United States Copyright Office
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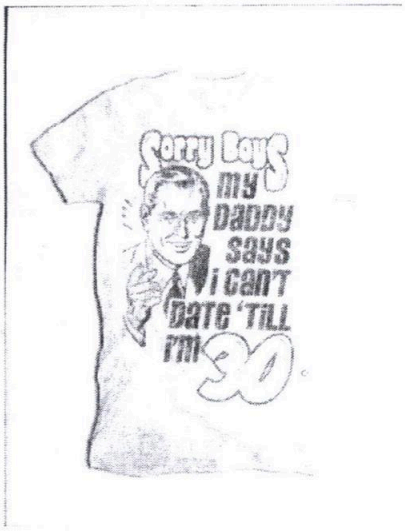
Re: SORRY BOYS, MY DADDY SAYS I CAN'T DATE 'TIL I'M 30
Correspondence ID: 1-A63T21

Dear Mr. Szczepanski:

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 an epigram entitled "Sorry Boys, my Daddy says I can't date 'til I'm 30" ("Sorry Boys"). You submitted this claim on behalf of your client, Heather Ann Daniels. 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 contains an insufficient amount of textual or artistic authorship to support a copyright registration.

I. DESCRIPTION OF THE WORK

The work is a decorative design for a young girl's T-shirt consisting primarily of an epigram stating: "Sorry Boys, my Daddy says I can't date 'till I'm 30." The words "Sorry Boys" and the number 30 are written in balloon letters and numerals. A clip art pictorial of a middle-aged man's head depicting a father figure appears to the left of the epigram. The design appears as follows:



II. ADMINISTRATIVE RECORD

A. Initial Submissions and Refusal to Register

On February 2, 2010, using the Copyright Office's electronic registration system, an application and deposit was received from Ronald Bell, Esq. on behalf of your client for a work entitled "Sorry boys, my Daddy says I can't date 'till I'm 30." The designated authorship was "text, 2-D artwork." Accordingly, registration was made, and certificate VA 1-698-384 was issued. The certificate of registration included the following Copyright Office annotation to the description of "text" in the "Author Created" space: "Copyright Office notes; Regarding author information:'text is title; titles not copyrightable. Autority 37 CFR 202.1."

On October 13, 2010, supplemental registration form CA was received from Mr. Bell disclaiming authorship in "2-D Artwork: human figure." On the basis of this clarification of the copyright claim, William Briganti, Assistant Chief of the Visual Arts Division, concluded that there was no basis for registration of the remaining portion of the claim, and that the issued certificate would have to be cancelled. Letter of Briganti to Bell of November 2, 2010, at 1. Mr. Briganti cited a Copyright Office regulation found at 37 C.F.R. §202.1(a) stating that "words, and short phrases such as names, titles, and slogans" are not subject to copyright. He concluded that the text "Sorry boys, my Daddy says I can't date 'till I'm 30" was a short phrase which could not be registered. *Id.* at 1.

In addition, Mr. Briganti stated that the layout, lettering, and punctuation were not copyrightable, and could not be used as a basis for supporting registration. He concluded that the combination of lower and upper case letters in this particular work was not so unusual or creative that it could be considered a copyrightable work of graphic arts. Mr. Briganti then closed the letter with information concerning the reconsideration procedures of the Copyright Office. *Id.* at 1.

B. First Request for Reconsideration and Copyright Office Response

First Request for Reconsideration

In a letter dated January 28, 2011, you submitted a first request for reconsideration of the Copyright Office's decision to refuse registration of the claim for supplemental registration and the decision to proceed with cancellation of the work "Sorry boys." First Request Letter at 1. You argued that there was textual expression in the epigram, and further graphic expression in selection and combination of the various elements of the design. *Id* at 2-3.

On the copyrightability of the epigram, you asserted that declarative sentences have been held to possess sufficient creativity to be copyrightable, even without being combined with other components, citing *Applied Innovations, Inc. v. Regents of the University of Minnesota*, 876 F.2d

626 (8th Cir. 1989). *Id.* at 7. You additionally refer to *Brilliant v. W.B. Productions, Inc.*, Civ. No. 79-1893-WMB (S.D. Cal. Oct. 22, 1979) in which a district court, in an unpublished ruling, recognized copyrights in two epigrams. Finally, you cited *Dahlen v. Mich. Licensed Beverage Ass'n*, 132 F. Supp. 2d 574 (E.D. Mich. 2001) as upholding the copyrightability of a combination of public domain shapes and text. *Id.* at 8.

