United States Copyright Office
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July 28, 2011

McKee, Voorhees & Sease, PLC
Attn: Kurt Van Thomme, Esq.
801 Grand Avenue, Suite 3200
Des Moines, IA 50309

Re: AVENUE OF THE SAINTS
SR 1-141959771
SR 1-285878934
Correspondence ID: 1-2VRCFR

Dear Mr. Van Thomme:

On behalf of the Copyright Office Review Board, I am responding to your request for reconsideration of the Registration Program's refusal to register a copyright claim in a sign/logo entitled AVENUE OF THE SAINTS. You have submitted this claim for your client, the Iowa Department of Transportation. The Review Board has carefully examined the eService application, the identifying reproduction, and all correspondence in this case. After careful consideration of the arguments in your letters of June 20, 2009, and November 17, 2009, the Board affirms the denial of registration of this copyright claim because the work does not contain a sufficient amount of original and creative pictorial or graphic authorship in either the treatment or arrangement of the design elements to support a copyright registration.

I. ADMINISTRATIVE RECORD

A. Initial submission

On January 2, 2009, the Copyright Office received from you an eService application covering "2-D artwork"and an uploaded deposit of a digital image of the logo work, AVENUE OF THE SAINTS, on behalf of the Iowa Department of Transportation. By letter dated March 25, 2009, registration specialist, Sandra Ware, refused registration of this work, stating that it lacked the authorship necessary to support a copyright claim. Ms. Ware stated that copyright protects original works of authorship, meaning that works of the visual arts must contain a minimum amount of pictorial, graphic, or sculptural authorship. She also noted the absence of protection for familiar symbols or designs, words and short phrases, ideas, concepts, or mere variations of typographic ornamentation, lettering or coloring, citing 17 U.S.C. § 102(b) and 37 C.F.R. § 202.1. She further concluded that neither the aesthetic appeal, nor commercial value of a work, nor the amount of time and effort expended to create a work were factors to be considered under the copyright law. In applying these principles, she concluded that the work at issue here could not support a copyright claim. Letter from Ware to Van Thomme of 3/25/2009, at 1.

B. First request for reconsideration; denial of request

By letter dated June 20, 2009, you filed for first reconsideration of the refusal to register AVENUE OF THE SAINTS and asserted that the work satisfies the threshold of authorship necessary to support a copyright claim. Letter from Van Thomme to Copyright Office of 6/20/2009, at 1. You cited two basic arguments to support registration. First, you stated that the work consists of a copyrightable compilation on the basis of original selection, coordination, or arrangement of constitutive elements. Second, you pointed out that the work at issue here is comparable to a logo found copyrightable by the Ninth Circuit. Letter from Van Thomme of 6/20/2009, at 2 - 3.

You argued that a compilation is copyrightable if it features an original selection, coordination, or arrangement of otherwise unprotectable elements, citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 360 (1991). While the work in *Feist* was found not to possess such compilation authorship, you asserted that your client's work was more similar to the work at issue in *Key Publ'n, Inc. v. Chinatown Today Publ'n*, 945 F.2d 509, 514 (2d Cir. 1991) in which there was an exercise of judgement in "choosing which fact from a given body of data to include in a compilation." *Id.* at 513. You argued further that, in creating AVENUE OF THE SAINTS, the author had to make specific choices from "vast alternatives of words, shapes, symbols, fonts, backgrounds, and colors, and then decide how to arrange the components." Letter from Van Thomme of 11/17/2009, at 2. You further contended that your client's logo was similar to the "Hot Wheels" logo found copyrightable in *Jada Toys, Inc. v. Mattel, Inc.*, 496 F.3d 974, 983 (9th Cir. 2007). You asserted that the general number of elements in the two logos were similar, and the fact that each may have uncopyrightable elements did not preclude extending copyright protection on the basis of compilation. Letter from Van Thomme of 11/17/2009, at 2.

