United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

August 10, 2009

Hamre, Schumann, Mueller
& Larson, P.C.
Attn: Bryan A. Wong
P.O. Box 2902
Minneapolis, MN 55402-0902

Re: CHRONOLOGICALLY GROUPED COUPON SET
(2 works with the same title)
Control Number: 61-410-4777(S)

Dear Mr. Wong:

I write on behalf of the Copyright Office Review Board ("Board") in response to your second request for reconsideration of copyright registration for two slightly different coupons identified above. Your second request for reconsideration of these copyright claims was received in this Office on June 14, 2007, on behalf of your client, Steve Foust. The Board notes that both applications complete line 5 of the application form relating to earlier versions of the work, and designate new matter on line 6b as "artistic changes in color and layout and additional design aspects." While the Board is unclear as to the nature of the asserted earlier editions, the Board finds, in looking at these coupons as a whole, that there is no copyrightable authorship on which registration can be based. For this reason, the decision in refusing registration of these coupons is affirmed.

I. DESCRIPTION OF WORKS

The works involved in this reconsideration are two coupon sets that appear generally identical, except the spine of the coupons are in different colors (one is red and the other gold), and the elements of the starburst design and dates are reversed in the two works. Each version has 12 separate pages differing only in the date of week that each coupon is intended to cover. The two versions in their entirety are reproduced in an appendix located at the end of this letter.

II. ADMINISTRATIVE RECORD

A. Initial submission and refusal to register

On February 22, 2006, the Copyright Office received two applications from the Sherrill law firm to register two coupons differing only in coloring and a slight change in the arrangement of two of the elements. In a letter dated June 6, 2006, Examiner Joy Fisher Burns refused to register these works on the basis that the identified new matter lacked sufficient authorship to be copyrightable. The applications described new matter as "artistic changes in color and layout and additional design aspects." Ms. Burns stated that to be protected by copyright, a work must contain original literary, artistic, or musical expression. Moreover, she explained that if a work contained previously registered, previously published, or public domain material the copyright in the revised version covers only the additions or changes appearing for the first time, and that if a work contained only

minor revisions or additions, or consisted only of new material not protected by copyright, registration was not possible. She identified material which could not be protected by copyright as including the following: familiar symbols, shapes or designs; basic geometric borders; words and short phrases; mere variations of typographic ornamentation; graphic elements such as coloring, lettering, typeface, layout, or format; and any idea, concept, system, or process embodied in the work.

B. First request for reconsideration and Office reply

In a letter dated August 31, 2006, Mr. Sherill submitted a first request for reconsideration on behalf of the Applicant in which he argued that the two coupon sets were copyrightable. Letter from Sherill to the Copyright Office of 8/31/06, at 1. He identified the copyrightable elements as including "the author's color selection and arrangement of the various elements of the coupon sets (i.e., relative positioning of the coupons, header, spine, text and coloration)." Citing *Feist Publications, Inc. v. Rural Telephone [Service] Co. Inc.*, 499 U.S. 340 (1991) and *Key Publications, Inc. v. Chinatown Today Publ'g Enters., Inc.*, 945 F.2d 509 (2nd Cir 1991), he contended that the requisite requirement of originality is extremely low. He asserted that under the *Feist* standard, the vast majority of works made the grade easily because most possessed the creative spark, "no matter how crude, humble or obvious" it might be. *Id.* He stated further that it is not the Register's task to shape the protection threshold beyond the minimal creative spark required by the Copyright Act, citing *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir.1992). *Id.* at 1. Mr. Sherill also cited 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright,* § 3.04(B)(2), as explaining that the *Feist* ruling only invalidates copyright in the most banal of works, such as the white pages of a phone book. *Id.* at 2.

