United States Copyright Office
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August 28, 2013

Momkus McCluskey, LLC
Attn: Karen Blouin
1001 Warrenville Road, Suite 500
Lisle, IL 60602-3481

Re: NO STACK (Multilingual)
Correspondence ID: 1-BKBH3X

Dear Ms. Blouin:

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: *No Stack (Multilingual)*. You submitted this request on behalf of your client, David MacNeil, on August 24, 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 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

No Stack (Multilingual) (the "Work") consists of a number of words and short phrases arranged so that they fit onto the triangular sides of a four-sided, pyramid-shaped structure. Two sides of the work include a standard "hazard" symbol and the following text:

- NO STACK
- PLEASE DON'T STACK ANYTHING ON TOP OF THIS PALLET.
- ***FRAGILE***
- For a Distributor in your area please call 1-888-887-8825
- STRAP THROUGH

- *Registered Trademark of MacNeil Automotive Products, Ltd.

  www.nostack.com

- Tape all four flaps to top of pallet or strap

A third side of the Work includes a standard "hazard" symbol and a Spanish translation of the above text. A fourth side of the Work includes a standard "hazard" symbol and a French translation of the above text. The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On December 15, 2011, the United States Copyright Office (the "Office") issued a letter notifying David MacNeil (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Mary Svrjcek, to Karen Blouin* (December 15, 2011). In its letter, the Office stated that it could not register the Work because it "represents less than the required minimum amount of original textual authorship on which to base a claim." *Id.*

In a letter dated February 24, 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 Karen Blouin to Copyright RAC Division* (February 24, 2012) ("First Request"). Your letter set forth your reasons as to why 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 possess a sufficient amount of original and creative authorship and again refused registration. *Letter from Attorney-Advisor, Stephanie Mason, to Karen Blouin* (June 6, 2012).

Finally, in a letter dated August 24, 2012, 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 Karen Blouin to Copyright R&P Division* (August 24, 2012) ("Second Request"). In arguing that the Office improperly refused registration, 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 7. In support of this argument, you claim that the Applicant's selection and arrangement of the Work's constituent elements involves a sufficient amount of creative authorship to warrant registration under the Copyright Act. Specifically, you assert that the Applicant's claim of copyright is directed to "the selection of the actual words, the positioning of the literary work on the structure, seven different font sizes, selective bolding, underlining, italicizing and the translations." *Id.* at 8-9.

In addition to *Feist*, your argument references several cases that demonstrate 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 6-9.

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 *No Stack (Multilingual)* fails to satisfy the requirement of creative authorship.

First, the Board finds 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 . . . familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the Applicant's Work is comprised of the word "fragile," several short phrases, and the standard, preexisting "hazard" symbol. Consistent with the above regulations, none of these elements, including the various fonts the Applicant used to print the word and short phrases, are eligible for copyright protection. *See Id.* (prohibiting the registration of basic symbols or designs such as the common "hazard symbol"); *see also Racenstein & Co., Inc. v. Wallace dba ABC Window Cleaning Supply*, 51 U.S.P.Q. 2d 1031 (S.D.N.Y. 1999) (indicating words and short phrases generally cannot support a copyright claim); *and see Coach, Inc. v. Peters*, 386 F. Supp 2d 495, 498-99 (indicating mere variations in typographic ornamentation or lettering cannot support a copyright claim). The Board agrees with your assertion that a series of short phrases is not, *per se*, ineligible for registration. Nevertheless, we find that the phrases included in the Work (all conveying either simple instructions or contact information) falls short of the requisite threshold for copyrightable authorship. Accordingly, 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 Work consists of the simple combination of a common word, simple short phrases, and a standard symbol, repeated four times and arranged so that they fit on the triangular sides of a pyramid-shaped structure. This obvious arrangement of unprotectable elements 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.

The Board is not persuaded by your argument that creative authorship lies in the Applicant's selection, positioning, and formatting of the text that appears on the Work (*Id.* at 8-9). Despite your claims to the contrary, the Work's text consists entirely of unprotectable

words and short phrases (all conveying either simple instructions or contact information), printed in unprotectable typesettings, and arranged intuitively so that they fit within a triangular shape. This configuration, as a whole, simply lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359; *Satava*, 323 F.3d at 811.

The Board also disagrees with your argument that the Applicant's incorporation of French and Spanish translations into the Work makes the Work sufficiently creative to warrant copyright protection. Because the original English text consists of uncopyrightable short phrases, we find that the Applicant's ordinary translations of those phrases into French and Spanish, regardless of any subjectivity exercised in their creation, are also prohibited from registration. Further, the Applicant's translations, in and of themselves, are too routine to meet the grade for registration. Even if it is true that there are alternative, acceptable options for communicating these phrases in French and Spanish, the mere existence of such options does not make the translations at issue copyrightable. Moreover, the mere fact that the Applicant has reproduced an ordinary configuration of unprotectable short phrases in three different languages and then arranged them so that they fit on the sides of a pyramid-shaped structure does not qualify the Work, as a whole, as sufficiently creative.

In sum, the Board finds that the Applicant's selection and arrangement of the elements that comprise the Work lacks 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: *No Stack (Multilingual).* 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