On the issue of graphic expression based on the selection and combination of various elements of the design, you stated that the work must be considered as a whole, citing *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970). You referred to *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991) as establishing that a combination of elements may be copyrightable if the selection and arrangement of the elements is original. You cite a number of cases where the court found a particular design copyrightable. These cases included *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800 (D.C. Cir. 1987); *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199 (3rd Cir. 2005); *Willard v. Estern*, 206 F. Supp. 2d 723 (D.C.V.I. 2002); *Boisson v. American County Quilts and Linens*, 273 F.3d 262 (2nd Cir. 2001); and *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). *Id.* at 4-5.

Copyright Office Response

In a letter dated May 27, 2011, Ms. Virginia Giroux-Rollow, attorney-advisor in the Copyright Office's Registration Program, supported the initial refusal of registration for the CA form, and the decision to cancel the original registration. Giroux-Rollow Letter at 1. Ms. Giroux-Rollow concluded that excluding the authorship in the artwork of the father figure left the work without a sufficient amount of original and creative textual expression to support registration. Additionally, the work could not be registered on the basis of compilation authorship because the work did not contain sufficient selection, coordination, or arrangement necessary for registration. *Id.* at 1.

Ms. Giroux-Rollow stated that section 102(b) of the copyright law precluded extending copyright to an idea. Instead, she asserted, it was actual resulting expression that was examined for copyrightable authorship. She stated further that while designs for T-shirts may be eligible for copyright registration, they must have at least a *de minimis* level of original and creative content, a proposition for which she cited to *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541 (2d Cir. 1959). *Id.* at 1. She also cited to Copyright Office regulations stating that "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents" are not subject to copyright protection. 37 CFR § 202.1(a).

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, meant 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 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 2 . The question, she said, is whether there is a sufficient amount of original and creative authorship within the meaning of the copyright law and settled case law. *Id.* at 2.

Regarding the work in issue, Ms. Giroux-Rollow stated that it consisted of pre-exiting "clip art" combined with a short textual expression. Citing section 202.1 of the Copyright Office regulations, she asserted that names, titles, short phrases or expressions, as well as numbering and lettering, are not copyrightable. Moreover, even the combination and arrangement of text with the pre-existing "clip art" was not sufficiently creative to constitute a copyrightable work of art. *Id.* at 2.

Ms. Giroux conceded that it is true that even a slight amount of creativity will suffice to obtain copyright protection. However, she pointed out there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright, citing *Nimmer on Copyright.*

Ms. Giroux-Rollow clarified that not all compilations are copyrightable. For instance, in the landmark case of *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991) a compilation arranged in alphabetical, chronological, or sequential fashion was not copyrightable. In order for a work to be a copyrightable compilation, the compiler must exercise enough selection, creativity, and judgment in collecting, coordinating, and arranging the material. *Id.* at 3.

With respect to the cases cited in support of registration, Ms. Giroux-Rollow distinguished each one on either factual or legal grounds. She stated that the Office accepted the principle in *Roth Greeting Cards, supra,* and *Atari Games*, *supra*, that a work must be viewed in its entirety; however, in this instance the treatment and combination of the pre-existing art work and short textual expression failed to rise to the level of copyrightable authorship. In *Regents of the University of Minnesota*, the work that was protected consisted of several declarative statements that taken as a whole constituted copyrightable authorship. In *Reader's Digest*, *supra,* she concluded that the combination and arrangement of elements was of greater complexity that the "Sorry Boys..." design. All the protected works in *Kay Berry*; *Willard v. Estern*; *Dahlen*; *Boisson*; and *Key Publications* Ms. Giroux-Rollow found to be considerably different from the T-shirt design.

In closing, Ms. Giroux-Rollow stated that since there were no elements, either alone or in combination, which could support copyright registration, the Copyright Office was proceeding with cancellation of the issued registration. In accordance with Ms. Giroux-Rollow's statement, the registration of "Sorry boys" was in fact cancelled.

C. Second Request for Reconsideration

On August 26, 2011, you submitted a Second Request for Reconsideration on behalf of your client, Heather Ann Daniels. As with your first letter seeking reconsideration, you assert that there is textual expression in the epigram, and further graphic expression in selection and combination of the various elements of the design. Second Request Letter at 2-6.