After reviewing the first request for reconsideration, Examining Division Attorney Advisor Virginia Giroux-Rollow responded in a letter dated March 1, 2007. She upheld the refusal to register the two coupon sets on the grounds that they did not contain a sufficient amount of original artistic or graphic authorship in either the coloring added or in the arrangement of the elements to support registration. Letter from Giroux-Rollow to Sherrill of 3/1/07 at 1. She stated that the Office did not dispute the fact that the coupon sets were original and independently created by the author; however, citing *Feist*, Ms. Giroux-Rollow stated that a work must not only be original but also possess more that a *de minimis* quantum of creativity. She elaborated that originality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation of public domain elements, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). *Id.* She added that because the Copyright Office does not make aesthetic judgments, the attractiveness of a design, its uniqueness, its visual effect or appearance, the time, effort, and expense it took to create, or its commercial success in the marketplace, are not factors in the examining process. *Id.* Rather, she said that the question is whether there is a sufficient amount of original and creative authorship within the meaning of the copyright law and settled case law. *Id.*

Ms, Giroux-Rollow stated that the Office viewed the placement and arrangement of elements in these works and the layout and format of the works to be uncopyrightable. She concluded that while it was true that courts have held that even a slight amount of creativity will

support a copyright claim, there remains a narrow area where admittedly independent efforts are too insignificant to support a copyright. She believed these coupon sets fell within this narrow area. *Id.* at 2.

C. Second request for reconsideration

In a letter dated May 30, 2007, you submitted a second request for reconsideration. Letter to the Review Board of 5/30/2007 at 1. You begin by reciting the *Feist* principle that the requisite level of creativity is very low. *Id.* You state further that copyright protection can be based on both compilations of facts, and selection and arrangement of elements. *Id.* at 1-2. You identify the features of your client's works such as: a middle spine having a different color than either of the header, footer, and coupons regions; a starburst design for each week designation; a laudatory statement "Red Hot Coupons" within the starburst design; eight rows of coupons regions directly adjacent to the side of the middle spine; and determinations of coupons per page, perforation lines between rows of coupon regions, week designations, sizes of spine, header footer, coupon regions, starburst design, and text. *Id.* at 2-3. You claim that the applicant's works include more than trivial originality and creative authorship: "[w]hen the features of Applicant's works are considered in their entirety, including the selection and arrangement of all the features illustrated, there is more than [a] reasonable basis to support a copyright registration." *Id.* at 3.

III. DECISION

After reviewing the application and your arguments, the Review Board upholds the Examining Division's refusal to register the two coupons sets. The elements themselves do not raise to the level of copyright protection because they are either outside of copyrightable subject matter or *de minimis*. While arrangement and selection of public domain elements may raise to the level of copyrightable authorship in some instances, the layout, arrangement and selection in this instance are too inconsequential to support copyright registration.

A. Copyrightable subject matter and the standard for creativity

The copyright law and regulations of the Copyright Office identify materials outside of the scope of copyright protection. Section 102(b) of the copyright law provides that copyright protection may not be extended to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." As a result, the idea behind your client's product promotion scheme cannot support copyright protection. Likewise, Copyright Office regulation 37 CFR § 202.1 relating to material not subject to copyright identifies numerous elements common to the coupon sets which cannot support a copyright claim. Identified elements include: words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; ideas plans, or systems; blank forms such as report forms or order forms; and works consisting entirely of information that is common property. As a result, no copyright claim may be made in the starburst shape, the short phrase "Red Hot Coupons," the colors of red and gold, the type design of letters of the alphabet, or the weeks of the year.

Copyright protection is available only for "original works of authorship." 17 U.S.C. § 102. In *Feist,* the Supreme Court stated that originality consists of two elements: "independent creation plus a modicum of creativity." *Feist*, 499 U.S. at 346. Consistent with that precedent, the Copyright Office examines works and their applications to ensure that the works satisfy the requirements for both independent creation and a minimum level of creativity. While the Board is satisfied that Applicant's claim in the coupons sets at issue meets the requirement for independent creation, it has determined that the works do not have sufficient creative authorship to be copyrightable.

