United States Copyright Office
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April 13, 2012

Via First Class Mail and Fax

Fullbright & Jaworski, LLP
Attention: Christopher M. Kindel
6000 Congress Ave., Suite 2400
Austin, Texas 78701

Re: GEEK SQUAD (logo)
SR 1-73998603

Dear Mr. Kindel:

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 work entitled "Geek Squad" logo. You have submitted this claim on behalf of your client, Best Buy Enterprises, Inc. The Review Board has carefully examined the application, the identifying reproduction, and all the correspondence in this case. After careful consideration of the arguments in your letter, 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 to support a copyright registration.

I. ADMINISTRATIVE RECORD

A. Initial submissions

On August 18, 2008, the Copyright Office received from you an application for registration of a work entitled "Geek Squad" logo for your client, Best Buy Enterprises, Inc. After resolving a fee problem, a letter was mailed to you on May 19, 2009, in which Registration Specialist Shawn Thompson refused registration of the work on the grounds that the work lacked the authorship necessary to support a claim of copyright. Mr. Thompson stated that copyright protects original works of authorship, meaning that claims in works of the visual arts must contain a sufficient amount of pictorial, graphic, or sculptural authorship. He also noted that copyright does not protect 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. He further stated that neither the aesthetic appeal, nor commercial value of a work, nor the amount of time and effort expended to create the work were factors to be considered under the copyright law. In applying these principles, Mr. Thompson concluded that the work could not support a copyright claim. Letter from Thompson to Wangensteen of 5/19/2009.

B. First request for reconsideration

By letter dated August 14, 2009, you filed a request for reconsideration of the refusal to register the "Geek Squad" logo, and asserted that the work satisfies the threshold of authorship necessary to support a copyright claim. Letter from Kindel to Copyright Office of 8/14/2009. You argued that the creativity threshold was very low, citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, (1991) and *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2nd Cir. 1970). You further quoted Professor Nimmer's treatise: "the creativity required to constitute a work of art may be of a most humble and minimal nature. Courts are rightly inclined to accept as a work or art any work which may arguably be said to evince creativity." NIMMER ON COPYRIGHT § 2.8[B][1], 2-84 (2009).

You argued that the applicant made numerous creative decisions in the design of the logo. The decisions included the selection of an oval with two thirds in orange and one third in black. The word "Geek" is written in black script in the orange section, and the word "Squad" is written in white lettering in the black section with the "q" off-center. The overall design and arrangement of the elements, you concluded, met the modicum of creativity required for protection.

You then asserted that the courts and the Copyright Office routinely recognize protection for logo designs such as your client's. You stated that although logos are used in connection with commercial products and services, that fact did not make them less protectable by copyright, citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). 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 983 (9th Cir. 2007). You also cited *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F.2d 541 (2nd Cir. 1959), and *Drop Dead Co. v. S.C. Johnson & Son, Inc.*, 326 F.2d 87 (9th Cir. 1963) as supporting registration in this instance. Finally, you supplied a list of logo designs registered by the Office which you believed "at least arguably exhibit less commercial artistry than does Applicant's "Geek Squad" logo design." *Id.* at 2.

After reviewing your first request for reconsideration, Attorney-Advisor Virginia Giroux-Rollow responded in a letter dated November19, 2009. She upheld the Registration Program's 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 Kindel, of 11/19/09 at 1.

Ms. Giroux -Rollow conceded that logos fall within the category of works that may be subject to copyright protection. However, she explained that under the *de minimis* doctrine of copyrightability, not every logo is copyrightable; it must contain an appreciable amount of original text or pictorial expression, citing *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F. 541 (2nd Cir. 1959). She further observed that the court in *Sara Lee*, affirmed the position of the Copyright Office that names, titles, words, short phrases or expressions are among works not subject to copyright protection even if they are distinctively arranged or printed. *Id.* 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 involved similar principles as enunciated in the *Sara Lee* case. *Id.* at 1. The use of a common geometric shape surrounding a short phrase ("Geek Squad") is not copyrightable, despite the fact that such phrase uses stylized or embellished lettering.

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). *Id.* 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 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. The question, she said, is whether there is a sufficient amount of original and creative authorship in the work. *Id.* at 1-2.

Ms. Giroux-Rollow described the work in question as a logo design consisting of an oval shape divided into orange and black segments in which the word "Geek" in black lettering is inscribed in the orange segment and the word "Squad" in white lettering is inscribed in the black segment. She stated that ovals, or any minor variation thereof, are common 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 "Geek Squad" logo is *de minimis* because it consists of a common and familiar public domain shape, uncopyrightable words, with a minor variation in coloring arranged in a rather simple configuration, citing *Compendium of Copyright Office Practices II*, Ch. 500, § 503.02(a). *Id.* at 2.