Regarding the epigram, you state that it is an eleven word declarative sentence expressing the idea of a very young girl repeating a message from an overly protective father, apparently without knowledge that her father will not have the ability of restrict her dating until she is thirty. The epigram is conveyed by altering standard lettering by using a variety of upper and lower case letters, and by varying normal punctuation rules. *Id.* at 2.

Regarding the graphic expression in selection and combination of the various elements, you cite a number of decisions made by Ms. Daniels which you contend constitutes authorship. These decisions include the following:

1. Hand drawing "Sorry Boys" using balloon letters with large letter S's at the beginning and end of the phrase.
2. Hand drawing the number "30" in fanciful balloon numerals
3. Selecting a fanciful font for the remainder of the Epigram to express the idea that the message comes from a very young girl.
4. Using the lower and upper case letters in an unconventional manner and omitting punctuation in the epigram to further express the idea that a very young girl is conveying the message in the epigram.
5. Inclusion of a male image and selection of the upper body of a middle-aged male from numerous potentially available male images to express the idea that the figure is the father of the very young girl.
6. Creating the layout of the visual art work that includes the father image and the text of the epigram including the fanciful letter, balloon letters, and balloon numerals. *Id.* at 2-6.

In support of your arguments, you cite a number of cases beginning with *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991). *Feist*, you point out, establishes that the requirement for "creativity" is extremely low, and even a slight amount will suffice. You cite *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800 (D.C. Cir. 1987) as providing protection for the arrangement and layout of the *Reader's Digest* cover, even though none of the individual elements were copyrightable. Similarly, you cite to *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199 (3rd Cir. 2005) in which copyright protection was extended to a garden rock depicting a public domain poem; *Dahlen, supra*, which you assert established creativity in the selection and arrangement of facts and pre-existing material; *Boisson v. American County Quilts and Linens*, 273 F.3d 262 (2nd Cir. 2001) which upheld copyright in a quilt

containing an alphabetical arrangement of letters in a five-by-six format; and *Willard v. Estern*, 206 F. Supp. 2d 723 (D.C.V.I. 2002) involving a rendition of the calendar year "2002" constructed from the public domain "Cancel" petroglyph flanked by the numeral "2" on each side.

In asserting that the epigram "Sorry boys, my Daddy says I can't date 'till I'm 30" is copyrightable, you cite a number authorities. You assert that in *Applied Innovations, supra,* the Eighth Circuit found that a series of short declarative statements which were part of a psychological test were copyrightable. You also cite *Brilliant v. W.B. Productions, Inc.*, Civ. No. 79-1893-WMB (S.D. Cal. Oct. 22, 1979) in which copyright was upheld in two epigrams. Finally, you assert that the Copyright Office registered an epigram "I feel much better now that I've given up hope," Reg. No. TX0001388053.

In closing, you assert that the Copyright Office has failed to consider the work as a whole, as required by *Roth Greeting Cards v. United Card Co.*, 429 G.2d 1106, 1109 (9th Cir. 1970), and *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). Instead, you contend that the two staff members who refused registration only considered the copyrightability of the individual elements, rather than the creative features of the arrangement and composition.

III. DECISION AND ANALYSIS

A. The Legal Framework

1. Copyrightable Subject Matter

In considering second requests for reconsideration, the Review Board conducts a de novo review which takes a fresh look at issues 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 and the two staff members who previously considered registration of the claim.

In your second request for reconsideration, you assert your client's work contains sufficient creative visual artistic authorship to support registration. You further assert that registration can be based on the textual expression in the epigram "Sorry boys, my Daddy says I can't date 'till I'm 30."

For the purposes of this response, the Review Board will first discuss the creativity standard applying to works of the visual arts. After this analysis will follow a discussion of the standards applying to copyright claims resting on compilation authorship. These discussions will be followed by an analysis of copyright issues associated with epigrams. The Board will close with an analysis of the work and the authorities relied upon in concluding that the work is not copyrightable.

2. The Creativity Threshold

All copyrightable works, be they graphic designs or otherwise, must also 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. The Copyright Office accepts at face value your assertion that your client, Heather Ann Daniels, independently created the design involved in this second request for reconsideration, although certain elements in which your client does not claim copyright, such as the clip art depiction of the father figure, were preexisting. Therefore, the first component of the term "original" is not at issue in the analysis set forth herein. 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 in either graphic artistic authorship, or textual authorship, 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) (2010) ("[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. 541 (2nd Cir. 1959). The Review Board agrees that this case is on point with respect to the visual design in this instance. 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.

