant copyright protection, and you argued that the designs at issue in these cases did not have the level artistic creativity found in LEAF PRINT. *Id.* (citing *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.,* 490 F.2d 1092 (2d Cir. 1974); *Tennessee Fabricating Co. v. Moutrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970); *Concord Fabrics Inc. v. Marcus Bros. Textile Corp.*, 409 F.2d 1315 (2d Cir. 1969); *In Design v. Lynch Knitting Mills, Inc.*, 689 F. Supp. 176 (S.D.N.Y. 1988)). In addition, you quoted *Alfred Bell v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) for the proposition that originality "means little more than a prohibition of actual copying" and that "[n]o matter how poor artistically the 'author's' addition, it is enough if it be his own. *Id.* at 103.

You argued that the cases cited by the Office are distinguishable, because they involved "much simpler" designs and they "exhibit[] less creative authorship" than LEAF PRINT. *Id.* at 4. Specifically, you argued that your client's design is "a stylized plant design with stems and leaves" and that it "involves more creativity than simple squares or geometric shapes" in the cases cited by the Office. You also argued that "the arrangement of the stems side by side . . . creates an interesting, mesmerizing effect almost creating an optical illusion and suggesting a forest, interrelated vines or a field of flowers." *Id.*

Finally, you acknowledged that tear drops shapes, straight lines, or any minor variation thereof are common and familiar shapes that are in the public domain. However, you argued that when LEAF PRINT is viewed in its entirety the work consists of more than a minor variation of a straight line or tear drop shape. You also reiterated that your client expended considerable creative effort in fashioning this design and that your client has created something innovative and new. *Id.*

III. DECISION

The Review Board has reviewed the application and deposit submitted for registration as well as the arguments set forth in the first and second request for reconsideration. Because the LEAF PRINT fabric design does not contain sufficient creative authorship to support a registration, the Board affirms the refusal to register.

In evaluating the creativity of this design, the Review Board considered both the individual elements of the work as well as the work as a whole. The Copyright Office accepts your representation that LEAF PRINT is intended to represent the leaves and stem of a plant. Nevertheless, the basic elements of the design are familiar objects or geometric shapes that are in the public domain, and as such, they cannot be registered by themselves. The Board also considered the combination and arrangement of these elements to determine whether the work as a whole meets the minimum standard of creativity. It does not. LEAF PRINT consists of two identically shaped tear drops bisected by a straight line. These elements are reproduced both vertically and horizontally in a simple, regular, repetitive design. All of the elements are presented in the same color and they are superimposed on a plain white background. The basic design is a simple combination of two familiar shapes, and the mere repetition of these familiar shapes in a mundane, regular fashion fails to demonstrate the level of creativity required to support a copyright registration.

A. The Legal Framework for Evaluating Copyrightability

The Supreme Court has explained that originality requires "independent creation plus a modicum of creativity." *Feist*, 499 U.S. 340, 346 (1991). In this context, "independent creation" means that the author must create his or her work without copying from another. *Id.* at 345. Based on your representation that LEAF PRINT was "not adopted or copied from any other product or design," the Office is satisfied that the independent creation requirement has been met. First Request at 3. Therefore, the Board focuses on the second aspect of the originality requirement: the amount of creativity needed to establish the copyrightability of the work.

In *Feist*, the Supreme Court reaffirmed that this standard is extremely low and that even a slight amount of creative expression will suffice. *Id.* at 345. However, the Supreme Court emphasized that there are works in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. Such works are ineligible for copyright protection, and as such, are incapable of sustaining a registration. *See id.* (citing *Nimmer* § 2.01[B]). The Court explained 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," 499 U.S. at 363, and that works that consist of common or obvious arrangements fail to meet this low standard of creativity. *See id.* at 362-63.

You argued that the *Feist* decision is distinguishable, because it involved a compilation of facts rather than a "repetitive leaf print and stem design." First Request at 1-2; Second Request at 1-2. However, *Feist* articulated the basic principles for evaluating the originality of any copyrightable work – regardless of its form of embodiment – and courts routinely follow this decision in cases involving the copyrightability of pictorial, graphic, or sculptural works. *See, e.g., Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (citing *Feist* for the proposition that "the amount of creative input by the author required to meet the originality standard is low, [but] it is not negligible" and holding that a jellyfish sculpture did not meet this requirement). In fact, you conceded that the Ms. Giroux-Rollow "correctly state[d] the holding that the requisite

level of creativity is very low," and you encouraged the Board to apply this standard in this appeal. First Request at 3 (citing *Feist*); Second Request at 2.

