United States Copyright Office
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May 14, 2008

Fulwider Patton LLP
Attn: Katherine McDaniel
6060 Center Drive, 10th Floor
Los Angeles, CA 90045

Re: DUB LOGO
Copyright Office Control Number: 61-410-6783(F)

Dear Ms. McDaniel:

I am writing to you on behalf of the Copyright Office Review Board [hereinafter Board] in response to your letter dated November 15, 2007, in which you requested the Copyright Office to reconsider its refusal to register the work entitled *DUB Logo*. The Board has carefully examined the application, the deposit and all correspondence concerning this application, and hereby affirms denial of registration.

I. DESCRIPTION OF WORK

The *DUB Logo* is a logo consisting of the word "DUB" in thick, black lettering. You describe the letters as "set forth in a novel, sans-serif, geometric, and smooth typeface meant to evoke a European style." Letter from Katherine L. McDaniel to Copyright R&P Division of 11/15/07, at 10. In the middle of the "U" letterform is a "circular, rivet-like design," Letter from Katherine L. McDaniel to Copyright R&P Division of 8/9/07, at 1. This design, set in white against the black lettering (and reproduced below), consists of a circle, the diameter of which does not completely span the width of the letterform; short line segments extend from the top and bottom of the circle connecting it with the letterform's edge.



II. ADMINISTRATIVE RECORD

A. Initial Application and Office's Refusal to Register

On April 4, 2006, the Office received a Form VA application from you on behalf of your client, DUB Publishing, Inc., to register a "2-Dimensional artwork" entitled *DUB Logo*. Space 6a of the application ("Preexisting Material. Identify any preexisting work or works that this work is based on or incorporates.") stated, "Distinctive lettering style for 'DUB'." Space 6b ("Material Added to This Work. Give a brief, general statement of the material that has been added to this work and in which copyright was claimed.") stated, "Circle feature in 'U'."

In a letter dated June 12, 2006, Visual Arts Section Examiner Melissa Crawford refused registration of this work because she determined that it did not contain a minimum amount of pictorial, graphic or sculptural authorship necessary to sustain a copyright registration. Letter from Melissa Crawford to DUB Logo [sic] of 6/12/06, at 1.

B. First Request for Reconsideration

In a letter dated August 9, 2006, you requested reconsideration of the Office's refusal to register the *DUB Logo*. Letter from Katherine L. McDaniel to Copyright R&P Division of 8/9/06, at 1.[1] You asserted that the design of the work was "entirely original, was crafted by a graphic designer, and, to the best knowledge of the author/claimant, is unlike any other design." *Id.* Therefore, you argued, the work was capable of copyright protection. *Id.* You stated that the work had become well known and recognized as a result of its use on magazines, merchandise, and promotional material. *Id.* You also noted that DUB Publishing was not claiming copyright in the letters "DUB," but "only in this graphic illustration that includes the circular, rivet-like design." *Id.* at 2.

C. Examining Division's Response

In response to your request and in light of the points raised in your letter, Attorney Advisor Virginia Giroux-Rollow of the Examining Division reviewed the application, and she, too, determined that the *DUB Logo* did not "contain a sufficient amount of original and creative artistic or graphic authorship upon which to support a copyright registration." Letter from Virginia Giroux-Rollow to Katherine McDaniel of 8/17/07, at 1 (emphasis in original). She acknowledged that logo designs may be subject to copyright protection, but stated that it would need to possess more than a *de minimis*

[1] We also acknowledge receipt of your letter of February 8, 2006 (received February 21, 2007, and presumably actually written on February 8, 2007, because it refers to your application dated March 31, 2006), sent in response to a request for an additional fee. As the reasons you gave for requesting reconsideration of your claim were the same, we will refer to the earlier letter dated August 9, 2006.

quantum of creativity. *Id.* (citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)). She noted that the Copyright Office examines the work to determine whether it contains elements, either alone or in combination, on which a copyright can be based, and does not consider its attractiveness, uniqueness, visual effect or appearance, or the like. *Id.* at 1-2.