Even prior to the *Feist* Court's decision, 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 construing this threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes, such as a rectangle, 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, such as adopting balloon script for certain words and numbers, 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.").

Your second request for reconsideration cites as a significant portion of your client's authorship the adoption of balloon letters for printing "Sorry Boys" and a similar adoption of balloon numbers for the numerical "30." Letter, at 3. It also cites to selection of the type font, adoption of unconventional use of upper and lower case letters, and the omission of certain punctuation. *Id.* at 4. Section 202.1(a) precludes copyright registration of "mere variations of typographic ornamentation, lettering or coloring..." This regulation was recently discussed in *Coach, Inc. v. Peters*, 386 F. Supp.2d 495 (S.D.N.Y. 2005), a case involving 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 Court stated as follows.

> Having determined that the works were essentially arrangements of the letter "C", [the Copyright Office] noted that letters, mere variations of letters, and familiar symbols can not be copyrighted. A.R. 1, Ex. 1 at 3-4 (citing 37 C.F.R. § 202.1(a) and Compendium of Copyright Office Practices, Compendium II, § 503.02(a)). [The Copyright Office] cited a number of cases which held that simple arrangements of such items are similarly uncopyrightable. *See. e.g., Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340, 111S.Ct. 1282, 113 L.Ed2d 358 (1991); *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d

> 989 (8th Cir. 1986); *The Homer Laughlin China Co. v.* [*v. Oman*, 22 U.S.P.Q. 2d 1074(D.D.C. 1991)]; *Jon Woods Fashions, Inc.*[*v. Curran,* 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988); *Magic Mktg. Inc. v. Mailing Serv. of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D.Pa. 1986); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp 964 (E.D.N.Y. 1950).....Plaintiffs fail to argue persuasively that [the Copyright Office] incorrectly relied on these cases, much less that this reliance was so improper as to amount to an abuse of discretion.

Id. at 498-99 (footnote omitted). See also *Boisson v. Banian, Ltd.,* 273 F.3d 262, 269 (2d Cir. 2001)(dismissing possibility that plaintiffs could object to ruling that the alphabet is in the public domain, "considering the applicable regulations provide no copyright protection for 'familiar symbols or designs' or 'mere variations of . . . lettering.' 37 C.F.R. § 202.1(a) (2000):); *Matthew Bender & Co. v. West Publ'g Co.,* 158 F.3d 674, 683 (2d Cir. N.Y. 1998)("Even if these choices regarding which words to capitalize and shorten to form the West digest title were an original inspiration, we doubt the decisions to shorten the titles or capitalize certain letters would be copyrightable. See *Secure Servs. Tech., Inc. v. Time & Space Processing, Inc.,* 722 F. Supp. 1354, 1363 n.25 (E.D. Va. 1989) ('Size of print . . . is not copyrightable.'); 37 C.F.R. § 202.1(a) (1998)"); *Spilman v. Mosby-Yearbook, Inc.,* 115 F. Supp. 2d 148, 154-55 (D. Mass. 2000); *Perma Greetings, Inc. v. Russ Berrie & Co.,* 598 F. Supp. 445, 448 (E.D. Mo. 1984)

All of the above cases cited by the Southern District of New York involved works which in their simplicity were comparable to "Sorry Boys, my daddy says I can't date 'till I'm 30." These works were a white page telephone directory (*Feist*); a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, (*John Muller*); a chinaware design pattern composed of simple variations or combinations of geometric designs (*Homer Laughlin China Co.*); a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed (*Jon Woods Fashions,*); envelopes with black lines and words "gift check" or "priority message" (*Magic Mktg*); and a label with words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lys (*Forstmann Woolen Co.*). To this list could have been added *Tompkins Graphics, Inc. v. Zipatone, Inc.,* 222 U.S.P.Q. 49 (E.D. Pa. 1983) ("basic geometric shapes have long been in the public domain and therefore cannot be regulated by copyrights."); *Past Pluto Productions Corp. v. Dana*, 627 F. Supp. 1435 (S.D.N.Y. 1986) (hat entitled "Crown of Liberty" consisting of seven identical, evenly spaced foam spikes that radiate from the hat's arcuate perimeter), *Bailie v. Fisher,* 258 F.2d 425 (D.C. Cir. 1958) (a cardboard star with two flaps which, when folded back, enabled it to serve as a stand for a display); and *Banzai, Inc. v. Broder Bros.*, 91 U.S.P.Q.2d 1062 (E.D. Pa. 2009)(tie-dye T-shirts). Moreover, Nimmer also states that "Any 'distinguishable variation' of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts, *and it is more than merely trivial.*" [emphasis added] Nimmer § 2.01[B](2010).