Cases decided before *Feist* used a similar standard to evaluate the originality of works of the visual arts, such as the mezzotint engraving at issue in *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). As you noted, the Second Circuit has explained that "Originality in this context means little more than a prohibition of actual copying. No matter how poor artistically the author's addition, it is enough if it be his own." Second Request at 3 (quoting *Alfred Bell & Co.*, 191 F.2d at 103). However, that does not mean that any work that depicts an object from the natural world is automatically copyrightable, or that a minimum standard for copyrightability does not exist. In fact, in the preceding sentence the Second Circuit clearly stated that an author must contribute "something more than a 'merely trivial' variation" in order to satisfy the originality requirement. 191 F.2d at 103. Forty years later, *Feist* confirmed that the "standard of originality is low, but it does exist." 499 U.S. at 362.

The Copyright Office adheres to this principle in deciding whether a work is eligible for registration. *Compendium II* states in § 202.02(a) that "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." With respect to pictorial, graphic, and sculptural works – the relevant class for the work at issue in this appeal – the *Compendium* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.* § 503.02(a). In implementing this principle, the Copyright Office has maintained that standard designs, figures, and geometric shapes are not sufficiently creative to support a copyright claim. *See id.* § 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 . . . .").[3] Likewise, making minor alterations or simple variations on a standard shape does not demonstrate the requisite level of creativity. *See id.* ("[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."). These principles have been confirmed by numerous judicial decisions.[4]

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[3] *See also* 37 C.F.R. § 202.1(a) ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained"); *Compendium II* § 202.02(j) ("Familiar symbols or designs . . . are not copyrightable."); *id.* § 503.03(b) ("No registration is possible where the work consists solely of elements which are incapable of supporting a copyright claim. Uncopyrightable elements include common geometric figures or symbols, such as a hexagon, an arrow, or a five-pointed star . . . .").

[4] *See, e.g., John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (8th Cir. 1986) (upholding a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form); *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for display not copyrightable 'work of art'); *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); *Forstmann Woolen Co., v. J. W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100 % Virgin Wool" interwoven with three *fleur de lis* held not copyrightable); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed

Although familiar shapes and standard forms may not qualify for copyright protection on an individual basis, in some cases a combination of unprotectable elements can be copyrightable. Specifically, a combination of common shapes will satisfy the low standard for copyrightability if there is sufficient creativity in the combination or arrangement of elements, or if the overall design – taken in its entirety – constitutes more than a trivial variation of its constitutive elements. *See United States v. Hamilton*, 583 F.2d 448, 451 (9th Cir. 1978) ("Originality may be found in taking the commonplace and making it into a new combination or arrangement."). However, it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. As the Ninth Circuit explained, "a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Satava v. Lowry*, 323 F. 3d 805, 811 (9th Cir. 2003).

After considering the LEAF PRINT design in light of these legal principles, the Board has determined that the work does not embody sufficient creativity to support a copyright registration.

B. Analysis of the Work

Copyright Office regulations contain an illustrative list of works that are not eligible for copyright protection, including "words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; [and] mere listing of ingredients or contents." 37 CFR § 202.1. Because these elements are the building blocks for creative expression, they are uncopyrightable and in the public domain.

LEAF PRINT consists of a straight line bisected by two identical tear drop shapes. These elements are then repeated vertically and horizontally. The resulting pattern features 5 vertical lines with 12 identical tear drop positioned on either side of each line. You acknowledged that tear drops, straight lines, or any minor variation on these elements are common and familiar shapes, and that these elements are not copyrightable when considered individually. Second Request at 4. Indeed, straight lines are one of the simplest building blocks for pictorial and graphic works.

All of these elements are presented in a uniform black color and they are superimposed on a uniform white background. The Board notes, however, that mere variations in coloring would not provide a basis for copyright protection, but in any event, there is no creativity in a simple black-on-white color combination.

In your first request for reconsideration you described LEAF PRINT as a "repetitive leaf print and stem design," and in your second request you described the work as "a stylized plant

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of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988) (upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright).

design with stems and leaves." First Request at 2; Second Request at 4. The Board accepts your representation that LEAF PRINT is intended to represent the leaves and stem of a plant, but the work still falls short of the required minimum level of creativity for the reasons stated below.

Expressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law. *Satava v. Lowry*, 323 F.3d at 810. It follows from this principle that no copyright protection may be afforded to the idea of producing a two-dimensional plant design with stems and leaves or to elements of expression that naturally follow from that idea. For example, no copyright protection may be afforded to a design that merely depicts a simple black two-dimensional shape of a plant with rounded leaves attached to a stem, because most plants possess these structures. Likewise, no copyright protection may be afforded to a design that merely depicts a plant growing vertically with identically-shaped leaves growing from opposite sides of the stem, because plants grow vertically in nature and they are often depicted with symmetrically shaped leaves. The Board recognizes that the tear drop shaped leaves depicted in this design are somewhat stylized, but as you acknowledged, a minor variation on a common geometric shape – in and of itself – does not demonstrate the requisite amount of creativity to support a registration. *See* Second Request at 4.

LEAF PRINT consists entirely of common geometric shapes and neither the straight line nor the tear drops contain sufficient two-dimensional graphic authorship when examined individually. However, the Board accepts the principle that consideration of a work's eligibility for copyright protection should not be limited to its constituent parts, but, rather, should be based on the composition as a whole. The passage you quoted from *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989) is instructive: "[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection by both the Register and in court."[5] 888 F.2d at 883. Unfortunately, the arrangement of tear drops and straight lines in this design represents *de minimis* graphic authorship – even when the design is viewed in its entirety. *See Compendium II* § 503.02(b) ("[T]he creative expression capable of supporting copyright must consist of something more than the mere bringing together of two or three standard forms or shapes with minor linear or spatial variations").

In *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991), the author placed a rose design in horizontal rows, imposed randomness by positioning the flowers so that they faced in different directions, and then superimposed the design against an ornate background. The court found that "what is protected in this case is the Folio Rose itself and the way in which *that* rose is arranged; the copyright umbrella does not cover the idea of arranging roses generally in a straight line pattern." 937 F.2d at 765. The Board finds no such creativity in the overall arrangement of the design at issue in this appeal, low as the standard of creativity may be under *Feist*. And while the court in *Folio Impressions* concluded that the work at issue satisfied the "minimal creativity" standard of *Feist*, the Board observed that that the Folio Rose

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[5] *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989) involved an audio-visual work in which the *movement* of individual elements, taken together, comprised a substantial portion of the copyrightable expression. The Board does not consider the design at issue here to be comparable.

must represent the bare minimum of creativity that would pass muster; as the court noted, "[t]he pattern thereby made was one of only slight originality" and that "the arrangement may have required little creative input." The court also noted that "the copyright umbrella does not cover the idea of arranging roses generally in a straight line pattern." 937 F.2d at 764, 765. LEAF PRINT, however, consists of nothing more than a repetitive arrangement of simple public domain figures in a straight line pattern.

LEAF PRINT consists of two familiar geometric shapes – a tear drop and a straight line – that are repeated – both vertically and horizontally – in a symmetrical, linear fashion. Indeed, you described the work as a "repetitive leaf and stem design." Second Request at 2. The individual tear drops and straight lines share the same dimensions, and all of these elements are evenly spaced in relation to each other. Combining a tear drop with a straight line is a simple combination that does not possess the requisite level of creativity to support a copyright registration. *Compendium II*, § 503.02(a) ("It is not possible to copyright . . . a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations."). As the Second Circuit noted, the idea of repeating flowers in a straight line is a commonplace arrangement that is not copyrightable. *See Folio Impressions,* 937 F.2d at 765. But unlike the roses at issue in *Folio Impressions*, there is no texture, ornamentation, or other detail in the leaves found in this work, all of the leaves are oriented in the exact same direction, and they are superimposed on a plain white background (rather than an ornate design).

In the Board's view, LEAF PRINT falls within the "narrow category of works" that do not demonstrate the modicum of creativity that is necessary for copyright protection under *Feist*. 499 U.S. at 359.

C. Legal Precedents

The cases cited by Ms. Giroux-Rollow confirm that where – as here – a work consists of common or familiar shapes, the overall combination and arrangement of those elements must be more than trivial. Giroux-Rollow Letter at 2.

- The logo at issue in *John Mueller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) consisted of a series of straight lines with a difference of one angle, containing two colors, and varying distances between the lines. The court upheld the refusal to register because the combination and arrangement of a handful of lines and colors did not contain enough variation to demonstrate copyrightable originality. *Id.* at 990.

- *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) confirms that if a work consists of common or familiar shapes – in this case three *fleur de lis* combined with the words "Forstmann 100% Virgin Wool" – the arrangement of those shapes must contain a minimum level of creativity. *Id.* at 971.

- *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) upheld a refusal to register a pattern common to chinaware that consisted of a series of lines with only slight variations of width and color.

- Similarly, the court upheld the Register's decision to reject the pattern in *Jon Woods Fashions Inc. v. Curran*, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) because the combination of stripes on a grid forming squares lacked the minimal level of creative authorship necessary for copyright. *Id.* at 1871.