Ms. Giroux-Rollow stated that neither the circular rivet-like shape by itself nor the combination and arrangement of the circular rivet-like shape with the word "DUB" possessed the requisite quantum of creative authorship necessary to support a copyright claim. *Id.* at 2. She noted that while the amount of creativity needed to obtain copyright protection under *Feist* is low, the *DUB Logo* fell within the narrow area where such creative efforts were too trivial or insignificant to support a copyright claim. *Id.* at 2-3 (citing 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.01(B) (2002)).

D. Second Request for Reconsideration

In a letter dated November 15, 2007, you requested that the Office reconsider for a second time its refusal to register the copyright claim in the *DUB Logo*. Letter from Katherine L. McDaniel to Copyright R&P Division of 11/15/07, at 1. You argue that the logo merits copyright protection because it is not "so familiar and 'commonplace' that it would be 'expected as a matter of course.'" *Id.* at 1-2 (citing *Feist*, 499 U.S. at 363). You assert that even "simple" designs can be sufficiently creative to warrant copyright protection, and that even a combination of unoriginal components may be sufficiently creative if evaluated as a whole. *Id.* at 2-7.

With respect to the *DUB Logo*, you claim that its ability to "conjure[] multiple connotations" establishes its copyrightability. *Id.* at 9. You describe the creative efforts that went into creating the logo, explaining that (1) the use of the word "dub" in combination with a "rivet" is not expected, *id.* at 9-10; (2) the design does not use any existing font, but rather consists of a novel typeface, *id.* at 10; (3) the design links the letters in "DUB" together as a single object, *id.*; and (4) the element in the center of the "U" (previously described as a "circular rivet-like shape") is unique and not easily described. *Id.* You claim that this design element was formed from a "melding of [] influences," *id.*, and describe the abstract impressions given off by the element in conjunction with the "DUB" lettering as a whole. *Id.* at 11-12. In conclusion, you argue that because of these factors, the *DUB Logo* is "sufficiently creative to qualify for copyright registration." *Id.* at 13.

III. DECISION

After reviewing the application and arguments in favor of registering Applicant's work, the Review Board upholds the Examining Division's decision to refuse registration of the *DUB Logo*. The Board determines that the work does not contain the requisite minimum amount of pictorial, graphic, or sculptural authorship necessary to sustain a copyright claim.

A. The Legal Framework

All copyrightable works, including graphic designs, must qualify as "original works of authorship." 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*, 499 U.S. at 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. This does not appear to be an issue with respect to the *DUB Logo*. Second, the work must possess sufficient creativity.

1. The Creativity Threshold

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. *Id.* However, the *Feist* court also ruled that some works (such as the telephone directory at issue in that 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 minimis* quantum of creativity," *id.* 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; *see also* 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."); *Nimmer* § 2.01(B) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

In your Second Request for Reconsideration, you argue that "the *Feist* test for the level of creativity necessary for copyright is based on whether the work presents a configuration that is more than an 'age-old practice' that is so familiar and 'commonplace' that it would be 'expected as a matter of course.'" Letter from McDaniel of 11/15/07, at 2. The Board disagrees with the proposition that the *Feist* standard can be described in this way. We accept that "even a slight amount [of creativity] will suffice" to merit copyright protection. *Feist*, 499 U.S. at 345. On one hand, "the vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Id.* (quoting *Nimmer* § 1.08). On the other hand, in some works, "the creative spark is utterly lacking or so trivial as to be virtually nonexistent," *id.* at 359 (emphasis added), and thus lack "the minimal creative spark required by the Copyright Act and the Constitution." *Id.* at 363.

Feist did not articulate a test for determining how much of a creative spark is required to distinguish an uncopyrightable work with a "trivial" amount of creativity from an original work that is copyrightable despite its "crude, humble, or obvious" amount of creativity. The Court merely observed that "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course,"

id. at 363 (describing the alphabetical ordering of names within a telephone directory), would fall within the narrow range of works containing insufficient creativity to merit a copyright. It did not preclude other types of "practices" from falling into this uncopyrightable range. Indeed, the Court suggested that other types of unoriginal creations do fit into the *de minimis* range; its reference to the alphabetically arranged directory as being "not only unoriginal, [but] practically inevitable," *id.*, indicates that there are other "unoriginal" works that are not as "inevitable," but nevertheless fail to meet the minimal level of creative authorship necessary to sustain a claim of copyright.