After reviewing your first request for reconsideration, Attorney Advisor Virginia Giroux-Rollow responded in a letter dated August 19, 2009. She upheld the refusal to register the work on the grounds that it did not contain a sufficient amount of original and creative artistic or textual authorship to support a copyright registration. Letter from Giroux-Rollow to Van Thomme of 8/19/2009, at 1. Ms. Giroux -Rollow conceded that the logo design fell within the category of works that may be subject to copyright protection. She explained, however, that the *de minimis* concept of copyright law holds that there must be a sufficient quantum of authorship present in any work in order for that work to be copyrightable. The concept finds its name from the Latin phrase *lex non curat de minimis– the law does not deal with trivial matters;* thus, not every commercial label is copyrightable: it must contain a sufficient quantum of original text or pictorial expression. *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F. 541 (2nd Cir. 1959). Ms. Giroux-Rollow further observed that the court in *Sara Lee* affirmed the position of the Copyright Office that name, titles, words, short phrases or expressions are among works not subject to copyright protection even if they are distinctively arranged or printed. Letter from Giroux-Rollow of 8/19/2009, at 1. She stated that this principle is embodied in 37 C.F.R. § 202.1. She concluded that the logo design in the instant case should be judged according to similar principles as enunciated in the *Sara Lee* case. *Id.* at 1.

Ms. Giroux-Rollow stated that a work must not only be original, but must possess more than a *de minimis* quantum of creativity, citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). 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). Letter from Giroux-Rollow of 8/19/2009, at 1. She stated that in applying that standard, the Copyright Office examines a work to determine whether it contains any elements, either alone or in combination, on which a copyright can be based. 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.* at 1 - 2. The question, thus, 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 went on to describe the work in question as a logo design consisting of a minor variation of a rectangular shape made to look like a road sign in which is inscribed the words AVENUE OF THE SAINTS in white lettering coupled with an orange-colored fleur-de-lis in the center, all of which are on a blue background. She stated that rectangles, or the fleur-de-lis, or any minor variation thereof, are common familiar geometric shapes which are in the public domain, citing Copyright Office regulation 37 C.F.R. § 202.1. *Id.* at 2. Moreover, citing the same regulation, she noted that names, titles, words, and short phrases, typographic ornamentation, lettering and coloring are not copyrightable. *Id.* at 2. Finally, she stated that the work at issue here, AVENUE OF THE SAINTS, is *de minimis* because it consists of two familiar and common shapes, a noncopyrightable textual expression, and a minor variation in coloring, arranged into a rather simple configuration, citing *Compendium of Copyright Office Practices, Compendium II*, § 503.02(a).

Ms. Giroux-Rollow further stated that the above principles were confirmed by several judicial decisions, including *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986)(a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below lacked the minimal required creativity to support registration); *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 1074 (D.D.C. 1991) (upholding refusal to register "gothic" pattern composed of simple variations and combinations of geometric designs due to insufficient creative authorship to merit copyright protection); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(upholding refusal to register a design consisting of two-inch stripes, with small grid squares superimposed upon the stripes); and *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F.Supp 959 (W.D. Pa. 1986)(envelopes printed with black stripes and a few words and lettering did not exhibit the minimal level of creativity to support a copyright registration). Letter from Giroux-Rollow of 8/19/2009, at 2.

Ms. Giroux-Rollow conceded that it is true that even a slight amount of creativity will suffice to obtain copyright protection. However, she went on to cite *Nimmer* § 2.01(B), which states that "there remains a narrow area where admittedly independent efforts are deemed too

trivial or insignificant to support a copyright." *Id.* at 2. She concluded the logo at issue fell within this narrow area. In explaining this conclusion, she stated that the Copyright Office believed even the low requisite level of creativity required by *Feist* was not met by the work at issue here with its rectangle in combination with the lettering and two words, coupled with the coloring, as well as the overall arrangement of the design elements. Ms. Giroux-Rollow found that the case of *Key Publ'n, Inc. v. Chinatown Today Publ'n,* 945 F.2d 509, 514 (2d Cir. 1991) was unpersuasive because the work in that case was a literary compilation with over 260 categories and 9000 listings. The present work is a claim in an artistic or graphic work where the creativity or amount of selective judgement is far less than that presented in the Key directory. *Id.* at 3.

C. Second request for reconsideration

In a letter dated November 17, 2009, you requested that the Office reconsider for a second time its refusal to register the copyright claim in AVENUE OF THE SAINTS. Letter from Van Thomme to Copyright R&P Division of 11/17/2009, at 1. You argue that the work contains sufficient originality to qualify for protection as a copyrightable compilation. Additionally, you assert that the work contains a copyrightable element.