Opposing these cases, your second request for reconsideration cites to the case of *Willard v. Estern*, 206 F. Supp. 2d 723 (D. V.I. 2002). Letter, at 18-19. This case involved a rendition of the calendar year "2002" constructed from the public domain "Cancel" 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 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 to dismiss in which all reasonable inferences were drawn in the plaintiff's favor. Unlike "Sorry Boys," the Willard *Petroglyph 2000* was registered by the Copyright Office. 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. Moreover, to the extent that the *Willard* court's reasoning may be in conflict with our analysis herein, the Board considers that decision poorly reasoned on the issue of copyrightability.

3. The works in their entirety -compilation, selection, and arrangement.

In your second request for reconsideration, you assert that the Copyright Office has failed to consider the work as a whole, as required by *Roth Greeting Cards v. United Card Co.*, 429 G.2d 1106, 1109 (9th Cir. 1970), and *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). Letter, at 15. 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 coordination or arrangement). However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. The numerous cases already cited in the preceding section discussing creativity illustrate this point. For example, *Coach, Inc. v. Peters* affirmed the conclusion of the Copyright Office "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.'" 386 F. Supp.2d at 499.

The Copyright Office follows the principle that works should be considered as a whole. Therefore, the Board agrees that it is possible for the selection and combination of commonplace elements or simple designs to rise to the level of copyrightability, even though individual elements in a work, taken alone, would not be copyrightable. Works based on public domain elements may be copyrightable if there is some distinguishable aspect in their selection, arrangement or modification that reflects choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist*, 499 U.S. at 359; see also 17 U.S.C. 101– definitions of "compilation" and "derivative work." Nevertheless, it is the opinion of the Board that Applicant's simple design considered in its entirety does not "possess more than a de minimis quantum of creativity." *Feist*, 499 U.S. at 363.

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 contains 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 choices does not necessarily 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.

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), specifically dealt with the arguments you raise in your second request for 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 located 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 courts affirmed the refusal of the Copyright Office to register the copyright claim.

Likewise, in *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003), the Ninth Circuit held unprotectible sculptural arrangements which combined elements not copyrightable in themselves.

The court explained that not "any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that 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." 323 F.3d at 811. A similar result was reached in *Lamp Plus, Inc. v. Dolan*, 345 F.3d 1140 (9th Cir. 2003), where the Ninth Circuit held that the mechanical combination of four preexisting ceiling lamp elements with a preexisting lamp base did not constitute original authorship.

As support for your argument for basing registration on selection and arrangement of elements, you cite a number of cases. The Review Board finds that in all the cases cited, the elements were more numerous, and their selection and arrangement more original than the work involved in this case. In *Dahlen v. Mich. Licensed Beverage Ass'n*, 132 F. Supp. 2d 574 (E.D. Mich. 2001), the work was a poster containing appreciable text, and a substantial number of elements. In *Boisson v. American County Quilts and Linens*, 273 F.3d 262 (2nd Cir. 2001), there was an arrangement of 26 letter shapes, as well as pictures and icons, into a 5 x 6 grid containing a combination of colors, borderes and edging which the court believed was sufficient to constitute an artistic creation. *Id.* at 271. Moreover, the court relied in part of the Copyright Office's issuance of certificates of registration. In *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800 (D.C. Cir. 1987), the D.C. Circuit ruled that the specific layout of lines, typefaces, and colors had been combined and arranged in the cover design so that it was a unique graphic design and layout. In *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199 (3d Cir. 2005), a garden rock was found copyrightable when the claimant "selected an inspirational poem from the public domain, adapted that poem to make it visually and rhythmically appealing, and then cast it on its own sculptural work." *Id.* at 207.

4. The Epigram "Sorry boys, my Daddy says I can't date 'till I'm 30" is not copyrightable.

The epigram "Sorry boys, my Daddy says I can't date 'till I'm 30" is a simple declarative sentence of eleven words, counting the number 30 as a word. While you contend that this simple sentence contains creative textual expression, in the view of the Review Board, it falls within the meaning of an uncopyrightable "short phrase." Section 202.1(a) provides that "words and short phrases such as names, titles, and slogans" are not subject to copyright protection. This exclusion has been a part of Copyright Office regulations for many years, and numerous cases have cited it as guidance. *See*, *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F. 541, 544 (2nd Cir. 1959); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286-87 (3d Cir. Pa. 2004); *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1520 & n. 21 (1st Cir. Me. 1996); *Murray Hill Publ'ns, Inc. v. ABC Communs., Inc.*, 264 F.3d 622, 632 (6th Cir. Mich. 2001).

