United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

September 20, 2013

The Law Offices of Mark S. King, P.C.
Attn: Mark King
2018 Eastwood Road, Suite 204
Wilmington, NC 28403

Re: **1 HR RATED FIRE WALL**
2 HR RATED FIRE WALL
3 HR RATED FIRE WALL
4 HR RATED FIRE WALL
1 HR FIRE BARRIER
SMOKE RESISTANT SMOKE WALL
2 HR FIRE BARRIER
1 HR SMOKE BARRIER
2 HR RATED SMOKE WALL
2 HR RATED FIRE/SMOKE WALL
1 HR SMOKE WALL
1 HR RATED FIRE/SMOKE WALL

Correspondence ID: 1-CB0ITL

Dear Mr. King:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the five works entitled: *1 HR RATED FIRE WALL; 2 HR RATED FIRE WALL;3 HR RATED FIRE WALL; 4 HR RATED FIRE WALL;* and *1 HR FIRE BARRIER* (the "Works"); and, your request that the Board also reconsidered the Registration Program's decision to cancel the seven previously registered works entitled: *SMOKE RESISTANT SMOKE WALL; 2 HR FIRE BARRIER; 1 HR SMOKE BARRIER; 2 HR RATED SMOKE WALL; 2 HR RATED FIRE/SMOKE WALL; 1 HR SMOKE WALL;* and *1 HR RATED FIRE/SMOKE WALL.*

You submitted these request on behalf of your client, Fire Wall Signs, Inc., on June 26, 2012. I apologize for the delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of

registration of these copyright claims, as well as its cancellation decisions. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORKS

A. The Five Works before the Board for Reconsideration

Each Work consists of the following configuration of elements: (1) a large, white rectangle with a black border and the text: "PROTECT ALL OPENINGS AND PENETRATIONS" printed inside it in black lettering; (2) the text: "ATTENTION: WORKMEN CUTTING INTO WALL" and "CONTACT BUILDING ENGINEER UPON COMPLETING WORK" printed in white lettering in the upper portion of the rectangle's black border; and, (3) a small, white rectangle, located in the bottom portion of the black border, that contains the Applicant's physical address, web address, phone number, and pre-existing logo.

In addition to the above elements, the Work *1 HR RATED FIRE WALL* includes the phrase "1 HR RATED FIRE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the Work *2 HR RATED FIRE WALL* includes the phrase "2 HR RATED FIRE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the Work *3 HR RATED FIRE WALL* includes the phrase "3 HR RATED FIRE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the Work *4 HR RATED FIRE WALL* includes the phrase "4 HR RATED FIRE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the Work *1 HR FIRE BARRIER* includes the phrase "1 HR FIRE BARRIER" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



B. The Seven Canceled Works

Like the above Works, each of the canceled works consists of the following configuration of elements: (1) a large, white rectangle with a black border and the text: "PROTECT ALL OPENINGS AND PENETRATIONS" printed inside it in black lettering; (2) the text: "ATTENTION: WORKMEN CUTTING INTO WALL" and "CONTACT BUILDING ENGINEER UPON COMPLETING WORK" printed in white lettering in the upper portion of the rectangle's black border; and, (3) a small, white rectangle, located in the bottom portion of the black border, that contains the Applicant's physical address, web address, phone number and pre-existing logo.

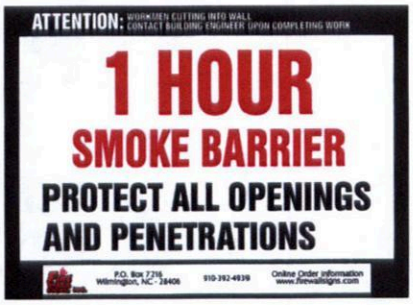
In addition to the above elements, the work *SMOKE RESISTANT SMOKE WALL* includes the phrase "SMOKE RESISTANT SMOKE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the work *2 HR FIRE BARRIER* includes the phrase "SMOKE RESISTANT SMOKE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the work *1 HR SMOKE BARRIER* includes the phrase "1 HR SMOKE BARRIER" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the work *2 HR RATED SMOKE WALL* includes the phrase "2 HR RATED SMOKE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the work *2 HR RATED FIRE / SMOKE WALL* includes the phrase "2 HR RATED FIRE / SMOKE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the work *1 HR SMOKE WALL* includes the phrase "1 HR SMOKE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



In addition to the above elements, the work *1 HR RATED FIRE / SMOKE WALL* includes the phrase "1 HR RATED FIRE / SMOKE WALL" printed in red letters inside the Work's white rectangle. The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On August 26, 2011, the United States Copyright Office (the "Office") issued a letter notifying Fire Wall Signs, Inc. (the "Applicant") that it had refused registration of the above mentioned Works. *Letter from Registration Specialist, Robin Jones, to Mark King* (August 26, 2011). In its letter, the Office indicated that it could not register the Works because they lack the authorship necessary to support a copyright claim. *Id.*

In a letter dated November 23, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Works. *Letter from Mark King to Copyright RAC Division* (November 23, 2011) ("First Request"). Your letter set forth your reasons as to why the Office improperly refused registration. *Id.* It also referenced seven similar works, owned by the Applicant, that the Office had previously accepted for registration. *Id.* at 2. Upon reviewing the Works in light of the points raised in your letter, the Office concluded that they "do not contain a sufficient amount of original and creative literary or artistic authorship" and again refused registration. *Letter from*

Attorney-Advisor, Stephanie Mason, to Mark King (March 27, 2012). The Office also determined that the registrations of the seven similar works had been made in error and stated that they would be canceled. *Id.* at 2.