Because *Feist* does not specifically define a test for determining whether a particular work meets the requisite creativity threshold, it does not invalidate prior cases evaluating this threshold. The principle that the Office may exercise its discretion in determining whether a specific work contains this minimum amount of creativity, was similarly left undisturbed. See *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) ("[D]etermining creativity . . . requires the exercise of informed discretion, and the Register . . . is generally recognized to possess considerable expertise over such matters."). Therefore, your argument that the Office relies on outdated case law to justify its refusal to register the *DUB Logo*, because many of the cases that Ms. Giroux-Rollow cited were decided before *Feist*, is incorrect. See Letter from McDaniel of 11/15/07 at 8-9, is inapposite.

Even prior to the *Feist* decision, the Office recognized that the level of creativity necessary to sustain a copyright claim is modest, but existent. *See Compendium of Copyright Office Practices II*, Ch. 200, § 202.02(a) (1984) [hereinafter *Compendium II*] ("Works that lack even a certain minimum amount of original authorship are not copyrightable."); *id.* § 503.02(a) ("A certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class."). In implementing this threshold, Copyright Office regulations prevent registration of "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring," 37 C.F.R. § 202.1(a); *see also Compendium II*, § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . .") and ("Familiar symbols or designs, and mere variations of typographic ornamentation, lettering, or coloring, are not copyrightable.") *id.* at § 202.02(j). These regulations have been upheld by the courts in many instances and have served as guides in their jurisprudence. *See, e.g., Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286-87 (3d Cir. 2004) (holding that the Copyright Office's views regarding the non-copyrightability of short phrases "merits deference" and "logically extends to part numbers"); *Atari Games Corp. v. Oman*, 979 F.2d 242, 247 (D.C. Cir. 1992) ("We do not in any way question the Register's position that simple geometric shapes and coloring alone are *per se* not copyrightable.") (internal quotation marks omitted); *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (concluding that the Office's regulatory bars to registering short phrases and typographic ornamentation was "a fair summary of the law"). These bars to registration are not based on the subject works being "commonplace" or "expected as a matter of

course," but rather, on their failure to possess more than a minimum amount of creativity.

Moreover, making trivial alterations to otherwise standard shapes or familiar designs will not inject the requisite level of creativity. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) ("[What] is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"); *Compendium II*, § 503.02(a) (Registration cannot be based upon "a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

We also address your objection to a *per se* rule barring registration of "simple" works. *See* Letter from McDaniel of 11/15/07 at 2-3. In support of your objection, you cite to *Runstadler Studios, Inc. v. MCM Ltd. Partnership*, 768 F. Supp. 1292, 1298 (N.D. Ill. 1991) ("relatively simple" works are entitled to copyright protection). We agree with this assertion in principle, but note that the word "simple" is a relative term. Our practices allow for the registration of "relatively simple" works. *See, e.g.*, *Compendium II*, § 503.01 (allowing for registration of a child's drawing exhibiting "a very low level of artistic merit"). We do not use the term to connote "ornateness." *See* Letter from McDaniel of 11/15/07, at 1 (asserting that the Office "confus[es] ornateness with creativity"). For present purposes, we use the term "simple" to identify those works that lack the requisite level of creative authorship to sustain a copyright.

2. Not All Combinations of Unprotectible Elements May Obtain Copyright Protection

We agree with your assertion that some combinations of unprotectible elements may exhibit sufficient creativity with respect to how the elements are combined or arranged to support a copyright. *See, e.g.*, *Feist*, 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 selection, coordination or arrangement); *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("It is true, of 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. . . . [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.") (emphasis in original). Of course, as you point out, "a work that is entirely a collection of unoriginal material nevertheless may be copyrighted if the material is selected, coordinated or arranged in an original fashion." Letter from McDaniel of 11/15/07, at 5 (quoting *Diamond Direct, LLC v. Star Diamond Group, Inc.*, 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000)). Conversely, however, merely combining unprotectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. 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 of Copyrights' decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares

was superimposed, even though distinctly arranged and printed, did not contain the minimal amount of original artistic material to merit copyright protection. Similarly, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986).