In your second request for reconsideration, you do not directly challenge the validity of the regulation. Instead, you assert that this eleven word sentence is not a short phrase or slogan, but rather a creative textual expression capable of supporting copyright registration. The Review

Board concludes that a single, simple declarative sentence, such as the one raised in this instance, lacks the creativity necessary on which to base registration. In *Kitchens of Sara Lee*, the Second Circuit articulated the test for textual expression as "an appreciable amount of original text." *Id.* at 544. In *Alberto-Culver Company v. Andrea Damon, Inc.*, 466 F.2d 705 (7th Cir. 1972), the Seventh Circuit Court of Appeals held that the phrase "most personal sort of deodorant" was an uncopyrightable short phrase or expression lacking the requisite "appreciable amount of original text." *Id.* at 711. In *CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504 (1st Cir. 1996), two phrases "if you're still 'on the clock' at quitting time" and "clock in and make $50 an hour" were found to lack the minimal level originality. *Id.* at 1520. A similar result occurred in *Murray Hill Publications v. ABC Communications*, 264 F.3d 622 (6th Cir. 2001) in which the lines "Good Morning Detroit. This is J.P on JR in the A,M. Have a swell day," was deemed "a phrase or slogan not worthy of copyright protection in its own right..." *Id.* at 633. In *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140 (2nd Cir. 1998), the Second Circuit Court of Appeals held that the phrase "You've got to stand for something, or you'll fall for anything" lacked originality, and was not protected by the song's copyright. Finally, in *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp 769 (W.D. Pa. 1986) envelopes printed with black stripes and containing words such as "contents require immediate attention," "telegram," "gift check," and "priority message," did not exhibit the minimal level of creativity to support copyright protection.

Not only is "Sorry boys, my Daddy says I can't date 'till I'm 30" a short phrase, but for this work, it serves as the work's title. Titles are clearly not copyrightable. *Wihtol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956)("We agree that the title, in itself, is not subject to copyright protection."); *Sweet v. City of Chicago*, 953 F. Supp. 225, 229 (N.D. Ill. 1996)("It is well established that titles and short phrases are not protected by copyright."); and *Benay v. Warner Bros. Entertainment, Inc.*, 607 F.3d 620, 628 (9th Cir. 2010)("A title standing alone cannot be copyrighted...").

As primary support for extending copyright protection to this single declarative sentence, you cite *Applied Innovations, Inc. v. Reagents of the University of Minnesota*, 876 F.2d 626 (8th Cir. 1989). The protected work in this case was a large psychological test, a part of which constituted 550 test statements, or short declarative sentences, to which the subjects responded by answering "true," "false," or "cannot say." The defendants created unauthorized personal computer software to administer the test, and included 38 of the test statements known as the "Grayson critical items." *Id.* at 628. As your letter for second reconsideration correctly states, the Eighth Circuit Court of Appeals found this taking to be a copyright infringement. It is, however, a huge leap to assume that extending copyright protection to 38 short declarative sentences constituting the heart of a significant psychological test means that a single declarative sentence, in and of itself, would also be regarded as copyrightable. The circumstances and the extent of the taking in *Applied Innovations* vitiates any meaningful application of that precedent to determining the copyrightability of a single eleven word sentence.

You also rely on the obscure, unreported case of *Brilliant v. W.B. Productions, Inc.*, Civ. No. 79-1893-WMB (S.D. Cal. Oct. 22, 1979), which you state protected two epigrams - "I may

not be totally perfect, but parts of me are excellent," and "I have abandoned my search for truth, and am now looking for a good fantasy." The Review Board has reviewed this cursory decision and finds that it lacks any analysis, and cites no facts or authorities to explain the result that the court purported to reach. Although the Board disagrees with the court's ruling on copyrightability in that case, it notes that these two epigrams taken together have more appreciable text, and are more expressive than, the single, simple declarative sentence "Sorry boys, my Daddy says I can't date 'till I'm 30." In light of the numerous case authorities cited in this section which contain a complete analysis, the Review Board assigns no weight to this unreported decision.