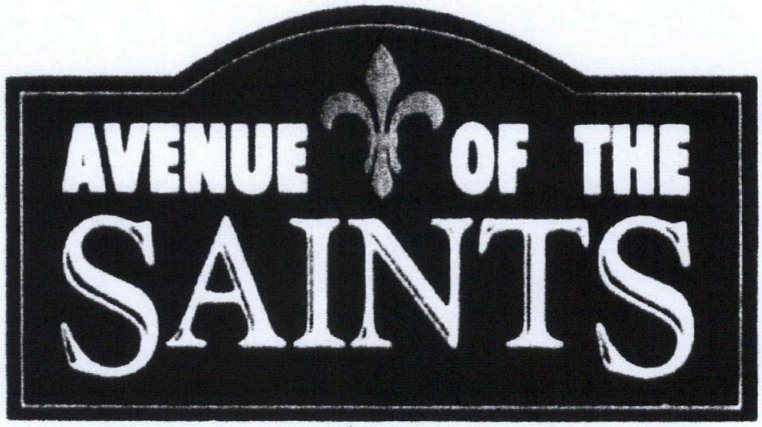
You cite section 103 of the copyright law identifying compilations as copyrightable subject matter as well as the landmark case of *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) providing that compilations are copyrightable so long as the selection, coordination, or arrangement of the elements shows sufficient originality. You state that your client's work exhibits creativity in the selection of the wording used on the sign; the selection of two coordinating type sizes and faces; the selection of a particular fleur-de-lis design; the selection of the street sign shape and colors, and the arrangement of all of the elements. Letter from Van Thomme of 11/17/2009, at at 1 - 2. You further cite two cases in which you allege that works similar to your client's were protected. In *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970) you contend that the Ninth Circuit found that the "association between the artwork and text" was copyrightable. In *Jada Toys, Inc. v. Mattel, Inc.*, 496 F.3d 983 (9th Cir. 2007), you state that the Hot Wheels logo was found copyrightable on the basis of the "combination of the words used, the stylization of the flame graphic, and the colors chosen." Letter from Van Thomme of 11/17/2009, at 2.

You further assert that the Office wrongly applied a "heightened logo standard" to your client's work. The case of *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F. 541 (2nd Cir. 1959), you contend, should not be applied to AVENUE OF THE SAINTS because the work is an artistic compilation of design elements paying tribute to a stretch of highway connecting St. Paul, Minnesota to St. Louis, Missouri. As such, it is not merely a commercial tag used to identify goods and services, but rather a symbol of a project bringing progress, hope, and change to Midwestern communities. Finally, you argue that even applying the "heightened logo standard" of the *Sara Lee* case, the stylized fleur-de-lis appearing in the work at issue here represents in itself a copyrightable pictorial work. You state that the fleur-de-lis symbol allows more room for artistic expression that the pictorial of the Sara Lee cake. Letter from Van Thomme of 11/17/2009, at 4 - 5.

II. DECISION

A. Description of work

The work at issue here is a design of a street sign presenting the words AVENUE OF THE SAINTS in white lettering on a blue background. The four words in the name are presented in two different type fonts with the letters of "SAINTS" having simple thin-line shading which follows part of the shape of the individual letters. Between the words "AVENUE" and "OF THE" is an orange colored fleur-de-lis appearing at the center-top of the design. A reproduction of the design appears below:



In considering requests for second reconsideration of works that have been refused registration, the Review Board conducts a de novo review which takes a fresh look concerning whether the copyright claim in issue can be registered. The Board studies carefully the deposit of the work and the arguments raised by the applicant as well as those raised by the two Registration Program staff members who previously considered registration of the claim. In your second request for reconsideration, you assert that your client's work contains copyrightable compilation authorship and an artistic rendering of one element of the design—the fleur-de-lis. For the purposes of this response, the Review Board will discuss the compilation issue after an analysis of the appropriate creativity standard applying to works of the graphic arts.

B. Feist; individual elements of AVENUE OF THE SAINTS

All copyrightable works, be they graphic designs or otherwise, 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 Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Feist*, 499 U.S. at 345. The Copyright Office accepts at face value your application statement

that the Iowa Department of Transportation independently created the 2-dimensional work AVENUE OF THE SAINTS. Therefore, the first component of the term "original" is not at issue in our analysis. Second, the work must possess sufficient creativity. For the reasons set forth below, the Board has determined that the subject graphic design fails to embody the requisite amount of creativity and, therefore, it is not entitled to copyright registration.