Ms. Giroux-Rollow stated that this conclusion is supported 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). *Id.* at 2.

Ms. Giroux-Rollow agreed 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 oval in combination with the lettering, coloring and arrangement of two words.

Ms. Giroux-Rollow found that the cases of *Drop Dead Co. v. S.C. Johnson& Son, Inc.*, 326 F.2d 87 (9th Cir. 1963), and *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3rd 628 (9th Cir. 2000) both involved works which contained copyrightable art work in addition to stylized text. The "Geek Squad" logo does not contain such additional artwork. Moreover, the list of logos approved for registration by the Copyright Office merely demonstrates that, in those cases, the Office found a sufficient amount of original and creative authorship to support a claim of copyright.

C. Second Request for Reconsideration

In a letter dated February 19, 2010, you requested that the Office reconsider for a second time its refusal to register the copyright claim in the "Geek Squad" logo. Letter from Kindel to Copyright R&P Division of 2/19/2010, at 1.

You begin by stating that the creativity threshold that a work of visual art must meet is very low. Citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), you assert only a "modicum of creativity" is required to merit protection, *Id.* at 246. Moreover, you further cite NIMMER ON COPYRIGHT § 2.8[B][1]2-84 (2009) providing that "the creativity required to constitute a work of art may be of a most humble and minimal nature. Courts are rightly inclined to accept as a work of art any work which may arguably be said to evince creativity."

You discuss the aesthetic merits of the design, and the intent of the designer to embody certain symbolic images into the logo design. You recount the decisions of the designer as follows:

> (1)Creating an oval design with roughly two thirds depicted in a "warm reddish shade of orange in order to convey a distinctive appearance and the other third depicted in black;
> (2) Providing a black outline that encompasses the orange portion of the device;
> (3) Modifying the letters in the design, including adding an indentation towards the end of curved "G" and vertically shifting the "q" up from the rest of the letters in "Squad";
> (4) Depicting the "Geek" component in a unique black handwritten-style text across the larger orange portion of the oval and in a manner that makes it appear to merge into the lower black portion of the device; and

(5) Offsetting the "Geek" text by depicting the "Squad" component in white stylized blocked text in the smaller, black portion of the oval.

While you acknowledge that some of the elements may not rise to the level of creativity to merit copyright protection, you contend that the arrangement of the elements meets the modicum of creativity threshold required for protection, citing in support, *Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989); *Diamond Direct, LLC v. Star Diamond Group*, 116 F. Supp. 2d 525 (S.D.N.Y. 2000); and Paul Goldstein, GOLDSTEIN ON COPYRIGHT § 2.11.1.1 (regarding copyrightable arrangement). Letter from Kindel to Copyright R&P Division of 2/19/2010, at 4.

You claim that the fact that the "Geek Squad" logo has few elements is of little consequence, because simplicity of the design was a reflection of creative expression. You suggest that to conclude there were too few elements on which to rest copyright protection would impermissibly apply an artistic merit test. *Id.* at 5. You further claim that if your client's logo is found uncopyrightable, many works of modern art would likewise be outside of copyright protection.

You state that in refusing to register your client's logo, possibly a heightened creativity threshold was applied because the work is a commercial design. You cite a large number of authorities providing that applying a higher standard for commercial art would be wrong. *Id.*at 6-8.

You additionally cited a number of cases dealing with commercial art. These cases included the Hot Wheels logo in *Jada Toys, Inc. v. Mattel, Inc.*, 496 F.3d 983 (9th Cir. 2007); commercial advertising in *Willard v. Estern*, 206 F. Supp.2d 723 (D. V.I. 2002); a polka dot pattern in *Prince Group, Inc v. MTS Prod.*, 968 F. Supp. 121 (S.D.N.Y. 1997); and various logos in *Sadhu Singh Hamded Trust v. Ajit Newspaper Advertising, Marketing and Communications, Inc.*, 503F.Supp.2d 577 (E.D.N.Y. 2007); *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541 (2nd Cir. 1959); *v. Drop Dead Co. v. S.C. Johnson & Son, Inc.*, 326 F.2d 87 (9th Cir. 1963); *Bouchat v. Baltimore Ravens Football Club*, 241 F.3d. 350 (4th Cir. 2001); and *Twentieth Century Fox Film v. Marvel Enterprises*, 155 F. Supp.2d 1 (S.D.N.Y. 2001). Letter from Kindel to Copyright R&P Division of 2/19/2010, at 8-10.

