United States Copyright Office
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July 29, 2013

Lowe, Hauptman, Ham & Berner, LLP
Attn: Jeffrey Greger
1700 Diagonal Rd., Suite 300
Alexandria, VA 22314

Re: New Look Logo
Correspondence ID: 1-AGJKL

Dear Mr. Greger:

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: *New Look Logo*. You submitted this request on behalf of your client, New Look, Ltd. (the "Applicant"), on March 15, 2012. I apologize for the 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 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

New Look Logo (the "Work") consists of three stylized letters that spell out the word "new" underscored by four standard letters that spell out the word "look." The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On July 8, 2011, the United States Copyright Office (the "Office") issued a letter notifying you that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Joy Burns, to Jeffrey Greger* (July 8, 2011). 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 September 14, 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 Jeffrey Greger to Copyright RAC Division* (September 14, 2011) ("First Request"). 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 authorship" and again refused registration. *Letter from Attorney-Advisor, Virginia Giroux-Rollow, to Jeffrey Greger* (December 21, 2011).

Finally, in a letter dated March 15, 2012, you requested, pursuant to 37 C.F.R. § 202.5(c), that the Office reconsider for a second time its refusal to register the Work. *Letter from Jeffrey Greger to Copyright R&P Division* (March 15, 2012) ("Second Request"). You claim the Work 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. You argue that: (1) the word "new," as it appears in the Work, is actually an artful arrangement of "ordinary shapes" in a "fanciful" manner; and, (2) there is sufficient creativity in the Applicant's combination of the "fanciful" letters that make up the word "new" with the word "look" to qualify the Work for protection under the Copyright Act.

You also claim that the Office's prior refusals to register the Work are in direct conflict with a decision from the United States District Court for the Southern District of New York in which the district court "opined that the logo is protectable under the copyright law." *See New Look Party, Ltd.*, No. 11 Civ. 6433 (NRB) (S.D.N.Y. Jan. 11, 2012).

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 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 the Work 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 three stylized letters that spell out the word "new" and four plain letters that spell out the word "look." According to the above regulations, neither the word "new," the word "look," nor the unique lettering the Applicant used to create the word "new" are eligible for copyright protection. *Id.*; *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).

The Board is not persuaded that the Applicant's use of a "fanciful" arrangement of geometric shapes to create the impression of the word "new" is sufficiently creative to warrant registration. *Second Request* at 3. The law is clear that mere variations in typographic ornamentation will not 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 (denying protection to the stylized letter "C" as it appeared on the applicant's line of fashion accessories). Even taking into account the Applicant's "fanciful" combination of common shapes, the fact remains that this portion of the work is an obvious combination of the letters "n," "e," and "w" to form the word "new." *See Coach, Inc.,* 386 F. Supp. 2d at 498-99.

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 combination of three equal-sized letters that spell out the word "new" and four smaller letters that spell out the word "look." This basic arrangement of two words, one on top of the other, is *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.

Finally, the Board does not agree with your assertion that we are compelled to register the Work by virtue of the *New Look Party* decision. No. 11 Civ. 6433 (NRB) (S.D.N.Y. Jan. 11, 2012). The United States District Court for the Southern District of New York's indication, without further examination, that it is "satisfied that there exists a valid copyright" in the Work is not binding upon the Board or the Office in general. The court opined, without explanation or analysis that the logo involved in that case was copyrightable. *Id.* The decision, made for purposes of resolving a preliminary motion for injunctive relief, is not binding on the Copyright Office in this case, nor is it enlightening or instructive in the application of the copyright law to the Work involved in this case or logos in general. *See Gemveto Jewelry Co. v. Jeff Cooper, Inc.*, 568 F. Supp. 319, 330 (S.D.N.Y. 1983) (providing "the decision to register an article rests in the sound discretion of the Register of Copyrights, and the scope of judicial review is limited to whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law").

In sum, the Board finds that both the individual elements that comprise the Work, as well as the Applicant's selection, organization, and arrangement of those elements lack the 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: *New Look Logo*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: [redacted]
William J. Roberts, Jr.
Copyright Office Review Board