United States Copyright Office
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August 28, 2013

Sheridan Ross P.C.
Attn: Brent P. Johnson
1560 Broadway, Suite 1200
Denver, CO 80202

Re: Ear Tag Design (2007)
Correspondence ID: 1-EXBA53

Dear Mr. Johnson:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Ear Tag Design (2007)*. You submitted this request on behalf of your client, Ritchey Manufacturing Company, on May 14, 2013.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of registration of this copyright claim. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORK

Ear Tag Design (2007) (the "Work") consists of an arrow-head shape with a short neck and a wide rectangular base, placed inside the outline of an oval shape. The top portion of the rectangle shape slopes upward to meet the "neck" of the arrow-head shape. The tip of the arrowhead shape abuts the oval shape. The whole of the Work, as depicted in the deposit materials, is slanted slightly to the right.

The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On September 13, 2012, the United States Copyright Office (the "Office") issued a letter notifying Ritchey Manufacturing Company (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Ivan Proctor, to Brent Johnson* (September 13, 2012). In its letter, the Office stated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated November 1, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Brent Johnson to Copyright RAC Division* (November 1, 2012) ("First Request"). Upon reviewing the Work in light of the points raised in your letter, the Office concluded that the Work "does not contain a sufficient amount of original and creative artistic or graphic authorship" and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Brent Johnson* (March 8, 2013).

Finally, in a letter dated May 14, 2014, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. *Letter from Brent Johnson to Copyright R&P Division* (May 14, 2014) ("Second Request"). In arguing that the Office improperly refused registration, you claim that both the individual elements that comprise the Work and the Applicant's careful selection and arrangement of the Work's constituent elements possess the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Id.* Specifically, you claim "there is no reasonable and accurate way to view or describe the work as corresponding only to a group of public domain shapes combined in a basic configuration." *Second Request* at 3.

In addition to *Feist*, your argument references several cases in support of the general principle that, to be sufficiently creative to warrant copyright protection, a work need only possess a "modicum of creativity." *Id.* You also reference several cases that demonstrate that works comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of their elements satisfies the requisite level of creative authorship. *Id.* at 4-7.

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this threshold. *Id.* 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." *Id.* at 363. It further found that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, some combinations of common or standard design elements may contain sufficient creativity, with respect to how they are juxtaposed or arranged, to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this grade. *See Feist,* 499 U.S. at 358 (finding the Copyright Act "implies that some ways [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not"). Ultimately, the determination of copyrightability in the combination of standard design elements rests on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D. D.C. 1989).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, Inc. et. al.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The court's language in *Satava* is particularly instructional:

> [i]t 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. 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.

Id. (internal citations omitted) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

B. *Analysis of the Work*

After carefully examining the Work, and applying the legal standards discussed above, the Board finds that *Ear Tag Design (2007)* fails to satisfy the requirement of creative authorship.

First, the Board has determined that none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R. § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the Applicant's Work consists of the outline of an oval shape, an arrow-head shape with a short neck and a wide rectangular base, and the color black. Both the arrow-head shape and the oval shape are simple variations of common geometric designs that are not eligible for copyright registration. *See Id.* (prohibiting the registration of basic symbols or designs). The color black is also prohibited from registration. *See Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). Thus, consistent with the section 202.1(a), the arrow-head shape, the oval shape, and the Work's simple color scheme are not sufficiently creative to qualify for copyright protection. The Board is not persuaded by your argument that the arrow-shaped element meets the threshold for copyrightability. Despite your claim that this element "exceeds the minimal standard for creativity for graphic works," *Second Request* at 3, the fact remains that the element is a simple, ordinary rendition of an arrow-head shape that emerges from a rectangular base. We find this basic design to be too *de minimis* to meet the grade for copyright protection. Accordingly, we conclude that none of the Work's constituent elements qualify for registration under the Copyright Act.

Second, the Board finds that the Work, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual noncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole). Viewed as a whole, the Work consists of a black arrow-head shape with a short neck and a wide rectangular base, placed inside a black outline of an oval shape and slanted slightly to the right. This basic configuration of two ordinary shapes and a common color is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883.

Finally, your assertions that the selection and arrangement of the shapes that make up the Work is unique and that "the author's choice of placing the [Work] on a vertical and horizontal slant . . . created the illusion of movement in a still art" do not add to your claim of sufficient creativity. *Second Request* at 6. As discussed, the Board does not assess a design's uniqueness, visual effect or appearance, symbolism, or the espoused intentions of an author in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere fact that the Work can be construed as depicting movement would not qualify the Work, as a whole, as copyrightable. *Feist,* 499 U.S at 359; *Satava*, 323 F.3d at 811.

In sum, the Board finds that the Applicant's selection and arrangement of the elements that comprise the Work lack a sufficient level of creativity to make the Work registerable under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *Ear Tag Design (2007).* This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board