You next cite a large number of registrations of commercial labels which you broadly assume are highly similar to your client's design. For only two of the cited works do you include copies of the registered work - the Aquafina and Mountain Dew labels. In closing, you cite the Office's rule of doubt as requiring the Office to resolve any doubts it might have regarding the protectability of your client's logo in favor of registration.

II. DECISION

B. Description of the work

The work at issue in this reconsideration is a design consisting of an oval divided into an orange portion and a black portion. In the orange portion the word "Geek" is written in black script. In the black portion, the word "Squad" is printed in white. A reproduction of the design appears below:



B. The Legal Framework

1. Copyrightable Subject Matter

In considering requests for second reconsideration, the Review Board conducts a de novo review of whether the copyright claim in issue can be registered. The Board carefully studies the deposit of the work, the prior record in the case, and the arguments raised in the request for reconsideration.

In your letter for second reconsideration, you state that your client's work meets the low creativity threshold for works of the visual arts, and that while some of the elements may be in the public domain, your client has utilized an original arrangement of the elements.

All copyrightable works, be they graphic designs or otherwise, must qualify as "original works of authorship." 17 U.S.C. § 102(a). As interpreted by the courts, 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. The Copyright Office accepts at face value your assertion that your client, Best Buy Enterprises, Inc., independently

created the "Geek Squad" logo. Therefore, the first component of the term "original" is not at issue. For the reasons set forth below, the Board has determined that the "Geek Squad" logo fails to satisfy the second component of originality–it does not embody the requisite amount of creativity, and therefore it is not entitled to copyright registration.

2. 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*, in which the Supreme Court held that only a modicum of creativity is necessary to support a copyright. However, the *Feist* Court also held that some works 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 heavily on the case of *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F.2d. 541 (2nd Cir. 1959). You also cite this case as supporting registration of "Geek Squad" logo. Letter from Kindel to Copyright R&P Division of 2/19/2010, at 10. In *Sara Lee*, the copyright owner sought protection for commercial labels consisting of pictorial representations of cakes, names and short phrases, instructions as how to serve, and list of ingredients. The Second Circuit held that the pictorial representations were copyrightable, while the other materials were not copyrightable. 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 publications 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. (Emphasis added).

In light of the fact that "Geek Squad" logo contains no original text or pictorial representations, it is unclear to the Review Board why you believe this case supports registration of this logo. The logo consists solely of the brand name "Geek Squad" in a familiar oval shape with mere variations of coloring and lettering. Similar elements alone or in a trivial combination were not copyrightable in *Sara Lee*.

Even prior to the Court's decision in *Feist*, the 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 an oval, are not sufficiently creative to sustain a copyright claim. *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. *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.").

Numerous other cases take a similar position. In *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958) the Court of Appeals for the District of Columbia held that a cardboard star with two flaps which, when folded back, enabled it to serve as a stand for a display was not copyrightable. Similarly, 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's refusal to register a chinaware "gothic" pattern of simple variations and combinations of geometric designs. Finally, in *Coach, Inc. v. Peters*, 386 F.Supp.2d 495 (S.D.N.Y. 2005), the district court upheld the Register of Copyrights' decision to refuse registration of a handbag designer's fabric pattern consisting of variations and arrangements of the letter "C." The Review Board finds these cases to be analogous to the facts of this case – the simple variations of style and color do not rise to the level of sufficient creative authorship.

Your letter for second reconsideration also cites a number of cases that you claim support registration of your client's logo. Letter from Kindel to Copyright R&P Division of 2/19/2010, at 8-10. One of the cases cited involves a "Hot Wheels" logo which was found copyrightable in *Jada Toys, Inc. v. Mattel, Inc.*, 496 F.3d 983 (9th Cir. 2007). *Id.* at 8. The Review Board concludes that the "Hot Wheels" logo is not analogous to "Geek Squad" because the "Hot Wheels" logo contains a pictorial representation of a flame in which the letters of the words "Hot Wheels" are incorporated.. "Geek Squad" has no pictorial material. It is not the number of choices which make the "Hot Wheels" logo copyrightable, but instead the words in combination with the pictorial rendering of a flame.

Similarly, the Review Board finds that *Willard v. Estern*, 206 F. Supp.2d 723 (D.V.I. 2002), does not support your position. Letter from Kindel to Copyright R&P Division of 2/19/2010, at 8-9. That case involved 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, "as 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 copyright deposit before it, the Office can state authoritatively that 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 originally received by the Copyright Office referenced only the petroglyph 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 to dismiss in which all reasonable inferences were

drawn in the plaintiff's favor. At that 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. For all of these reasons, *Willard* is distinguishable from the present case.