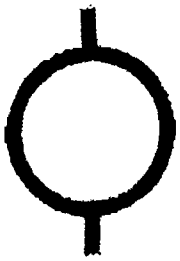
You cite *Runstadler* for the proposition that relatively simple works, including a combination of standard shapes, can possess the minimum amount of creativity required to sustain a copyright. Letter from McDaniel of 11/15/07 at 2, 6. The Board agrees with this assertion in general, but *Runstadler* does not stand for the principle that all such combinations will support a copyright. In fact, the two sculptures at issue in that case (one registered, one not) stands for the opposite conclusion, that not all such combinations will support a copyright if they do not exhibit the requisite level of creativity. This case demonstrates that the Office will register some combinations of unprotectible elements and refuse to register others, based on the level of creativity in the selection, coordination, or arrangement of those elements. While the court said that "the case law is contrary" to the defendant's general assertion that a "combination of glass rectangles cannot be a proper subject of copyright," *id.* at 1296 n.5, it did not pass judgment on the Copyright Office's refusal to register the licensor's specific sculpture. This is not to say that the Office will compare a work presented to it with works previously registered; indeed, no such comparison takes place. However, the *Runstadler* episode highlights the fact that the Office considers the amount of creativity involved in the selection and arrangement of public domain elements in determining the registrability of a work, and does not follow a "general rule that a[ny] combination of familiar shapes is not sufficiently creative for a copyright registration . . . ." Letter from McDaniel of 11/15/07, at 9. However, as set forth below, the Board finds that with respect to the particular combination of such shapes in the *DUB Logo*, the amount of creativity present is insufficient to support a copyright claim.

B. Analysis of the Work

You argue that the *DUB Logo* meets the minimal amount of creativity necessary to sustain a copyright registration. Letter from McDaniel of 11/15/07, at 9. Although the Board agrees that the creativity standard is very low, the Board disagrees with your conclusion that the *DUB Logo* satisfies this standard.

1. The Claim in the Application Appears to be Limited to the "Circular Feature in 'U'"

As noted above, the application for registration identified the "Distinctive lettering style for 'DUB'" as preexisting material and stated that the material in which copyright is claimed consists only of "Circle feature in 'U'." Thus, from the face of the application, it appears that the copyright claim extends only to the following graphic image:



Or, a more liberal construction of Space 6 of the application might also extend the copyright claim to the placement of that image on the letter "U." However, it is difficult to reconcile the application with your arguments that a registration should have been issued because (1) the use of the word "dub" in combination with a "rivet" is not expected; (2) the design does not use any existing font, but rather consists of a novel typeface; and (3) the design links the letters in "DUB" together as a single object. As is set forth below, neither that graphic image nor the placement of that image on the letter "U" constitutes copyrightable authorship. Moreover, even without the disclaimer in Space 6, and accepting your current characterization of the scope of the copyright claim, the Board cannot discern copyrightable authorship in the *DUB Logo*.

2. None of the *DUB Logo*'s Features, Individually or in Combination, Exhibit the Requisite Level of Creativity to Sustain a Copyright

In your First Request for Reconsideration, you described the *DUB Logo* as "a graphic illustration containing the letters 'DUB' with a unique circular, rivet-like design incorporated into the base of the 'U.'" Letter from McDaniel of 8/9/06, at 1. In your Second Request, you describe the design in more detail, asserting three features of the work that purport to contain sufficient originality. First, you state that "the design does not consist of the term 'DUB' in any existing font." Letter from McDaniel of 11/15/07, at 10. Second, you state that "the letters are linked together so that the term 'DUB' appears as a single object," forming "an original, unique, creative design that must be treated as a single work and is perceived as a single work." *Id.* You then state that "the element in the center of the 'U' is unique and not easily described," asserting that the previous description as a "'circular rivet-like shape . . . would not be sufficient to enable a graphic artist to recreate the design." *Id.* at 10-11. You describe it as "more than a circle," but also "more than a rivet." *Id.* at 11. You continue to describe the multiple images or connotations that the image purports to evoke, including a "visual impression created by the graphic '01," *id.* (referring to the fact that the work was created in 2001), "the impression that the 'D' and the 'B' have been riveted together," *id.*, and "the ornamental features found on certain large wheel rims," *id.* at 12. Finally, you argue that "the Office has presented no evidence of any other designs that are similar to the DUB LOGO or its design element." *Id.* The Board finds that none of your arguments support the proposition that the *DUB Logo* contains sufficient creativity to warrant a registration.

