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August 20, 2008

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RE: PALOMINO, WRANGLER AND STAMPEDE
Control No. 61-411-0645(K)

Dear Mr. Wilson:

After receiving additional fabric samples that the Copyright Office Review Board requested from you by letter dated February 27, 2008, the Board again considered Culp, Inc.'s second request for reconsideration. This is to notify you that the Board has approved Culp, Inc.'s second request to register three leather-like fabric designs identified as Palomino, Stampede and Wrangler. The certificates for these registrations will be separately mailed. Although we are registering the claims in these three designs, we provide the following information to let your client, Culp, Inc., know the limitation we consider applicable to the registrations being placed on the public record.

The Copyright Office adheres to the standard for creativity set forth by the Supreme Court which requires only a modicum of creativity to support a copyright claim. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 346 (1991). *Accord, Alfred Bell & Co. v. Catalda Fine Arts, Inc.*,191 F.2d 99, 102 (2d Cir. 1951) (no large measure of novelty is necessary.) Written practices and guidelines for the Copyright Office incorporated that principle even prior to *Feist*. *Compendium of Copyright Office Practices, Compendium II* (1984) (*Compendium II*), § 202; chapter 600 (detailed guidelines for examination procedures). The Review Board is registering the designs Palomino, Wrangler and Stampede on the basis that these designs exhibit at least the level of creativity which is sufficient to meet the *Feist* standard.

However, the Review Board takes this opportunity to emphasize that these registrations cover, *i.e.*, extend to, only the identical combination of design elements presented in the actual deposit copies which accompanied the applications for these works. The registrations do not extend to a general look and/or texture of leather or to the appearance of materials emulating leather or animal skins in general. We point out this principle because, in arguments for first request for reconsideration, the previous attorney for the applicant, Karl Sayer, Jr., stated that the underlying layers used to create each fabric design include the "natural lines, shadowing, shading, wrinkling, tones, skin pores, surface irregularities, and the like, of a particular form of genuine finished animals leather, such that when the respective layers are overprinted in relative registry with each other, the natural appearance of the leather is replicated as closely as possible." *Letter from Sayer of*

8/16/2006, at 2. (emphasis added). And, Applicant has also stated that "the overall finished product"... "emulates a distinctive natural leather." *Id.*, at 3.

While the Review Board recognizes that some courts addressing copyrightability speak in terms such as the "look and feel" of a work, we again state that we can ascertain no standard by which the Office can be expected to judge the requisite originality and creativity based upon a work's "feel." *See* 4 M. & D. Nimmer, Nimmer on Copyright §13.03[A][1][c] (criticizing the use of "feel" as an "amorphous referent" that "invites an abdication of judicial analysis"). Invoking a work's "feel" is no substitute for articulating an objective analysis of the work's original and creative elements. *See Letter from Giroux-Rollow of 1/17/2007*, at 3.

There are limitations with respect to the creative expression that may be claimed in the registrations for Palomino, Wrangler and Stampede. For example, Copyright Office examination procedures do not evaluate the commercial merit of works or assess their aesthetic merit. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-252 (1903); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1075 (9th Cir. 2000) ("Thus, whether a photograph is used in (or intended for) a museum, an art gallery, a mural, a magazine, or an advertisement does not bear on its copyrightability."). A work may be highly valued for its aesthetic appeal or artistic merit and, yet, not be copyrightable, and *vice versa*. *Compendium II*, § 503.02(a) recognizes that it is not aesthetic merit that determines the copyrightability of a work:

> A certain minimal amount of original creative authorship is essential for registration. . . . Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value. Thus, 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. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. For example, it is not possible to copyright a new version of a textile design merely because the colors of red and blue appearing in the design have been replaced by green and yellow, respectively. 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.

As a result, the commercial success of Applicant's fabric designs is not a relevant factor in determining whether they are entitled to copyright protection.

The language quoted above also incorporates the principle that the basic building blocks for creative pictorial works must remain in the public domain, available to all; these include the individual elements of Applicant's works *to the extent* that such individual elements may be categorized as common shapes or minor variations on such shapes. Further, Copyright Office regulations state that protection does not extend to mere variations in coloring. 37 C.F.R. § 202.1(a); *Compendium II*, § 503.02(a). *See above, at 2 - 3*. Extending copyright to elements such as standard or common symbols, shapes, and simple coloration would tend to impede the constitutional goals that underlie congressional authority to establish copyright protection found in the Constitution, Art. I, § 8, cl. 8: "to promote the Progress of Science and useful Arts."

For individual design elements that are *de minimis* in themselves, *i.e.*, they carry no copyright protection as such, the choices and arrangement of such elements within an overall design, be it 2-, or 3-dimensional, may be protected, depending on the use of such elements and whether the chosen elements are sufficient in quantity within the design as a whole. The Ninth Circuit said it well: "But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable 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." *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The Ninth Circuit quoted *Feist* to bolster its explanation: "[T]he principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection." 323 F.3d at 811, *citing Feist*, at 358. The focus, therefore, must be on the overall design that fairly may be said to be synonymous with the selection, coordination, or arrangement of individual (possibly) trivial elements, brought together to form a more-than-trivial, copyrightable overall design.

We make a further comment on the use of color within designs for which copyright is sought. Copyright Office regulations list mere coloration as one of the elements for which copyright protection is not available. *See above, at 3*. An individual color is not copyrightable in itself; but, a pattern or design which utilizes color may be copyrightable, again, depending on the choice and arrangement of the elements of coloration. *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2nd Cir. 2001), a case involving standard symbols, common shapes, and colors per se, explicitly stated that "[E]ven though a particular color is not copyrightable, the author's choice in incorporating color with other elements may be copyrighted. *Id.,* at 271.

We state this information to emphasize that the individual elements of the leather-like designs submitted by Culp, Inc., including irregular lines, wrinkling appearances, tones and areas of coloration, and other surface irregularities, are not individually copyrightable elements. The copyright claim, rather, which is recognized by the Review Board as registrable, is limited to the particular expression of these elements as they are coordinated and arranged in each deposit to form a unitary design– the totality of the individually *de minimis* markings which, taken together, constitute each work's design.

Finally, we again remind you that ideas are not copyrightable. 17 U.S.C. § 102(b), 37 C.F.R. § 202.1(b). *Baker v. Selden*, 101 U.S. (1879); *Feist*, 499 U.S. at 347. The Copyright Office is registering not the idea of leather, its facsimile look, nor the concept of artificial animal skins. These registrations extend to the particular copyrightable combination and arrangement of the elements constituting each design.

No response is necessary; the Copyright Office considers this a final agency action in this matter.

Sincerely,

/s/

Nanette Petruzzelli
Associate Register,
Registration and Recordation Program
for the Review Board
United States Copyright Office