Finally, you assert that the Copyright Office registered the epigram "I feel much better, now that I've given up hope," TX0001388053. Letter for second reconsideration at 13. The work that you cite was not an epigram but in fact a book of 167 pages, most of which were illustrations. The work was considered so significant by the Library of Congress that it was added to the collections. Attached are of catalog records of the Copyright Office and the Library revealing the nature of the work. Appendix B.

5. Analysis of the Work

Your client's design is basically two elements - a declarative sentence of 11 words, and a clip art picture of a father figure. Certain variations have been made in the lettering by utilizing balloon lettering for "Sorry Boys," balloon numbers for "30," and by using upper and lower case letters in an unconventional manner. The declarative sentence surrounds the father figure on three sides and is typical of arrangements of short phrases printed on T-shirts. This small number of elements arranged in a predictable pattern to facilitate its placement on T-shirts is precisely the "routine" and "garden-variety" arrangement declared to be uncopyrightable in *Feist*. *Feist*, 499 U.S. at 362. The Review Board additionally finds the design falls squarely within the scope of uncopyrightable matter codified at 37 C.F.R. §202.1(a) precluding copyright protection in titles, short phrases and slogans, and mere variations of typographic ornamentation.

In asserting that your client's work should be registered, you cite a number of cases involving works which are distinguishable. *Boisson* and *Reader's Digest* had far more elements, and made substantial use of color. *Dahlen* had an appreciable amount of text, and the Court was unpersuaded that all the text had been slavishly copied so as to render it uncopyrightable. *Kay Berry* contained some original sculpting of the garden rock.

The Review Board believes your client's work could only be registrable upon a finding of "an appreciable amount of text" (*Sara Lee*), or combination of uncopyrightable elements "numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship" (*Satava v. Lowry*). Applying the appreciable text standard, the Review Board believes the phrases "more personal sort of deodorant"(*Alberto-Culver Company*); "if you're still 'on the clock' at quitting time" and "clock in and make $50 an hour" (*CMM Cable Rep.*); and "Good Morning Detroit. This is J.P on JR in the A,M. Have a swell day;" (*Murray Hill Publications*) are equivalent to (if not more creative than) "Sorry Boys,

my daddy says I can't date 'till I'm 30." In your second request for reconsideration, you have cited no well-reasoned case in which a single declarative sentence of eleven words was extended copyright protection.

Regarding extending copyright protection on the basis of combining uncopyrightable elements, the Review Board believes cases such as *Darden v. Peters*, *Satava v. Lowry, and Coach, Inc. v. Peters* establish that the number of elements selected must be far greater than choices made in this instance. The layout, moreover, is routine for the T-shirt industry.

