United States Copyright Office
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July 26, 2013

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Re: ***GNC Live Well*** **Design**
Copyright Office Control Number: 61-418-4244(S)
Attorney Docket No.: 129891-4004

Dear Ms. Sickler:

The Review Board ("Board") of the United States Copyright Office ("Copyright Office" or "Office") is in receipt of your second appeal of the decision of the Office to refuse registration of the work entitled *GNC Live Well*. You submitted the second appeal on September 17, 2007 on behalf of your client, General Nutrition Investment Company ("GNC"). The Board has carefully examined the application, the deposit, and all correspondence concerning this application and, for the reasons stated below, hereby affirms the denial of registration. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

I. DESCRIPTION OF WORK

GNC Live Well is a graphic design which consists of the stylized letters "GNC," printed in red ink, followed by the phrase "Live Well," printed in gray ink, with all of the lettering inscribed in a rectangle. According to the attachments to the Copyright Registration Form VA submitted by you on July 28, 2006, the stylized name "GNC," printed in red ink, adheres to your client's standards for its corporate logo. The *GNC Live Well* image is reproduced below:



II. ADMINISTRATIVE RECORD

On July 31, 2006, the Copyright Office received from you a Form VA application on behalf of your client, GNC, to register a two-dimensional artwork. On October 18, 2006, Visual Arts Section Examiner, Kathryn Sukites, wrote to you explaining that the Copyright Office could not register *GNC Live Well* because the work lacked the authorship necessary to support a copyright claim. Letter from Kathryn Sukites to Jennifer S. Sickler (Oct. 18, 2006) at 1. In a letter dated February 14, 2007, you filed with the Office a first appeal of the Office's refusal to register the work. Pursuant to 37 C.F.R. § 202.5(b)(1), you set forth your reasons as to why the work is copyrightable and should be registered.

In a letter dated June 15, 2007, the Office again refused to register the work. Attorney Advisor, Virginia Giroux-Rollow, reviewed the application and concluded that the graphic design "does not contain a *sufficient* amount of original and creative artistic or graphic authorship upon which to support a copyright registration." She noted that "there are no elements or features embodied in this work, either alone or in combination, upon which a copyright registration is possible." Letter from Virginia Giroux-Rollow to Jennifer S. Sickler (June 15, 2007) ("Giroux-Rollow Letter") at 1, 4.

In a letter dated September 17, 2007, you filed a second appeal of the Office's refusal to register the copyright claim in *GNC Live Well*. Letter from Jennifer S. Sickler to Copyright R&P Division (Sept. 17, 2007) ("Second Appeal Letter") at 1. In support of your position that the work should be registered, you offer three primary arguments. First, you assert that the elements in the work at issue include two kinds of stylized lettering surrounded by a thin border, and these elements must be viewed as they "inter-relate to the work as a whole," and conjure "many possible artistic interpretations within the expression," comprising expression that is artistic and possesses at least the *de minimis* quantum of creativity required for copyright registration. Second, you argue that the Copyright Office made an improper aesthetic judgment of the work by characterizing the work as "a rather simple and common configuration." Third, you claim that the fact that the Applicant created its work from an "infinite choice of shapes, sizes, colorings, font types, spacing, proportion, and arrangement of elements" to arrive at a design "conjuring images of activity and weight loss in a secure environment," demonstrates that there is "artistic symbolism, *i.e.,* creative expression" in the work of a sufficient degree to render it appropriate for copyright registration.

III. DECISION

A. The Legal Framework

To be eligible for copyright protection, a work must qualify as an original work of authorship fixed in any tangible medium of expression. 17 U.S.C. § 102(a). In the copyright context, the term "original" includes both independent creation and sufficient creativity. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). While the Supreme Court held in *Feist* that only a modicum of creativity is necessary to support a copyright, it ruled that the telephone directory at issue in the case failed to meet that 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. *Id.* at 363. 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; *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.").

The Office's regulations implement the well established requirements of originality and creativity set forth in the law and, subsequently the *Feist* decision. The regulations prevent 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." 37 C.F.R. § 202.1(a). In *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959), the Second Circuit concluded that the Office's regulatory bars to registering short phrases and typographic ornamentation were a "fair summary of the law."