- *Tompkins Graphics Inc. v. Zipatone*, Inc., 222 U.S.P.Q. 49 (ED Pa. 1983) reinforced the rule that a work composed of public domain shapes or symbols (in this case geometric shapes) may be copyrightable only if the arrangement has a sufficient level of artistic expression. *Id.* at 51.

You attempted to distinguish these cases by claiming that they involved "a much simpler design" than LEAF PRINT. You appear to be arguing that these cases are factually distinguishable, because your client's work is a "stylized plant design" rather than an arrow, a fleur de lis, a china pattern, a striped cloth with grid squares, or a collection of various geometric shapes. However, LEAF PRINT – like the designs at issue in these cases – is composed entirely of common and familiar shapes, in a predicable, uncreative arrangement. Although the design may be intended to suggest an object from the natural world, the execution of that design is merely a stock expression of leaves and stems that is commonplace in the representation of this subject matter.

You also argue that the side by side arrangement of the stems "creates an interesting, mesmerizing effect almost creating an optical illusion and suggesting a forest, interrelated vines or a field of flowers,"[6] and that this arrangement "involves more creativity than simple squares or geometric shapes." Second Request at 4. As Ms. Giroux-Rollow explained, the fact that a work produces a certain effect on the viewer does not make it copyrightable. The relevant question is whether the combination and arrangement of common and familiar shapes demonstrates the modicum of creativity necessary for copyright protection. As discussed above, LEAF PRINT is a repetitive design superimposed on a white background, consisting of two geometric shapes. Each series (identically shaped tear drops bisected by a straight line) alternate both vertically and horizontally in a repetitive manner. Simply put, the overall pattern results in a simple combination of no more than two familiar shapes, and that combination fails to rise to the level of creativity required to support a copyright registration.

You also cited a number of cases where "simple designs" – which you claim are less creative than LEAF PRINT – were found to be copyrightable. Second Request at 3. These

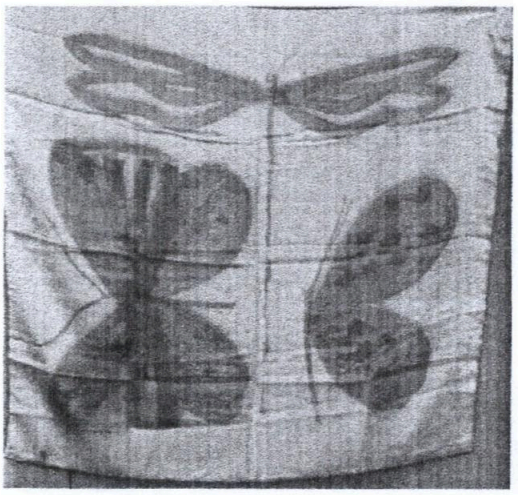
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[6] LEAF PRINT does not contain any petals, pistils, stamins, or other images that might evoke a single flower – let alone a field of flowers, nor does it contain any trunks, branches, twigs, or other images that might evoke a single tree – let alone a forest. Even if the Office accepted your characterization of the work as a series of vines, it still falls short of the required minimum level of creativity for the reasons discussed above.

color. None of these shapes intersected with each other, and the shapes that shared the same color did not touch each other, but were connected by small black diamonds. Superimposed onto this background was the heavy black outline of a third set of diamond-like rhomboids, with the same size and orientation, which met in the middle of the red and gray-blend shapes described above. These black outlines formed diamond shapes of roughly the same size as those linking the parallelograms in the background of the design, but unlike those shapes, the interior of these black outlines had a blended gray color which was identical to the gray parallelograms in the background of the design. Although this case involved an abstract geometric design, it is clearly more complex than the design at issue in this appeal.

- *Concord Fabrics, Inc. v. Marcus Bros. Textile Corp.*, 296 F. Supp. 736 (S.D.N.Y. 1969), *rev'd,* 409 F.2d 1315 (2d Cir. 1969) involved a handkerchief fabric consisting of a circular design within a circle within a square within another square. In addition, the design featured 12 geometrical designs and 32 kidney shaped designs between the squares and around the outer square. 736 F. Supp. at 738; 409 F.2d at 1316. The opinions issued by the district court and the appellate court did not address the issue of copyrightability, but instead focused solely on the substantial similarity between the plaintiff's and defendant's designs. 296 F. Supp. at 738; 409 F.2d at 1316-17. Nevertheless, the number of constituent elements in the work and the arrangement of those elements is far more complex than the design at issue in this appeal.