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. However, the *Feist* Court also ruled that some works (such as the work at issue in that case) failed 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; *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.") 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01(B) (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

In considering your first request for reconsideration, Ms. Giroux-Rollow relied on the case of *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F.2d 541 (2d Cir. 1959). The Review Board agrees that this case is on point with respect to the logo AVENUE OF THE SAINTS at issue in this appeal. In *Sara Lee*, the copyright owner sought protection for commercial labels consisting of pictorial representations of several types of cakes; the labels also contained names and short phrases, instructions as to how to serve the particular cake, and a list of ingredients of the particular cake. The Second Circuit held that the pictorial representations were copyrightable in themselves while the other elements of the labels— lettering, coloring, mere listings of ingredients of content— were not. 266F.2d at 544. The Court summarized the principles as follows:

> Not every commercial label is copyrightable; it must contain 'an appreciable amount of original text or pictorial material.' 'Brand names, trade names, slogans, and other short phrases or expressions cannot be copyrighted, even if they are distinctively arranged or printed.' The Copyright Office does not regard as sufficient to warrant copyright registration 'familiar symbols or designs, mere variations of typographic ornamentation, lettering or coloring, and mere listing of ingredients or contents.' Although the publication of these views (Copyright Office Publication, No. 46, Sept. 1958) [now codified in 37 C.F.R. § 202.1] does not have the force of statute, it is a fair summary of the law. *Id.* at 544.

We recognize that *Kitchens of Sara Lee* was decided under the previous, 1909 statute; it nevertheless reflects the continuing principle of non-protection for short phrases, names, slogans. AVENUE OF THE SAINTS essentially consists of a name, that of a street, and the name is presented in two different type faces, of two different colors, accompanied by a pictorial representation [as opposed to print lettering] of a fleur-de-lis in a flat, single hue of orange. Unlike the short phrase, *i.e.*, the street's name, the single element of the fleur-de-lis could, like the pictures of the cake in *Sara Lee*, possibly be copyrightable. The Review Board has determined, however, that this particular fleur-de-lis is not. It is an unadorned fleur-de-lis symbol, having the three standard, lily-like leaves/parts, united to each other by a short, rectangular, horizontal bar. Although, as you say, an Internet search of "fleur-de-lis" may produce some 900,000+ depictions [Letter from Van Thomme of 11/17/2009 at 5], the single depiction which appears in the logo/road sign in question here is simple and without decorative features. In itself, it is a minor variation of a common and familiar symbol. A piece of cake, though, may, in the words of the *Sara Lee* Court, "although possibly not achieving the quality of a Leonardo Still Life nevertheless have sufficient [commercial] artistry..." 266 F.2d at 545. As Ms. Giroux-Rollow states in her August 19, 2009 Letter, at 3: "It is not the possibility of choices that determines copyrightability, but whether the particular resulting expression or product contains copyrightable authorship." This fleur-de-lis is a minor variation on a familiar symbol.

Your letter for second reconsideration asserts that the fleur-de-lis is a protectable element because it "is amenable to a wide variety of artistic interpretation." Letter from Van Thomme of 11/17/2009, at 5. The same may be said for other familiar symbols, shapes, lettering, and the like, but such minor variations do not necessarily transform all standard elements into copyrightable expression. One of the cases cited by Ms. Giroux-Rollow, *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F.Supp 964 (E.D.N.Y. 1950), specifically involved three fleurs-de-lis. Letter from Giroux-Rollow of 8/19/2009, at 2. In that case, the district court found a label with the words "Forstmann 100% Virgin Wool" interwoven with three fleurs-de-lis was not copyrightable. The Copyright Office Review Board believes that content of that label is similar to that of AVENUE OF THE SAINTS.

Even prior to the *Feist* Court's decision, the Copyright Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "Works 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, *Compendium II* states 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). In implementing this threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes, such as a circle, rectangle, fleur-de-lis are not sufficiently creative to sustain a copyright claim. *Again, 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 . . . ."); *id.* §

202.02(j) ("Familiar symbols or designs . . . or coloring, are not copyrightable."). *See also, id.* § 503.03(b) and 37 C.F.R. § 202.1(a).