Some combinations of common or standard shapes or other protectable elements can embody sufficient creativity to support a copyright, based on how the elements are combined or arranged. *See Feist*, 499 U.S. at 358. However, merely combining unprotectable elements does not automatically establish creativity where the combination or arrangement itself is simplistic. In *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988), the district court upheld the decision of the Register of Copyrights ("Register") that a fabric design did *not* contain the minimal amount of original artistic material to merit copyright protection, even though the design – striped cloth over which a grid of 3/16-inch squares was superimposed – was distinctly arranged and printed. Likewise, in *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986), the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. In *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991), the district court upheld the Register's refusal to register a chinaware "gothic" pattern of simple variations and combinations of geometric designs.[1]

B. Analysis of the Work

Your request for second reconsideration does not assert that any particular element of the *GNC Live Well* design is copyrightable. Instead, you argue that the work must be viewed as a "composite" and that the "inter-relatedness" within the work of the term 'GNC' in thick stylized lettering followed by the term 'Live Well' in thinner letters, and surrounded by a thin border," possesses at least the *de minimis* quantum of creativity required for copyright registration. Second Appeal Letter at 3. You further argue that the artistic qualities and recognizable contributions of your client surpass those elements in the works in cases cited in the Giroux-Rollow Letter.

As demonstrated in the preceding section, case law makes clear that simple arrangements of a few public domain elements or trivial variations of simple arrangements

[1] *See also Magic Mktg., Inc. v. Mailing Servs. of Pittsburgh, Inc.*, 634 F. Supp. 767 (W.D.Pa. 1986) (holding that envelopes with black lines and words "gift check" or "priority message" did not contain a minimal degree of creativity necessary for copyright protection); *Forstmann Woolen Co. v. J.. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (holding that a label with the words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lis was not copyrightable).

cannot support a copyright claim. You contest that your client's design is simple. The Board finds that the *GNC Live Well* design is comparable to the designs cited in the preceding section. The design consists of the unprotectable individual elements of the letters "GNC" in red block lettering and the short phrase "Live Well" in "thinner" gray lettering, all surrounded by a thin gray rectangle. The Board finds your client's selection, coordination and arrangement of these non-copyrightable elements to be too trivial and of too little creativity for the design as a whole to merit copyright protection.

You argue on second appeal that your client "created its work form an infinite choice of shapes, sizes, colorings, font types, spacing, proportion, and arrangement of elements to arrive at the instant work." However, it is not the possibility of choices that determines copyrightability, but whether the resulting expression contains copyrightable authorship. *See Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) ("aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright). The fact that an author had many choices does not necessarily mean that the choice the author made meets even the modest creativity requirement of the copyright law. For the *GNC Live Well* design, the choices made were relatively few, and the arrangement is commonplace. The work as a whole does not exhibit sufficient originality to warrant copyright protection.

The Board also finds your reliance on the case of *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1076-77 (2d Cir. 1992) to be misplaced. The case was an infringement action by the copyright holder in works he developed for his psychological and emotional self-help training program. At the heart of the training materials was an enneagram figure to which the author attached nine personality type labels. The Second Circuit found that the author's attachment of the nine labels to the enneagram figure (a public domain symbol) contained the minimal degree of creativity necessary to make it copyrightable. However, the court also found that the author's assertion of copyright in numerous words and short phrases in the training materials could not be supported for lack of minimal creativity. *Id.* at 1072. The Board finds the *GNC Live Well* design more analogous to the words and short phrases found noncopyrightable by the Second Circuit than the labels on the enneagram figure which was at the core of the author's extensive training program.

Finally, you argue that the *GNC Live Well* design has "creative expression" worthy of copyright protection because the expression has "artistic symbolism" in the contrast between the thick block lettering in the "GNC" element and the thin gray "Live Well" element, which you claim "conjure[s] images of activity and weight loss," and the thinner gray rectangle around the letters, which you claim suggests that the activity and weight loss occur "in a secure environment." However, as Ms. Giroux-Rollow pointed out in her decision on first reconsideration, in applying the standard of originality and creativity set out in *Feist,* in the registration process, the Office does not make aesthetic judgments or consider the attractiveness, uniqueness, visual effect or appearance of, or symbolism in a design, nor does it consider the time, effort, or expense it took to create it, or its commercial success. The question addressed by the Office is whether there is a sufficient amount of original and creative, artistic, or graphic authorship to warrant protection. In this case, the Board has determined that there is not.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the graphic design entitled *GNC Live Well*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g)

Maria A. Pallante
Register of Copyrights

BY: Andrea Zizzi
Andrea Zizzi
Member of the Review Board