- In *Fabrex Corp. v. Scarves by Vera, Inc.*, 129 U.S.P.Q. 392, 393 (S.D.N.Y. 1961) the court found that a silk screen print on a scarf consisting "of a novel execution and variation of commonplace items" to be "sufficiently original to warrant copyright protection." The copy of the scarf deposited with the Copyright Office is reproduced below. Clearly, in this case a picture is worth a thousand words: the creativity in the two-dimensional artistic authorship here is clear.



- *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 159 USPQ 363 (M.D. Ga. 1968), *rev'd*, 421 F.2d 279 (5th Cir. 1970) involved an "open filigree pattern . . . formed entirely of intercepting straight lines and arc lines." The district court found that the design did not possess the minimal degree of creativity required for a work of art and declared the registration for the design to be invalid. 159 USPQ at 364. The 5th Circuit disagreed and held that the pattern "possessed at least the minimal degree of creativity required for copyright," 421 F.2d at 282. However, the opinions issued by the district court and the appellate court shed no further light on the nature of the pattern, apart from the fact that it appeared on an "architectural metal casting unit intended for use in combination or singly for a decorative screen or room divider to 'finish up' a space." 421 F.2d at 280. In the Review Board's opinion, *Tennessee Fabricating* does not stand for the proposition that any combination of basic shapes or commonplace items will satisfy the originality requirement in copyright law. Some such combinations will be sufficient; others will not. However, the courts did not specify the exact configuration that met the creativity standard in either of these cases.

Unlike the works at issue in these cases, the combination and arrangement of elements in LEAF PRINT represents *de minimis* graphic authorship. As discussed above, the work consists of two common shapes that are combined and arranged in a manner that is commonplace for a plant design. This simple design is then repeated in a symmetrical, linear fashion. The only variation is the specific combination of the tear drop shape with a straight line, but "[i]t is not possible to copyright . . . a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations." *Compendium II*, § 503.02(a).

D. The Other Factors Cited in the Request for Reconsideration Are Irrelevant to this Inquiry

Finally, you argue that LEAF PRINT should be registered based on factors that have no bearing on whether a work is copyrightable.

As discussed above, the Office accepts your representation that LEAF PRINT was independently created, and the Office has no reason to address your representation that the author "has created something which is innovative and new." First Request at 3; Second Request at 4. The fact that a work may be unique or novel would be a relevant consideration in an application for a patent, but it is not relevant to whether the work is eligible for copyright protection. *Compendium II*, § 503.02(a).

You argued that your client "expended considerable creative effort in fashioning the design." Second Request at 4. However, the Supreme Court has rejected the "sweat of the brow" theory, which means that the amount of effort your client expended in creating this work is irrelevant to the copyrightability analysis. *See Feist*, 499 U.S. at 359-60.

The Board accepts your representation that the author "carefully considered" the design and pattern of this work, and "selected and configured [it] to be appealing such that a consumer would be likely to purchase products adorned with the design." First Request at 2. However,

the Supreme Court has made it clear that the Office may not consider aesthetic value or commercial success in evaluating the copyrightability of a work. *See Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251-52 (1903); *see also Compendium II*, § 503.02(a) ("Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value.").

Finally, you argue that the author "could have adopted many possible alternatives schemes and design patterns" and that this "demonstrates conclusively that creativity is embodied in the Orla Kiely design." First Request at 3. As Ms. Giroux-Rollow explained, the number of possible design alternatives that the author may have considered is irrelevant to the issue of copyrightability. Instead, the Office focuses solely on the work that the author actually created and whether that work contains a sufficient amount of original and creative authorship within the meaning of the statute and settled case law. Ms. Giroux-Rollow aptly noted that the process of creating LEAF PRINT presumably included choices, and there may have been other ways in which the tear drops and straight lines could have been selected or arranged. However, these types of choices are present in every two-dimensional design. *Id.* It is not the variety of choices available to the author, but the design elements in the actual work that must be assessed. *Id.* The Board agrees that the LEAF PRINT contains no design elements – whether these elements are whether the work is considered in its entirety – upon which a registration may be based.

Although the Supreme Court has held that only a modicum of creativity is necessary to support a copyright, the Court made it clear that some works fail to meet that admittedly low standard. The Court 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," 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. LEAF PRINT falls within this narrow category of works that do not possess the minimum creative spark.

CONCLUSION

For the foregoing reasons, the Copyright Office Review Board concludes that the LEAF PRINT design cannot be registered for copyright protection. This decision constitutes the final agency action on this matter.

Sincerely,

/s/

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