Although the requisite level of creativity is low, the Supreme Court stated 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." *Feist*, 499 U.S. at 363. There can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. A work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Id.* at 362-63.

Even prior to *Feist*, Copyright Office registration practices, following settled precedent, recognized that works with only a *de minimis* amount of authorship are not copyrightable. *See Compendium of Copyright Office Practices II,* § 202.02(a) (1984). *Compendium II* also states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.* at § 503.02(a). *Compendium II* recognizes that it is not aesthetic merit but the presence of creative expression that is determinative of copyrightability. *Id.* Section 503.02(a) states that:

> [R]egistration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. ... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations."

The Office and courts have consistently found that standard designs, figures and geometric shapes are not sufficiently creative to support a copyright claim. *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.") In *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986), the court upheld a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form." Likewise, in *Vogue Ring Creations, Inc. v. Hardman*, 410 F.Supp.609

(D.R.I. 1976), the issue was raised whether a derivative ring contained more than a trivial variation from a ring in the public domain. The Court concluded that in spite of some differences in ornamentation and the width and shape of the rings, the differences were trivial. *See also Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lys held not copyrightable); *Bailie v. Fisher*, 103 U.S. App. D.C. 331, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); *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).

B. The works in their entirety - compilation and arrangement, including layout

Consistent with your arguments, the Copyright Office follows the principle that works should be considered as a whole. Therefore, the Board agrees that it is possible for the selection and combination of commonplace elements or simple designs to rise to the level of copyrightability, even though individual elements in a work, taken alone, would not be copyrightable. Works based on public domain elements may be copyrightable if there is some distinguishable aspect in their selection, arrangement or modification that reflects choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist*, 499 U.S. at 359; *see also* 17 U.S.C. 101– definitions of "compilation" and "derivative work." Nevertheless, it is the opinion of the Board that Applicant's coupon sets considered in their entirety do not "possess more than a *de minimis* quantum of creativity." *Feist*, 499 U.S. at 363.

You have stated that the compilation, selection, and arrangement in the coupon sets are more than a reasonable basis to support copyright registration. Letter to the Review Board of 5/30/07, at 3. On line 6b of your applications, you identify "layout" as a component of your client's authorship. However, the Review Board finds the quantum of creativity in the selection and arrangement of individual graphic elements which is required to reach a level that supports copyright is not satisfied by these coupon sets. The layout is "garden variety," devoid of creativity. *Feist*, 499 U.S. at 362. Each coupon set has only one color: one is a red version, the other gold. No case has ever suggested that the selection of one color could support a copyright claim. There are three basic elements of each coupon: a week number (week 4 through 1); a starburst design with the words "Red Hot Coupons" in the middle; and a date of the week designation. This basic design is repeated many times to cover many weeks of the year. The Board concludes that these coupon sets are simple variations of standard designs, short phrases, and public domain information such as dates of the week. The coupon sets require very few choices for exercising judgment about graphic elements, short phrases, colors, weeks of the year, etc. Merely combining unprotectible elements does not alone establish creativity where the combination or arrangement is itself simplistic,

formulaic or minor in its configuration. For example, in *Jon Woods Fashions, Inc. v. Curran,* 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988), the district court upheld the Register's decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctively arranged or printed, did not contain the minimal amount of original artistic material necessary to merit copyright protection. Likewise, in *Satava v. Lowry*, the Ninth Circuit held unprotectible sculptural arrangements which combined elements not copyrightable in themselves. 323 F.3d 805 (9th Cir. 2003). The court explained that not "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." 323 F.3d at 811.

IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board concludes that the two coupon sets cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

/s/

Maria Pallante
Associate Register,
Policy & International Affairs
for the Review Board
United States Copyright Office

APPENDIX
1. Chronologically Grouped Coupon Set (Red Version - 12 pages)
2. Chronologically Grouped Coupon Set (Gold Version - 12 pages)