Your first two arguments (that the design "does not consist of the term 'DUB' in any existing font" and that it "link[s the letters] together so that the term 'DUB' appears as a single object") appear to suggest that the design is copyrightable because of the unique typeface used.[2] However, neither typeface nor "variations in typographic ornamentation [or] lettering" are copyrightable. 37 C.F.R. §§ 202.1(a), (e). As explained above, the Office's longstanding view is that these typographic elements fail to meet the concededly low standard for creativity articulated by *Feist*. Even assuming that some typographic ornamentation consists of more than trivial variations of standard, public domain letterforms, we see no such authorship in the *DUB Logo*. Many fonts set forth letters in a sans-serif style; the rounded edges on some letters in the design (the top of the "B," for example) do not constitute copyrightable variations of such letterforms. The fact that the letters appear linked together also is no more than a trivial variation of a standard typeface. Such elements, we accept, may make the design pleasing to the eye, but its aesthetic appeal does not bear on its copyrightability. *See, e.g.*, *Compendium II*, § 503.02(a) ("A certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class. Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value.) The style that the typeface is meant to evoke likewise is irrelevant to determining the design's copyrightability. *See, Compendium II*, § 503.01. ("The registrability of a work of the traditional fine arts is not affected by the style of the work or the form utilized by the artist.")

Similarly, the circular, rivet-like shape does not exhibit the degree of creativity required to sustain a copyright claim. Although you state that this shape is "not easily described," the Board finds it very easy to describe the shape. It is, in essence, a circle, with short line segments protruding straight out from the very top and bottom of the circle. Your third argument describes in great detail the inspiration for the graphic design and the many ideas or images that the design is meant to suggest. Of course, ideas in themselves are not copyrightable. 17 U.S.C. § 102(b). Furthermore, the process by which a work is created, including the inspiration for the design and the images which the work is meant to represent, is irrelevant to copyrightability. *Compendium II*, § 202 ("Quality, aesthetic merit, ingenuity, and uniqueness are not considered in determining the copyrightability of a work."). Only the resulting work is evaluated, regardless of how it came to be. That resulting work is, as described above, a simple circle with short, protruding line segments—only a trivial variation or arrangement of standard, public domain shapes. Thus, this element is also not copyrightable.

"If the work consists entirely of uncopyrightable elements, registration is not authorized." *Compendium II*, § 503. Therefore, the only means by which the various unprotectible elements in the *DUB Logo* could possibly sustain a copyright would be if their particular combination or arrangement exhibited a sufficient level of creativity. Unfortunately, they do not.

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[2] Because Space 6a of the application states that the "Distinctive lettering style for 'DUB'" is preexisting material not included in the claim for registration, these arguments appear to be off the mark. But the Board addresses them in any event.

Ignoring Space 6 of the application and giving your claims the most generous construction, the only elements under consideration are the letterforms spelling "DUB" and the circular, rivet-like shape, which we have explained are uncopyrightable in themselves. The circular shape is simply superimposed in the middle of the "U" character—a completely typical arrangement, especially given that the "U" is a symmetrical shape and lends itself to being bisected. The fact that this configuration "gives the impression that the 'D' and the 'B' have been riveted together," Letter from McDaniel of 11/15/07, at 11, has no bearing on the copyrightability of the combination of these elements. Again, the Office does not consider the inspiration for the design or the images which the design is meant to conjure; rather, it examines only the resulting work. The Board finds that the design as a whole, resulting from the simple combination of two unprotectible elements does not qualify for copyright protection; in the words of the court in *Satava*, 323 F.3d at 811, the elements are not "numerous enough," nor are their "selection and arrangement original enough," to constitute an original work of authorship.