The case of *Sadhu Singh Hamded Trust v. Ajit Newspaper Advertising, Marketing and Communications, Inc.*, 503 F. Supp. 2d 577 (E.D.N.Y. 2007), was inconclusive on whether the Ajit logo met the requisite originally and creativity standards of the U.S. copyright law. The reported case arose on motions for summary judgement by both the plaintiff and defendant, and the court declined ruling on the copyrightability of the logo because the issue remained a disputed question of material fact. *Id.* at 590. The court stated: "In the instant case, whether the Ajit logo, with its modification in color and shape from standard Punjabi font, possesses the requisite originality and creativity to warrant United States copyright protection is a close question. However, drawing all inferences in favor of plaintiff, as this Court must on this motion for summary judgment, the Court declines to grant summary judgment to either party on this issue." *Id.* at 589. This cited case does not alter Review Board's conclusion that the "Geek Squad" logo is uncopyrightable.

The remaining cases mentioned in your letter for second reconsideration all involved works distinguishable from "Geek Squad" logo. Letter from Kindel to Copyright R&P Division of 2/19/2010, at 10. For instance, in *Drop Dead Co. v. S.C. Johnson & Son, Inc.*, 326 F.2d 87 (9th Cir. 1963), the court agreed with the plaintiffs that the overall PLEDGE label was copyrightable because there were a number of commonplace elements contained in the label such as instructions, phrases, oval and gold foil that went "beyond a mere trademark." *Id.* at 93. The court also noted the prima facie evidentiary presumption of originality that was created by the Copyright Office's registration of the work. A comparable degree of creativity is absent in the "Geek Squad" logo.

Similar differences may be found in the other cases cited. In *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350 (4th Cir. 2001), the court did not find that the Baltimore Ravens' football team logo was copyrightable, but rather that this logo had infringed plaintiff's "drawing." *Id.* at 352. The court stated that "Bouchat's drawing contains several public domain elements which are not protectable. These elements, however, were selected, coordinated, and arranged in such a way as to render the work original." *Id.* at 356. Moreover, the Copyright Office registered the drawing.

In *Twentieth Century Fox Film v. Marvel Enterprises*, 155 F. Supp.2d 1 (S.D.N.Y.), there was no description of the logos in question in the opinion, but again, the Copyright Office had registered the work. In the posture of this motion to dismiss, the court found that the defendants had put forth insufficient evidence to invalidate the copyright. *Id.* at 24.

In *Prince Group, Inc. v. MTS Prod.*, 967 F. Supp. 121 (S.D.N.Y. 1997), the court found the polka dot design copyrightable, not only as a result of the irregularities in the shape and shading of the individual dots, but also due to their placement "in imperfect and conflicting diagonal lines at varying distances from each other giving the appearance of randomness,

distinguish[ing] this arrangement from the regularity of the generic polka dot design; thus, establishing a sufficient level of creativity for copyright validity." *Id.* at 125. As in the other cases that you cite, the Copyright Office registered this work.

Although you cite all of these cases as support for your position, each of the cases are distinguishable from the case at hand, and do not provide support for registering the "Geek Squad" logo. Moreover, in all of these cases, the Copyright Office found sufficient creativity to register the work.

Your letter for second reconsideration also lists a large number of logos registered by the Copyright Office. In the letter responding to your first request for reconsideration, Ms. Giroux-Rollow stated that "some logos fall within the category of work that may be subject to copyright protection." Letter from Giroux-Rollow to Kindel of 11/19/2009 at 1. The existence of numerous registrations of logos just proves Ms. Giroux-Rollow's point that some logos do qualify for copyright protection. That does not mean that all logos will qualify for such protection. Moreover, the fact that the Copyright Office did find sufficient creativity in the works registered means that those works contained more creativity than that found in the "Geek Squad" logo.

For two of the registered works cited, you included copies of the actual works along with the registration certificates. Letter from Kindel to Copyright R&P Division of 2/19/2010, Exhibit E. Those works were the commercial labels used by Aquafina and Mountain Dew. Both labels contained simple drawings. The Aquafina label contained drawings of mountains, while the Mountain Dew contains a drawing of a cap. While both drawings were simple, they contained some original and creative artwork, similar to *Jada Toys, Inc. v. Mattel, Inc.*, 496 F.3d 983 (9th Cir. 2007). The addition of pictorial artwork to the logo met the low level of creativity necessary to support a claim of copyright. Those works are distinguishable from the present logo that contained no copyrightable pictorial authorship.