IV. CONCLUSION

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

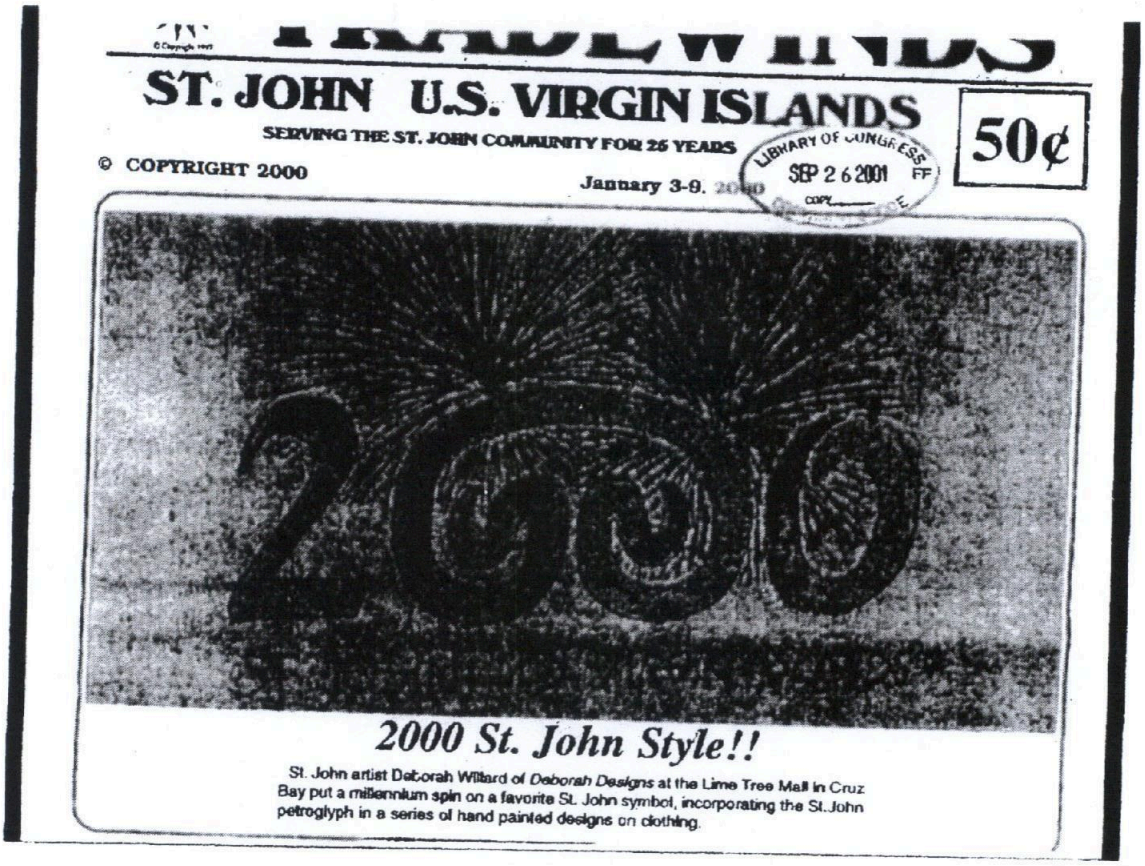
Sincerely,

/s/

David O. Carson
General Counsel
for the Copyright Office Review Board

Appendices
A - Deposit in *Willard v. Estern*
B - Catalog records concerning "I feel much better, now that I've given up hope"

APPENDIX A



TRADEWINDS

ST. JOHN U.S. VIRGIN ISLANDS

SERVING THE ST. JOHN COMMUNITY FOR 25 YEARS

50¢

© COPYRIGHT 2000

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January 3-9, 2000

2000

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.

Appendix B

Copyright
United States Copyright Office

Help | Search | History | Titles | Start Over

Public Catalog

Copyright Catalog (1978 to present)
Search Request: Left Anchored Copyright Number = tx0001388053
Search Results: Displaying 1 of 1 entries

previous | next

Labeled View

I feel much better, now that I've given up hope.

Type of Work: Text
Registration Number / Date: TX0001388053 / 1984-07-16
Title: I feel much better, now that I've given up hope.
Notes: Cataloged from appl.
Copyright Claimant: Ashleigh Brilliant
Date of Creation: 1984
Date of Publication: 1984-06-01
Authorship on Application: Ashleigh Brilliant.
Basis of Claim: New Matter: "selection, arr., text & additional ill."
Names: Brilliant, Ashleigh

previous | next

Save, Print and Email (Help Page)

Select Download Format: Full Record — Format for Print/Save

Enter your email address: — Email

Help Search History Titles Start Over

Contact Us | Request Copies | Get a Search Estimate | Frequently Asked Questions (FAQs) about Copyright | Copyright Office Home Page | Library of Congress Home Page

LIBRARY OF CONGRESS ONLINE CATALOG

DATABASE: Library of Congress Online Catalog
YOU SEARCHED: Title Keyword = i feel much better
SEARCH RESULTS: Displaying 5 of 46.

◀ Previous Next ▶

Brief Record | Subjects/Content | Full Record | MARC Tags

I feel much better, now that I've given up hope : and even more brilliant...

Relevance: ●●●●●
LC control no.: 84002284
LCCN permalink: http://lccn.loc.gov/84002284
Type of material: Book (Print, Microform, Electronic, etc.)
Personal name: Brilliant, Ashleigh, 1933-
Main title: I feel much better, now that I've given up hope : and even more brilliant thoughts / by Ashleigh Brilliant.
Published/Created: Santa Barbara, Calif. : Woodbridge Press, c1984.
Description: 167 p. : chiefly ill. ; 24 cm.
ISBN: 0880071451
0880071478 (soft)
Subjects: Epigrams, American.
LC classification: PN6281 .B667 1984
Dewey class no.: 818/.5402

CALL NUMBER: PN6281 .B667 1984
Copy 1
-- Request in: Jefferson or Adams Building Reading Rooms
-- Status: Not Charged

CALL NUMBER: PN6281 .B667 1984 FT MEADE
Copy 2
-- Request in: Jefferson or Adams Building Reading Rooms - STORED OFFSITE
-- Status: Not Charged

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Email Text (Full Info) to: Press to SEND EMAIL