United States Copyright Office
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July 19, 2013

Garvey, Smith, Nehrbass & North, LLC
Attn: Brett North
3838 North Causeway Blvd., Suite 3290
Metairie, LA 70002

Re: Kush Logo
Correspondence ID: 1-8MQHI2

Dear Mr. North:

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: *Kush Logo* (the "Work"). You submitted this request on behalf of your client, Blunt Wrap USA, Inc., on August 22, 2011. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

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

The Work consists of four stylized, interconnected letters that spell out the word "KUSH." The letters are white with a thin green outline followed by a thin black outline. The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On November 19, 2010, the United States Copyright Office (the "Office") issued a letter notifying you that it had refused the application you submitted on behalf of your client, Blunt Wrap USA (the "Applicant"), for registration of the above mentioned Work. *Letter from Registration Specialist Bill Shuttleworth to Brett North* (October 19, 2010). In its letter, the Office indicated that it could not register the Work because it "lacks the authorship necessary to support a copyright claim." *Id.*

In a letter dated January 12, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Brett North to Copyright RAC Division* (January 12, 2011). Your letter set forth the reasons you believed the Office improperly refused registration. *Id.* 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 in either the treatment or arrangement of its elements to support a copyright registration" and again refused registration. *Letter from Attorney-Advisor Virginia Giroux-Rollow to Brett North* (May 23, 2011).

Finally, in a letter dated August 22, 2011, 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 Brett North to Copyright R&P Division* (August 22, 2011) ("Second Request").

In arguing that the Office improperly refused registration, you claim that the Work, as a whole, includes at least 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). *Second Request* at 3. In support of this argument, you claim that the Applicant carefully selected and combined the individual elements that comprise the Work to give the Work a meaning that is not present when the elements are evaluated independently. You also maintain that the Applicant's claim of copyright is directed to the unique arrangement of the Work's elements to symbolize a "distinctive type of 'Autocross Racetrack.'" *Second Request* at 2.

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 was 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 non-protectable 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.*, 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 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 *Kush Logo* fails to satisfy the requirement of creative authorship.

First, the Board has determined that none of the Work's 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 four stylized, interconnected letters forming the word "KUSH." The letters are outlined in the colors green and black. According to the above regulations, neither the word "KUSH," the font the Applicant used to create the word's lettering, nor the colors outlining the word, are eligible for copyright protection. *Id.*; *see Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim); *see also Coach, Inc. v. Peters*, 386 F. Supp 2d 495, 498-99 (indicating mere variations in typographic ornamentation or lettering cannot support a copyright claim); *and see Racenstein & Co., Inc. v. Wallace dba ABC Window Cleaning Supply*, 51 U.S.P.Q. 2d 1031 (S.D.N.Y. 1999) (indicating a word or short phrase, alone, generally cannot support a copyright claim). Thus, we conclude the Work's constituent elements do not 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 Applicant's Work consists of the simple arrangement of four white, interconnected letters outlined in two common colors. This basic arrangement of a word, a typographic ornamentation, and a simple color scheme 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. Accordingly, we conclude that the Work, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359.

Your argument that the Applicant has created an original font that "does not follow any spacing rules of existing texts" and does not consist of "standard or conventional lettering" is unpersuasive. *Second Request* at 2. The law is clear in that a mere distinctiveness in typographic ornamentation will not ordinarily qualify otherwise unregisterable material for copyright protection. *See* 37 C.F.R. § 202.1(a); *see also Coach, Inc.*, 386 F. Supp. 2d at 498-99. Even taking into account the interconnectedness and stylization of the letters, the Work remains a simple variation of the word "KUSH." Because it is well settled that typographic ornamentation of this nature is insufficient to qualify a stylized letter design for registration, this argument fails. *See Coach, Inc.*, 386 F. Supp. 2d at 498-99 (denying protection to the stylized letter "C" as it appeared on the applicant's line of fashion accessories).

Finally, your assertions that the Applicant's arrangement of the word "KUSH" so that it represents a "distinctive type of 'autocross racetrack'" with the three colors (white, green, and black) symbolizing the racetrack's "roadway, landscaping, and walls" do not add to your claim of sufficient creativity. *Second Request* at 2. As discussed, the Board does not assess attractiveness, intent of the author, uniqueness, or symbolism 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 fact that the Applicant's Work is symbolic of an "autocross racetrack" would not qualify the Work as copyrightable.

In sum, the Board finds that the Applicant's selection and arrangement of the common elements that comprise the *Kush Logo* 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: *Kush Logo*. 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