The same appears to be the case in the registrations for "RED BULL energy drink: front label design" and the "Coca-Cola classic" label cited in your letter. Letter from Kindel to Copyright R&P Division of 2/19/2010, at 11. Although you did not provide copies of the works in question or copies the registration certificates, a review of these documents reveal that both claims incorporated pictorial authorship in the labels. In the case of the "RED BULL" label, a drawing of two bulls was included in the claim for the selection and arrangement of elements. In the case of the "Coca-Cola classic" label, a drawing of the classic bottle was included within the logo. The addition of pictorial artwork that was selected and arranged within the overall designs in both claims provided additional creativity that is absent in the "Geek Squad" logo.

3. Selection, Coordination and Arrangement

In your letter for second reconsideration, you assert that your client's work is a copyrightable arrangement. Letter from Kindel to Copyright R&P Division of 11/12/09, at 4-6. It is true that some combinations of common or standard shapes or other unprotectable elements

can embody sufficient creativity with respect 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"; determination of copyright rests on creativity of the selection, coordination or arrangement). However, merely combining a few unprotectible elements does not automatically establish creativity where the combination or arrangement itself is minimal. 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 at 499, discussed in the previous section, 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.'"

Another recent case, *Darden v. Peters*, 402. F.Supp.2d 638 (E.D. N.C. 2006), *aff'd* 488 F.3d 277 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 1443 (2008), specifically dealt with the arguments that you raise in your letter for second reconsideration 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 shadowing, and shading, labeling, and call-outs". *See* 488 F.3d at 281. The courts affirmed the refusal of the Copyright Office to register the copyright claim.

The Review Board additionally notes that in theory an author creating any work has an unlimited choice of alternatives. However, it is not the possibility of choices that determines copyrightability, but whether the resulting expression chosen contains sufficient copyrightable authorship. *See 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 had many options does not mean that the choice the author made meets even the modest creativity requirement of the copyright law. The choices in this particular design are relatively few, and the arrangement is commonplace.

You further contend in your letter for second consideration that the relatively few elements in your client's work should not have a bearing in determining copyrightability of the design. Courts have rejected this argument. For instance, in *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003), an artist brought a copyright infringement action against a competitor over the

artist's life-like, glass-in-glass sculptures of jellyfish. In this case, the court agreed that a combination of unprotectable 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.

Id. In the case of the "Geek Squad" logo, the Review Board finds that the logo as a whole, and its elements in combination, fall short of the level of creativity needed to support a claim of copyright.

C. Additional Arguments

In support of your client's registration, your letter for second reconsideration stresses the aesthetic merit of your client's logo ("Mr. Stephens' design was to create a timeless and distinctive look that was not cluttered of 'overdone.'") Letter from Kindel to Copyright R&P Division of 2/19/2010, at 5, and its symbolic value ("Robert Stephens, the work's author, sought to 'convey a graphical look reminiscent of old gas stations and familiar brand treatment of [hie] childhood and earlier periods'.") *Id.* at 3. The aesthetic merit of a work or its symbolic value cannot be taken into account in in determining the copyrightability of this work. The *Compendium of Copyright Office Practices II*, § 503.02(b) (1984) (*Compendium II*) 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 originally may enjoy none

> whatsoever. Nothing has been presented to us showing any correlation between the two.

Id. at 488

You also assert that failure to register your client's logo would constitute an impermissible bias against works of modern art. Letter from Kindel to Copyright R&P Division of 2/19/2010, at 5. It is true that many works of modern art could be found uncopyrightable. But that fact is completely consistent with the law. Copyrightability is not a determination of aesthetic merit or artistic worth, *i.e.*, an assessment of what constitutes art; it is an assessment of whether sufficient original authorship exists to sustain a legal claim of copyright. The Review Board does not question the value or aesthetic appeal of the "Geek Squad" logo, it simply finds that it does not possess the modest level of creativity necessary to support a claim of copyright.

Your final argument states that "even if the Review Board has some doubt about [the] protectability" of the "Geek Squad" logo, it should resolve those doubts in favor of registration under the Office's rule of doubt. *Id.*, at 12. If the Review Board did have such doubts, we would authorize registration in this instance. However, for the reasons stated in this letter, well supported by numerous cases, the Review Board concludes that the "Geek Squad" logo fails to rise to the level of creativity necessary to support a copyright claim.

III. CONCLUSION

The Review Board has reviewed this design in its entirety as to its individual elements and the selection and arrangement of those elements. The Board finds that the work cannot be registered because the work does not contain a sufficient amount of original and creative authorship 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/

Robert Kasunic
Deputy General Counsel
for the Review Board
United States Copyright Office