3. None of the Case Law You Have Cited Compels Registration of the *DUB Logo*

In your Second Request for Reconsideration, you cite to a number of cases for the general propositions that combinations of simple shapes, combinations of shapes with text, and the manner of presentation of a graphic rendering consisting of text may contain the minimum amount of creativity necessary to sustain a copyright claim. The works at issue in these cases, however, contain a much greater quantum of creativity than the *DUB Logo*. Thus, the Board does not consider these cases to compel registration of the logo.

Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989) [*Atari I*] and *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992) [*Atari II*] involved the copyrightability of a computer game entitled *Breakout*. *Atari I* remanded the refusal to register *Breakout* because the "Register's attention may have trained dominantly on components, not the work as a whole . . . ." 888 F.2d at 883. *Atari II* remanded the Register's decision again, because of its "focus on the individual screens, rather than the flow of the game as a whole" and its emphasis on the lack of "distinctive" or "unique" features of the game. 979 F.2d at 245-46. The *DUB Logo*, in contrast, does not contain nearly the number and variety of graphic elements, sound effects, and sequential flow of the *Breakout* game. The Examining Division and the Board have considered both the component elements of the work and the work as a whole, and we do not require that the work contains any "distinctive" or "unique" features. We merely require that the work (or any part of it) exhibit the minimal creativity required under *Feist* to sustain a copyright. The *DUB Logo* does not meet this requirement.

The work at issue in *Prince Group, Inc. v. MTS Products*, 967 F. Supp. 121 (S.D.N.Y. 1997) was a fabric design consisting of a polka-dot like pattern that differed from a generic polka-dot pattern. The dots were "irregularly shaped," "shaded," and

"place[d] . . . in imperfect and conflicting diagonal lines at various distances." *Id.* at 125. The court found that both the individual elements and their setting in combination were sufficient to meet the creativity threshold. *Id.* We also note that the Copyright Office examined and registered this fabric design. *See id.* at 123 (noting that the fabric design was "copyrighted [meaning registered] on October 6, 1994"). However, the creative elements in *Prince Group*, unlike the *DUB Logo*, did not consist of "mere variations in typographic ornamentation [or] lettering," which is not registrable under 37 C.F.R. § 202.1(a). In addition, the *DUB Logo* does not exhibit the irregular shapes and shading of the polka dots in *Prince Group*, and the constituent elements of the logo were not placed in such a manner as to exhibit more than a *de minimis* amount of creativity.

Your citation to *Dahlen v. Michigan Licensed Beverage Ass'n*, 132 F. Supp. 2d 574 (E.D. Mich. 2001) is also inapposite. You are correct in asserting that the poster at issue in that case contained "'the use of bold or capitalized letters . . . to emphasize certain words,' and simple shapes such as 'a box of text' and 'a border around the outer edges of the poster.'" Letter from McDaniel of 11/15/07, at 6 (quoting *Dahlen*, 132 F. Supp. 2d at 582). But the poster in *Dahlen* also contained "an enlarged block of text at the top of the poster," "bullet points highlighting various facts relating to drinking and driving," and "a box of text in the middle of the poster surrounded by two columns of additional text." 132 F. Supp. 2d at 582. The court's finding that the poster contained the minimal amount of creativity necessary to sustain a copyright was based on consideration of all of these elements, and not simply the presence of bold and capitalized letters or a border, as you imply in your letter. We also note that the Copyright Office examined and registered the poster at issue. *See id.* at 578 ("Plaintiff first registered her copyright in the 'We Care About You' poster on February 24, 1998.") Unlike the poster in *Dahlen*, we find that the *DUB Logo* does not contain enough creative authorship to sustain a copyright claim. The logo does not contain a similar number and variety of elements or similar originality in their selection and arrangement.

Willard v. Estern, 206 F. Supp. 2d 723 (D. V.I. 2002), concerned 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." *Id.* 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 of 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, 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* 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," 206 F. Supp. 2d 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 for summary judgment in which all reasonable inferences were drawn in the plaintiff's favor. Unlike the *DUB logo* situation, the Willard *Petroglyph 2000* was registered by the Copyright Office. At the 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 *DUB Logo* involves the combination of elements that are much more standard than those involved in *Willard*—letterforms found in the Roman alphabet and a circle, or merely trivial variations thereof. The combination of these elements forming the logo simply does not exhibit enough creativity to merit copyright registration. For all of these reasons, *Willard* is distinguishable from the present case. To the extent that the Office's present view of the *DUB Logo* is in conflict with the *Willard* decision, the Board considers that decision poorly reasoned on the issue of copyrightability.