Moreover, making simple alterations to otherwise standard shapes or familiar designs will not inject the requisite level of creativity. *See, e.g.,* the hallmark *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.").

C. Feist; compilation of design elements in AVENUE OF THE SAINTS

In your request for second reconsideration, you assert that your client's work is a copyrightable compilation. Letter from Van Thomme of 11/17/2009, at 3. It is true that some combinations of common or standard shapes or other unprotectable elements can embody sufficient creativity with respect as to how the elements are combined or arranged to support a copyright. *See 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." However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic or trivial. Numerous examples may be cited. 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. Likewise, the district court in *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F.Supp. 769 (W.D. Pa. 1986) held that envelopes with black lines and words "gift check" or "priority message" did not contain a minimal degree of creativity necessary for copyright protection. In *Coach, Inc. v. Peters,* 386 F. Supp. 2d 495, 499 (S.D.N.Y. 2005), the court affirmed the conclusion of the Copyright Office that "not simply that the letter "C" is not copyrightable but that '[t]he elements embodied in this work, individually, and in their particular combination and arrangement, simply do not contain a sufficient amount of original and creative authorship to be copyrightable'."

Numerous other cases take a similar position. In *John Muller & Co. v. New York Arrows Soccer Team,* 802 F.2d 989 (8th Cir. 1986), 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. In *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074 (D.D.C. 1991) the district court upheld the Register of Copyrights' refusal to register combinations of geometric designs. In *Darden v. Peters*, 402 F. Supp.2d 638 (E.D.N.C. 2006), *aff'd* 488 F.3d 277 (4th Cir. 2007), the case specifically dealt with the arguments you raise in your November 17, 2009 Letter on the issue of selection and arrangement of standard elements. *Darden* involved a copyright claim in a website providing

an online referral service allowing consumers to locate real estate appraisers throughout the United States. The copyright claimant used preexisting census maps and asserted copyright protection in the "overall design, his special combination of font and color selection and arrangement of geographic locations, such as counties, visual effects such as relief, shadowing, and shading, labeling, and call-outs." 488 F.3d at 281. The Court affirmed the refusal of the Copyright Office to register the copyright claim, saying that , even considering the website as a compilation and accepting that a website may "well contain copyrightable elements," "its formatting and layout is not registrable." 488 F.3d at 288. In the work at issue here, the overall work consists of typeface centered within a slightly modified rectangle [there is a centered curved and oval portion of the upper rectangular border with the standard reproduction of the fleur-de-lis appearing under this oval portion.] In the words of the *Darden* Court, the elements of AVENUE OF THE SAINTS resemble the kind of uncopyrightable works set forth in 37 C.F.R. 202.1(a). 488 F.3d at 287. And, the Office considers the sign/logo at issue here a unified entity, where the individual elements are considered in their inter-relationship to each other, *i.e.*, the overall selection, coordination, and arrangement of the elements. When looked at in this sense, the arrangement of the elements is that of a name, presented in two typefaces and two colors, with one standard symbol positioned at the top center of the name. Under any standard, the pictorial authorship is simply too minimal to carry a copyright claim.[1]

Further, one or two colors or simple shadings can be taken into account only as they appear in conjunction with other authorship elements to render an overall composition copyrightable. The examination of the 2-dimensional artwork as it is manifested in the sign / logo at issue here, in order to determine copyrightability, must be focused on the authorship work in its entirety. *See, e.g., Atari Games Corp. v. Oman,* 888 F.2d 878 (D.C. Cir. 1989) [although the Office had initially refused to register the videogame at issue, registration, upon Office reconsideration, was made in recognition of the overall audiovisual authorship composed of several individual elements which, taken together, were sufficient]. The signage pictorial authorship at issue here is not analogous.

