United States Copyright Office
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July 8, 2013

Spencer, Fane, Britt & Browne, LLP
Attn: Glenn K. Robbins II, Esq.
North Brentwood Blvd., Suite 1000
St. Louis, MO 63105-3925

Re: WOOLY BARS LOGO
SR 1-426704001
SR 1-480556684
SR 1-586430703

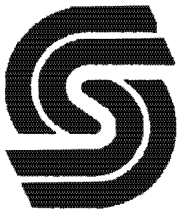
Dear Mr. Robbins:

The Copyright Office Board (or "Board") of the United States Copyright Office (or "Office") is in receipt of your second request for reconsideration of the Registration and Recordation Program's refusal to register a copyright claim in a design entitled "Wooly Bars." You have submitted this claim for your client, Sauer-Danfoss, Inc. 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 carefully examined the application, the identifying deposit, and all the correspondence in this case. After careful consideration of the arguments in your letter, the Board affirms the denial of registration of this copyright claim, because the work does not contain a sufficient amount of original and creative pictorial or graphic authorship in either the treatment or arrangement of the elements to support a copyright registration. This decision constitutes final agency action in this matter.

I. DESCRIPTION OF THE WORK

WOOLY BARS is a graphic work consisting of four black lines of similar thickness and shaped in the general form of a hook. Two of the hook-shaped lines appear at the top of the design and two below, such that their combination produces an empty space between them in the shape of an elongated letter "S." The same combination also creates the overall appearance of the letter "S" formed by the black lines, as does the narrow empty space between each of the two sets of lines. The WOOLY BARS image is reproduced below from the submitted deposit material.



II. THE ADMINISTRATIVE RECORD

On July 22, 2010, the Copyright Office received from you an eService application covering artwork in a design entitled WOOLY BARS on behalf of your client, Sauer-Danfoss, Inc. By letter of July 28, 2010, you were notified that the Copyright Office could not register WOOLY BARS, because it lacked the authorship necessary to support a copyright claim. *Letter from Assistant Chief William Briganti to Kyle Elliott (July* 28, 2010),at 1. In a letter dated August 27, 2010, you requested reconsideration of the Office's refusal to register the work, as required by 37 C.F.R. § 202.5(c), setting forth your reasons as to why the work was copyrightable and should be registered.

In a letter dated December 21, 2010, Attorney Advisor, Virginia Giroux-Rollow, upheld the refusal to register the work on the grounds that it did not contain any artistic authorship either in the treatment or arrangement of its elements to support a copyright registration. *Letter from Virginia Giroux-Rollow to Glen K. Robbins, II* of (Dec. 21,2010) at 1.

In a letter dated March 18, 2011, you requested that the Office reconsider for a second time its refusal to register the copyright claim in WOOLY BARS. *Letter from Glen K. Robbins, II to Copyright R & P Division* (Mar. 18, 2011) at 1. You argue that WOOLY BARS is a work of visual art and not a letter or lettering as contemplated in 37 C.F.R. § 202.1. *Id.* You state that the "design is not comprised of such standard and conventional figures and shapes, but rather is a clever arrangement of symmetrical figures of non-standard shapes to create an abstract design that coincidentally gives an impression of the letter 'S.'" *Id.* at 3. You argue that the cases cited by Ms. Giroux-Rollow – *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950); *The Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988); and *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 959 (W.D. Pa. 1986) – are all distinguishable because "none of the[se] cited cases can be read to provide a specific prohibition against registrability of the design that may give an impression of a single stylized letter such as that created by Applicant..." *Id.* at 4. You cite *Willard v. Estern*, 206 F. Supp. 2d 723 (D. V.I. 2002), where the Copyright Office registered as a graphic work the calendar year "2000," in which the second and third zeros were replaced by petroglyphs, as supportive of a registration of WOOLY BARS.

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. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. Second, the work must possess sufficient creativity. While only a modicum of creativity is necessary to establish such creativity, the Supreme Court has ruled that some works (such as a telephone directory at issue in the case) fail to meet the 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 minimus* 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. § 202.1(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 Copyright Office's regulations implement the long-standing 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 Court concluded that the Office's regulatory bars to registering short phrases and typographic ornamentation was a "fair summary of the law."

Of course, some combinations of common or standard design elements may contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See, Feist,* 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not." The determination of copyrightability rests on whether the selection, coordination, or arrangement was done in "such a way" as to result in copyrightable authorship). However, not every combination or arrangement will be sufficient to meet this grade. 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. *John Muller*, 802 F.2d 989. *See also, Satava v. Lowry*, 323 F.2d 805, 811 (9th Cir. 2003)("It is true, or course, that a *combination* of unprotectible elements may qualify for copyright protection. But, it is not true that any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible 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.")(citations omitted)(emphasis in original).

Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. Likewise, they are not influenced by the attractiveness of a design, it uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. 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 WOOLY BARS

After carefully examining the work WOOLY BARS and applying the legal standards discussed above, the Board determines that WOOLY BARS fails to satisfy the requirement of creativity. Section 202.1(a) of the Office's rules, 37 C.F.R., identifies certain elements that are not copyrightable, including "familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring." The letter "S" is a familiar symbol in all of the renditions contained in WOOLY BARS. The formation of WOOLY BARS from four hook-shaped black lines is nothing more than a mere typographic variation of letter "S" that does not warrant registration.[1]

[1] You assert that while section 202.1(a) excludes "lettering" from protection, it does not exclude individual letters. This is not a correct interpretation of the regulation. *See, Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498-99 (S.D.N.Y. 2005)(denying protection for the stylized letter "C" appearing on handbags).

