United States Copyright Office
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May 31, 2012

Michael Garzone
249 Tugaloo Road
Travelers Rest, SC 29690

RE: Rising Star Field and Rising Star Field on American Flag (Founding Fathers Flag)
Correspondence ID: 1-5WKOVF

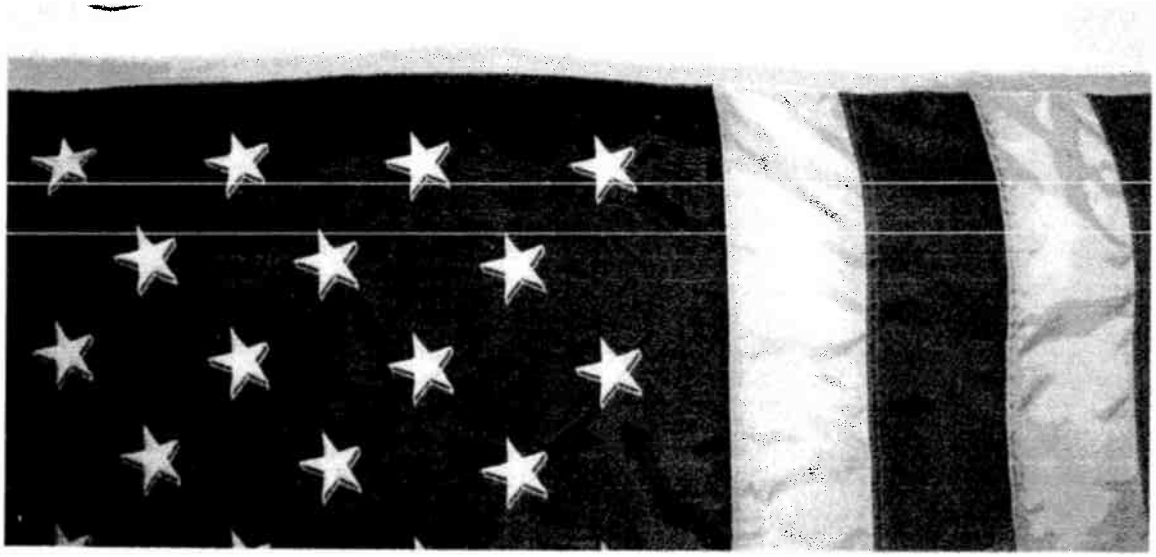
Dear Mr. Garzone:

I am writing on behalf of the Copyright Office Review Board ("Board") in response to your letters dated January 4, 2011, in which you requested a second reconsideration of refusal to register the work entitled RISING STAR FIELD and RISING STAR FIELD ON AMERICAN FLAG ("FOUNDING FATHERS FLAG"). The Board has carefully examined the application, the deposits, and all correspondence concerning the application and affirms the denial of registration of the work.

I. DESCRIPTION OF THE WORK

The RISING STAR FIELD and RISING STAR FIELD ON AMERICAN FLAG consists of three-dimensional stars applied to the American flag. The stars appear three-dimensional through the use of white colored stitching. An image of a star from RISING STAR FIELD is depicted below:

The three-dimensional stars replace the 50 two-dimensional stars on the American flag. An image of RISING STAR FIELD and RISING STAR FIELD ON AMERICAN FLAG best serves to describe the work and is shown below.



II. ADMINISTRATIVE RECORD

A. Initial submission

On May 2, 2009, you submitted two separate copyright registration applications for Rising Star Field (Founding Fathers Flag). The applications had differences in the copyright claims and deposit formats: one application claimed copyright in 2-dimensional artwork and was supported by a deposit of photographs only: the other application claimed copyright in embroidery design in addition to the 2-dimensional artwork, and was supported by fabric swatches as well as a photograph deposit.

