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September 28, 2001

Charles N.J. Ruggiero, Esq.
Ohlandt, Greeley, Ruggiero, & Perle
One Landmark Square
Stamford, Ct. 06901-2682

Re: O's and I's
Control Number: 60-710-5940(O)

Dear Mr. Ruggiero:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated October 13, 1999, appealing a refusal to register a work entitled "O'S AND I'S" for your client Rocky Mountain Traders, Ltd. The Copyright Office Board of Appeals affirms the Examining Division's refusal to register.

Administrative Record

On July 14, 1998, the Copyright Office received a short form VA, fees, and drawings for copyright registration of a pictorial work entitled O'S AND I'S. In a letter dated February 6, 1999, Visual Arts Examiner John Martin refused registration on the grounds that the work contained no artistic material, and that familiar symbols and designs can not support a copyright.

In a letter dated May 4, 1999, you appealed the refusal to register your client's copyright claim. The letter asserted that copyright was not claimed in the shapes themselves but rather "the relative placement of each shape..." The overall design, you argued, achieved both the originality and creativity required for copyrightability.

The Examining Division again refused to register O'S AND I'S in a letter dated June 15, 1999. Virginia Giroux, an Attorney Advisor in the Examining Division, characterized the work as three pairs of geometric shapes arranged in a way which was quite simple. She concluded that the arrangement of such shapes left limited opportunity for placement, and the arrangement overall lacked sufficient creativity to support a copyright claim. Simple arrangements of standard designs can not support a copyright claim under legal precedents such as John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), and Jon Woods Fashions Inc. v. Curran, 8 U.S.P.Q.2d 1879 (S.D.N.Y. 1988).

On October 13, 1999, you wrote to the Register of Copyrights seeking a second appeal of the refusal to register. In your letter you argue that the work in issue consists of six shapes and there are 720 ways these six shapes could be placed. Therefore, you argue, the statement that there was limited opportunity for placement was incorrect, and the creative choice in selecting this particular arrangement met the creativity standard for copyright registration.

Arrangement of Familiar Shapes and Designs

The Board has concluded that this work is not registrable because neither the simple geometric shapes nor the commonplace manner in which they are arranged are sufficiently creative to support a copyright claim. In the first letter of rejection, the Examiner stated that familiar symbols and designs could not support a copyright claim. You responded by arguing that your client was not seeking copyright protection in the shapes themselves, but only in the "relative placement of each shape..." Your second appeal letter maintained a similar position. Therefore, it appears you accept that the shapes themselves cannot support a copyright, but you believe that registration can be based on the arrangement of those shapes.

In your second appeal letter you raise a novel argument. In response to the statement in the second rejection letter that the arrangement "left limited opportunity for placement," you argue that there are 720 possible ways these six shapes could be arranged. You apparently believe that if there are substantial numbers of alternative arrangements, then the particular arrangement selected by the party claiming copyright should be extended protection. No court, however, has ever determined creativity using such an approach.

In Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991), the Supreme Court acknowledged that only a modicum of creativity was necessary to support a copyright. However, the Court ruled that some works failed to meet that standard. The Court observed that "as 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. and that there can be no copyright in work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." Id. at 359. The Court also recognized that some works, such as a "garden-variety white pages directory devoid of even the slightest trace of creativity," are not copyrightable. Id. at 362.

With respect to pictorial, graphic & sculptural works, the class in which O'S AND I'S would fall (see 17 U.S.C. §102(a)(5)), the Compendium of Copyright Office Practices, Compendium II (1984) ("Compendium II") has long recognized this principle, stating that 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)(1984). The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability, id., and that "registration 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... 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." Id. See also section 202.1(a) of the Copyright Office regulations, 37 C.F.R. §202.1(a) ("familiar symbols or designs" are "not subject to copyright and applications for registration of such works cannot be entertained"); 37 C.F.R. §202.10(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 combination of O's and I's that you seek to register is, in the words of the Compendium, "a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations." As such, it is insufficiently creative to support a copyright registration.

The numerous judicial opinions denying protection to common symbols and shapes also serve as precedent for denying protection on the basis of layout or position of such symbols or shapes. This is because in all of the cases, the subject matter shapes could have been placed in innumerable other positions or manipulated in countless other ways, and this fact did not render the works copyrightable. These cases include Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(upholding Copyright Office's refusal to register a design consisting of striped cloth over which was superimposed a grid of 3/16" squares); John Muller & Co., Inc. v. New York Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986)(logo consisting of four angled lines forming an arrow, with

the word "arrows" in cursive script below, found not copyrightable); Magic Marker, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F.Supp. 769 (W.D. Pa. 1986) (envelopes printed with solid black stripes and a few words such as "priority message" or "gift check" did not exhibit minimal level of creativity necessary for copyright protection); Forstmann Woolen Co. v. J.W. Mays, Inc., 89 F.Supp. 964 (E.D.N.Y. 1950) (reproduction of standard fleur-de-lis could not support a copyright claim without original authorship); and Homer Laughlin China v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (affirmed Copyright Office's refusal to register a commercially successful chinaware design consisting of a combination of familiar shapes and designs).

In the few instances where copyright claimants attempted to secure copyright protection in the positioning of public domain shapes, the courts have consistently found lack of copyrightability. In Florabelle Flowers, Inc. v. Joseph Markovits, 296 F.Supp. 304 (S.D.N.Y. 1968), the court found that "the aggregation of well known components to comprise an unoriginal whole" fell short of the standard of originality. Likewise, in DBC of New York, Inc. v. Merit Diamond Corp., 768 F.Supp. 414, 415 (S.D.N.Y. 1991) the court held: "DBC's gestalt theory that the whole is greater than the sum of its parts is rejected by the great weight of evidence indicating that these two rings are, on whole, not exceptional, original, or unique."

Because this work does not possess the required minimal degree of creativity necessary to support a copyright registration, we must affirm the Examining Division's decision to refuse registration.

The Board's decision constitutes final agency action.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
U.S. Copyright Office