You have further cited two cases (the particular works of authorship governed by the 1909 copyright law then in effect) from the Ninth Circuit– *Drop Dead Co. v. S.C. Johnson & Son, Inc.*, 326 F.2d 87 (9th Cir. 1963) and *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970). Letter from Van Thomme of 11/17/2009, at 2 - 5. With respect to the greeting cards in the *Roth* case, these works are clearly distinguishable from AVENUE OF THE SAINTS because the greeting cards contained copyrightable pictorial material

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[1] *See, e.g., Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 307 (S.D.N.Y. 1968) (an "aggregation of well known components [that] comprise an unoriginal whole" cannot support a claim to copyright). The fact that an author has many choices does not necessarily mean that the choices the author makes meets even the modest creativity requirement of the copyright law. The choices in this particular design, AVENUE OF THE SAINTS, are relatively few and the arrangement is commonplace with the print elements presented in the traditional horizontally linear manner; the one simple graphic symbol is placed in the middle top position within the print. The overall presentation may be said to be trivial in its creativity.

accompanying usually short phrases/words. With respect to the *Drop Dead* case, the "laudatory and instructional words of the Pledge label as well as the design" provided the original basis for the required authorship necessary to support a copyright. *Drop Dead*, 326 F.2d at 93. Although these cases held that a minimal combination of elements [which may, in themselves, not be copyrightable], the combinations were, indeed, held protectible. More recently, *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003), concerned the work of an artist of a life-like glass-in-glass sculpture of jellyfish. In this case, the Court agreed a combination of unprotectible elements may qualify for copyright protection but stated in unequivocal terms:

> [I]t 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.

Id. at 811. The court went on to find that:

> [t]he combination of unprotectable elements in Satava's sculpture falls short of this standard. The selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form, considered together, lacks the quantum of originality needed to merit copyright protection.

In a table format you have compared your client's work AVENUE OF THE SAINTS to the "Hot Wheels" logo which was found copyrightable in *Jada Toys, Inc. v. Mattel, Inc.*, 496 F.3d 983 (9th Cir. 2007). Letter from Van Thomme of 11/17/2009, at 2 - 3. The Review Board concludes that the two works of authorship are not analogous because the "Hot Wheels" logo is a clearly copyrightable pictorial representation of a flame combined with slightly stylized lettering of the words "Hot Wheels." On the other hand, AVENUE OF THE SAINTS presents an uncopyrightable symbol of a fleur-de-lis with two type faces for the lettering of the accompanying phrase.in which the letters are a mere selection from two standard type fonts. We note that it is not the number of choices which make the "Hot Wheels" logo copyrightable, but, instead, the pictorial rendering of a flame that is in itself registrable.

Finally, your Letter for second reconsideration [Letter from Van Thomme of 11/17/2009, at 3 - 4] raises the symbolic valuation of your client's work. You claim that the work is an artistic tribute to a stretch of highway connecting St. Paul, Minnesota to St. Louis,

Missouri, and that it represents an increase in commerce and progress within the region.[2] The commercial success of a work or its symbolic value cannot be taken into account in determining the copyrightability of a work. *Compendium II*, § 503.02(b), states that: "the requisite minimal amount of original sculptural authorship necessary for registration in Class VA does not depend upon the aesthetic merit, commercial appeal, or symbolic value of a work." (emphasis added) Recently, *Paul Morelli Design, Inc. v. Tiffany and Co.*, 200 F.Supp.2d 482, 488 (E.D. Pa 2002) cited this provision of *Compendum II* with approval. The Court observed as follows:

> Works may experience commercial success even without originality and works with originality may enjoy none whatsoever. Nothing has been presented to us showing any correlation between the two. 200 F. Supp. at 488.

The same may be said of AVENUE OF THE SAINTS' possible symbolic value with respect to its copyrightability under relevant statutory and case law.

III. CONCLUSION

The Board has reviewed this design in its entirety and as to its individual elements and has determined that the work cannot be registered because the work does not contain a sufficient amount of pictorial or graphic authorship in either the treatment or arrangement of the elements to support a copyright registration. Accordingly, for the reasons stated above, the Review Board affirms the refusal to register this design. This decision constitutes final agency action.

Sincerely,

/s/

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

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[2] We point out that the work at issue here is a 2-dimensional representation / sign of a street name, bordered within a stylized rectangle and accompanied within the rectangle by a non-copyrightable minor variation of a common symbol, a fleur-de-lis. We have described the pictorial aspect of this work, above. (We also note the design similarity of this work, AVENUE OF THE SAINTS, to standard Parisian street signage format.) Ms. Giroux-Rollow, in her August 19, 2009 Letter, at 2, further cited Copyright Office regulations, 37 C.F.R. 202.1, that names and titles are not copyrightable. Thus, the fact that a given street is known by a particular name is not a fact that copyright protects. *See* 17 U.S.C. § 102(b); *see also Feist*, 499 U.S. at 347.