On March 17, 2010, the Copyright Office ("Office") rejected both registration applications and refused to register the work. The Registration Specialist ("Specialist") who examined the work explained that it lacked the authorship necessary to support a copyright claim. In determining that the work was not copyrightable, the Specialist cited the Supreme Court's discussion of the Copyright Act's originality requirement in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The Specialist further stated that copyright law does not protect familiar symbols or designs, or mere variations of typographic ornamentation, lettering or coloring. *See* 37 C.F.R. § 202.1(a). Based on an examination of the work, the Specialist concluded that the Office could not issue the requested registration because the work did not satisfy the requisite legal standards for originality. Letter from Specialist to Michael Garzone, 3/17/2010, at 1.

B. First request for reconsideration

In your first request for reconsideration, you asserted that the work contains the minimum amount of graphic authorship to be copyrightable. Letter from Michael Garzone to Copyright Office RAC Division, 6/15/2010. You explained that the change from two-dimensional stars to three-dimensional stars was significant. *Id.* You stated that a flag with three-dimensional stars "looks completely different" and is a "unique

adaptation of the traditional American Flag." *Id.* You clarified that you were trying to register a copyright claim "for the unique change" you made to the familiar symbol, and not for the American flag itself. *Id.*

C. Examining Division's response

In response to your first request for reconsideration, Attorney-Advisor Virginia Giroux-Rollow notified you that the Office was still unable to register a copyright claim in the work because it did not contain "a sufficient amount of original and creative artistic or graphic authorship" that would support a copyright registration. Letter from Virginia Giroux-Rollow to Michael Garzone, 10/7/2010, at 1. Ms. Giroux-Rollow stated that to be regarded as copyrightable, a work must "possess more than a *de minimis* quantum of creativity." *Id.*, citing *Feist*, 499 U.S. at 363. She further stated that originality, as interpreted by the courts, means that the authorship must constitute more than a trivial variation or arrangement of public domain or noncopyrightable elements. *Id.*, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (2d Cir. 1951)).

Ms. Giroux-Rollow then stated that, in applying this standard, the Office examines a work to determine whether it contains elements, either alone or in combination, on which registration can be based. She stressed that 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 taken into account during the examining process. *Id.*

Ms. Giroux-Rollow explained that the work consists of stars stitched to appear three-dimensional and then applied to the American flag, replacing the 50 two-dimensional stars. *Id.* at 1-2. She noted that stars are common and familiar shapes, in the public domain, and are, therefore, not copyrightable. In addition, she explained that the American flag is in the public domain and is not subject to copyright protection. She found that the three-dimensional stars and their arrangement on the American flag are not sufficiently creative for copyright protection. She concluded that the resulting design is *de minimis* because it is composed of a minor variation of a star and each star is applied to the American flag in a common and recognizable configuration. *Id.* at 2, citing *Copyright Office Practices, Compendium II*, § 503.02(a)-(b) (hereinafter *Compendium II*).

Ms. Giroux-Rollow noted that the *Compendium II* principles referred to above have been confirmed by several judicial decisions. *Id.* at 2, citing *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) (logo design consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, held not copyrightable); *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-lis held not copyrightable); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d (BNA) 1074 (D.D.C. 1991) (chinaware "gothic" design pattern composed of simple variations and combinations of geometric shapes held not copyrightable); *Jon Woods Fashions, Inc.*

v. Curran, 8 U.S.P.Q. 2d (BNA) 1870 (S.D.N.Y. 1988) (fabric design consisting of striped cloth with small grid squares superimposed on the stripes held not copyrightable).

Ms. Giroux-Rollow recognized that even a slight amount of creativity will suffice to obtain copyright protection and that the vast majority of works make the grade easily if they possess some creative spark. She pointed out, however, that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." *Id.*, citing *Nimmer on Copyright* § 2.01(b). She found that transforming two-dimensional stars into three-dimensional forms and applying them to the American flag does not meet the low threshold for copyrightable authorship. *Id.*