The work at issue in *Sadhu Singh Hamdad Trust v. Ajit Newspaper Advertising, Marketing & Communication, Inc.*, 503 F. Supp. 2d 577 (E.D.N.Y. 2007) was a stylized rendering of the word "Ajit" in Punjabi script. The defendants argued that "when compared to standard Punjabi font, plaintiff's logo reflects only two minor changes involving the extension of one letter and the flattening of another." *Id.* at 588. The magistrate judge, ruling on cross-motions for summary judgment, considered the copyrightability of "the Ajit logo, with its modification in color and shape from standard Punjabi font," to be "a close question," and therefore, "drawing all inferences in favor of plaintiff, ... decline[d] to grant summary judgment to either party on this issue." *Id.* at 577. Even then, the court considered not only the two minor changes identified by the defendants, but also the "arrangement of the lettering, and the manner of presentation, including background, letter size, and spacing," as well as the "modification in color." *Id.* at 589. Thus, the *Sadhu Singh Hamdad Trust* case was not an adjudication of copyrightability Moreover, because the logo in *Sadhu Singh* was not a United States work, *see* 17 U.S.C. § 101 (definition of "United States work"), the plaintiff in that case

was not required to attempt to register the copyright in the logo prior to bringing suit. *See id.* § 411. Therefore, the Office did not have the opportunity to make this factual determination with respect to the logo. With respect to the *DUB Logo*, the Board agrees with the Office's initial determination that the logo does not meet the *Feist* creativity threshold.

You also attempt to distinguish the pre-*Feist* cases cited in the Letter from Giroux-Rollow of 8/17/07, at 2 (citing *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950); *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991); and *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)). The *Feist* ruling did not overrule any of these cases. You argue that the *DUB Logo* exhibits more creativity than the works at issue in these cases, because it does not contain "standard or common" elements or designs. Letter from McDaniel of 11/15/07, at 8-9. The Board disagrees. The sans-serif letterforms "D," "U," and "B," a circle, and short line segments, are just as standard and common, and perhaps more so, than the arrow in *John Muller*, the fleur-de-lis in *Forstmann Woolen*, the familiar geographic designs in *Homer Laughlin*, and the stripes and squares in *Jon Woods Fashions*. Likewise, the selection and arrangement of the standard elements in the *DUB Logo* is just as trivial as that in any of the cases cited by Ms. Giroux-Rollow.

Your final argument is that "the Office has presented no evidence of any other designs that are similar to the DUB LOGO or its design element." Letter from McDaniel of 11/15/07, at 12. Comparison to works previously registered is not a part of the Office's determination of copyrightability. While the Patent Office is statutorily required to examine "prior art" in order to substantiate non-obviousness and novelty, the Copyright Office's duty is to examine each claim of registration and determine whether the deposit satisfies the requirements for registrability. Indeed, two different authors may independently register an identical work as long as the works were original and sufficiently creative. As Judge Learned Hand stated, "if by some magic a man who had never known [Keats's work] were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author'" of that work. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936). The fact that the *DUB Logo* contains insufficient creative authorship is the only relevant evidence. The Board finds that the logo depicts no more than a trivial variation of elements in the public domain, such as standard letterforms and circles, and a selection and arrangement of these elements that does not exhibit the level of creativity required to sustain a claim of copyright.

IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the *DUB Logo*. This decision constitutes final agency action in this matter.

Sincerely,

David O. Carson,
Associate Register for Policy and International Affairs
on behalf of the Review Board
United States Copyright Office

APPENDIX A



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2000 St. John Style!!

St. John artist Deborah Willard of *Deborah Designs* at the Lime Tree Mall in Cruz Bay put a millennium spin on a favorite St. John symbol, incorporating the St.John petroglyph in a series of hand painted designs on clothing.