The Board does not agree with your assertion that the cases cited in the first reconsideration of refusal to register are distinguishable based upon their facts and the works involved. All of those cases stand for the proposition that basic or simplistic graphic designs do not warrant copyright protection. To this list could have been added *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. 49 (E.D. Pa. 1983) ("basic geometric shapes have long been in the public domain and therefore cannot be regulated by copyrights."); *Past Pluto Productions Corp. v. Dana*, 627 F. Supp. 1435 (S.D.N.Y. 1986) (hat entitled "Crown of Liberty" consisting of seven identical, evenly spaced foam spikes that radiate from the hat's arcuate perimeter), and *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958) (a cardboard star with two flaps which, when folded back, enabled it to serve as a stand for a display). The work involved in *John Muller*, cited in Ms. Giroux-Rollow's letter, was factually quite similar to WOOLY BARS in that it also involved four black lines arranged together to form a stylized shape of an arrow. In addition, the letter "C" design involved in *Coach, Inc. v Peters*, 386 F. Supp. 2d 495 (S.D.N.Y. 2005) is similar to the "S" in WOOLY BARS in that it is a stylized variation of a single letter.

The single decision that you have cited in your second request for reconsideration, *Willard v. Estern*, involved a rendition of the calendar year "2002" constructed from the public domain "Caneel" petroglyph flanked by the numeral "2" on each side. The court noted that the plaintiff had obtained a registration of the work using the glyph to form the calendar year "2000." 206 F. Supp. 2d at 724. In the court's words, "[a]s the plaintiff considered and ultimately decided to combine the calender [sic] date and the petroglyph, it appears that she had the requisite originality to create a copyrightable work." *Id.* at 725. The basis for this statement is not explained in the opinion. The court may have relied on, and given deference to, the Copyright Office's registration of the plaintiff's work as a starting point in its copyrightability determination. Although it is not clear from the opinion whether the court had the plaintiff's deposit in the Copyright Office's records before it, the work deposited with the Office for registration incorporated not only a glyph and the numerals "2" and "0," but also other graphic elements drawn to represent fireworks in the background. *See* Deborah Willard, *Petroglyph 2000*, VA 1-116-068 (Sept. 26, 2001). The application form as originally received referenced only the glyph and the numerals. *Id.* The Office wrote to the applicant informing her that these elements alone could not sustain a copyright registration. *Letter from Joanna Corwin to Deborah L. Willard (Nov. 13, 2001).* The application was ultimately amended to include the background artwork within the scope of the copyright claim, and a certificate of registration was issued on this basis. *See* Appendix A, Deborah Willard, *Petroglyph 2000* (as amended Jan. 29, 2002).

The *Willard* court does not indicate whether it had access to this registration, deposit, and the correspondence record between the Copyright Office and the applicant/plaintiff. It does not describe its basis for holding that the work it had before it "appear[ed to exhibit] the requisite originality" to obtain copyright protection; the assertion that the plaintiff's work merely consisted of a combination of two public domain works was the defendant's, not the court's. *See Willard,* 206 F. Supp. 2d at 725. As discussed above, the record underlying the registration makes clear that such a combination would not support a copyright claim. Moreover, the court referred to the use of the petroglyph in the middle of the year 2000 as an "idea," *id.* at 724, and it is axiomatic that ideas are not protected by copyright, 17 U.S.C. § 102(b). The court may have taken into account the combination of all of the graphic elements incorporated in the *Petroglyph 2000* deposit, including the background fireworks, but it is also important to note that the posture of the case was a motion to dismiss in which all reasonable inferences were drawn in the plaintiff's favor. Unlike WOOLY BARS, the *Willard Petroglyph 2000* was registered by the Copyright Office. At that preliminary stage of the litigation,

it is very likely that the court presumed that the work was copyrightable based on the Copyright Office's registration of the work. In any event, the WOOLY BARS design involves a simple combination of two pairs of curved bars without any background as existed in *Willard.* The combination of a pair of two bars forming a stylized "S" simply does not exhibit enough creativity to merit copyright registration. For all of these reasons, *Willard* is distinguishable from the present case. Moreover, to the extent that the *Willard* court's reasoning may be in conflict with our analysis herein, the Board considers that decision poorly reasoned on the issue of copyrightability.

Finally, consistent with the decision in *Feist*, the Board has considered the selection and arrangement of the four hook-shaped lines present in WOOLY BARS. *See*, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination or arrangement). However, merely combining unprotectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. The numerous cases already cited in the preceding section discussing creativity illustrate this point. Most important of these cases is likely *Coach, Inc. v. Peters* affirming the conclusion of the Copyright Office that "not simply that the letter "C" is not copyrightable but that '[t]he elements embodied in this work, individually, and in their particular combination and arrangement, simply do not contain a sufficient amount of original and creative authorship to be copyrightable.'" 386 F. Supp. 2d at 499. The Board notes that in theory an author creating any work has an unlimited choice of alternatives. 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) (an "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. The choice of four black lines in WOOLY BARS is quite simple, and their arrangement is commonplace in creating the individual and overall impressions of the letter "S." As a consequence, the Board determines that the overall selection, arrangement, and organization of the elements in WOOLY BARS do not rise to the level of sufficient creativity to support a copyright registration

IV. CONCLUSION

For the reasons stated above, the Copyright Office Board affirms the refusal to register the work entitled WOOLY BARS. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Member of the Board