D. Second request for reconsideration

In your second request for reconsideration, you again claimed that the work merits copyright registration. You first pointed out that you are the sole creator of the work. Letter from Michael Garzone to Virginia Giroux-Rollow, 1/4/11, at 1. You then stated that the work is not a trivial variation of a star. In support of this, you explained that the three-dimensional stars make the American flag "look more beautiful than the traditional flag." *Id.* You state that the work "represents the rights of the states and their citizens, and is an expression of love for God and country" and "emphasizes the inherit [sic] genius that is the sovereignty of our great states and the majesty of their unity." *Id.* Furthermore, you explained that multiple flag companies have expressed interest in producing the work. *Id.* You concluded that the work contains the required spark of creativity "based on the excited reactions of all the people who have seen the flag, it creates fireworks." *Id.*

III. DECISION

The Board concludes that it is unable to register a copyright claim in the work because the work does not contain any copyrightable authorship. Although the Board does not dispute that the work was independently created by the author, the work does not possess at least some minimal degree of creativity.

The work at issue, RISING STAR FIELD and RISING STAR FIELD ON AMERICAN FLAG (FOUNDING FATHERS FLAG), depicts stars made to appear three-dimensional through the addition of white stitching. The three-dimensional stars are applied to the American flag and replace the 50 traditional two-dimensional stars.

In determining whether a work has a sufficient amount of creative authorship necessary to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, 499 U.S. at 345, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. However, the Court also held that some works (such as the work at issue in *Feist*) 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 minimis* quantum of creativity." 499 U.S. at 363, and that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial

as to be virtually nonexistent." *Id.* at 359. While "the standard of originality is low . . . it does exist." *Id.* at 362.

Compendium II has long recognized this principle, stating that "[w]orks that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a). With respect to pictorial, graphic, and sculptural works, the class within which the works at issue fall (*see* 17 U.S.C. § 102(a)(5)), "[a] certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Compendium II*, § 503.02(a). *Compendium II* recognizes that it is the presence of creative expression that determines the copyrightability of a work and that "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." *Id.*; *see also* 37 C.F.R. § 202.1(a) (stating that "familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained").

Case law confirms these principles. *See, e.g., Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for retail display was not copyrightable); *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" were not copyrightable); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 222 U.S.P.Q. (BNA) 49 (E.D. Pa. 1983) (collection of various geometric shapes was not copyrightable).

We do not dispute that a substantial amount of time and effort went into creating the work at issue. However, copyrightability does "not [depend] upon aesthetic merit, commercial appeal, or symbol value." *Compendium II*, § 503.02(a). The time and effort expended in creating the work, the attractiveness of the work, the work's commercial success in the marketplace, and the symbolic meaning or significance of the work are not relevant to the Board's determination of copyrightability.

The Board finds that the work at issue, three-dimensional stars, does not exhibit enough variations on a standard symbol to support a copyright claim. Furthermore, the selection and arrangement of the three-dimensional stars into a common configuration do not constitute original selection and arrangement necessary to sustain copyright protection. Although the three-dimensional stars may make the American flag "look more beautiful" and "create[] fireworks" in people's reactions, Letter from Michael Garzone to Virginia Giroux-Rollow, 1/4/11, at 1, the Office does not make aesthetic judgments, and such considerations have no role in determining copyrightability. Moreover, the work may have been intended to symbolize the "rights of the states and their citizens," the "love for God and country," and "the inherit [sic] genius that is the sovereignty of our great states and the majesty of their unity." *Id.* However, symbolic meaning is not determinative of copyright protection. *Compendium II*, § 503.02(a). Finally, though "multiple flag companies have already expressed an interest in producing the Founding Fathers Flag," Garzone Letter, 1/4/11, at 1, any commercial appeal of the work to flag companies is irrelevant during the examining process. What matters is whether the resulting, overall expression contains copyrightable authorship. Here, the

Board concludes that the work lacks the requisite modicum of creativity to rise above the *de minimis* level and thus does not merit copyright protection.

IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the work entitled RISING STAR FIELD and RISING STAR FIELD ON AMERICAN FLAG (FOUNDING FATHERS FLAG). This decision constitutes final agency action in this matter.

Sincerely yours,

/s/

Michele J. Woods
Associate Register for Policy
and International Affairs
on behalf of the Review Board,
United States Copyright Office