Finally, in a letter dated June 26, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. *Letter from Mark King to Copyright R&P Division* (June 26, 2012) ("Second Request"). In arguing that the Office improperly refused registration of the Works, you claim all five of the Works include at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *Second Request* at 1-2. In support of this argument, you claim that the Applicant's careful selection and arrangement of the Works' constituent elements possess a sufficient amount of creative authorship to warrant registration under the Copyright Act. *Id.* You also assert that the Applicant's claim of copyright is directed to the Works' "eye-catching" arrangement of unprotectable elements, which is unique and distinguishable from "other [signs] known in the marketplace." *Id.* at 2. In addition to *Feist*, your argument references *Bleistein v. Donaldson*, 188 U.S. 239 (1903) and *Alfred Bell v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) in support of the principle that, to be sufficiently creative to warrant copyright protection, a work need only possess a "modicum of creativity." *Id.* at 1.

In your Second Request, you also urge the Office to reconsider its decision to cancel the registrations of the seven previously registered works. *Second Request* at 1-3. Relying on the same arguments as those summarized above, you maintain that these works are also sufficiently creative to warrant copyright registration.

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this threshold. *Id.* The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." *Id.* at 363. It further found that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, some combinations of common or standard design elements may contain sufficient creativity, with respect to how they are juxtaposed or arranged, to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this grade. *See Feist,* 499 U.S. at 358 (finding the Copyright Act "implies that some ways [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not"). Ultimately, the determination of copyrightability in the combination of standard design elements rests on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D. D.C. 1989).

To be clear, the mere simplistic arrangement of unprotectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc. et. al.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The court's language in *Satava* is particularly instructional:

> [i]t is true, of course, that a combination of unprotectable elements may qualify for copyright protection. But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.

Id. (internal citations omitted) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are

not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

B. *Analysis of the Five Rejected Works*

After carefully examining the Works, and applying the legal standards discussed above, the Board finds that all five of the rejected Works fail to satisfy the requirement of creative authorship.

First, the Board finds that none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F.R § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring." *Id.* Here, the Applicant's Works are comprised of the following elements: (1) a red, white, and black color scheme; (2) several short phrases printed in a basic font; (3) the phrase "Fire Wall Signs, Inc.," printed in a stylized font and garnished with a drawing of an ordinary flame; and, (4) three rectangular shapes.

The colors red, white, and black are prohibited from copyright registration. *See Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). Familiar shapes and symbols, such as a rectangle and a common flame design, are also prohibited from registration. 37 C.F.R. § 202.1(a); *see also Feist*, 499 U.S. at 363. Likewise, the short phrases that appear within the Works, as well as the fonts the Applicant used to letter the phrases, are not eligible for copyright protection. *See Coach,* 386 F. Supp. 2d 495, 498-99 (S.D.N.Y. 2005) (indicating mere variations in typographic ornamentation or lettering cannot support a copyright claim); *see also Racenstein & Co., Inc. v. Wallace dba ABC Window Cleaning Supply*, 51 U.S.P.Q. 2d 1031 (S.D.N.Y. 1999) (indicating a word or short phrase, alone, generally cannot support a copyright claim). Thus, consistent with section 202.1(a), we find that the Works' constituent elements do not qualify for registration under the Copyright Act.

Second, the Board finds that the Works, each considered as a whole, fail to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual noncopyrightable elements judged not separately, but in their

overall interrelatedness within the work as a whole). Viewed as a whole, each Work consists of no more than a few *de minimis* short phrases arranged so that they fit within a common rectangle shape and matched with a common color scheme. The level of creativity involved in this basic configuration of unprotectable colors, shapes, and short phrases fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Thus, we conclude that the Work, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359; *Satava*, 323 F.3d at 811.

Finally, your assertions that the Applicant's arrangement of the Works' constituent elements is "eye-catching" and distinguishable from "other [signs] known in the marketplace," do not add to your claim of sufficient creativity. *Id.* at 2. As discussed above, the Board does not assess the attractiveness of a design, its visual effect or appearance, or its commercial success in the marketplace in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere fact that the Works consists of a unique, "eye-catching" arrangement of familiar shapes and short phrases would not qualify the Work, as a whole, as copyrightable.

In sum, the Board finds that the Applicant's selection and arrangement of the elements that comprise the Works lack a sufficient level of creativity to make the Works registerable under the Copyright Act.

C. *Analysis of the Seven Canceled Registrations*

The Board also affirms the Registration Program's decision to cancel the registration of the seven previously registered works. *See First Request* at 2.

Like the Works discussed above, each of the seven canceled works includes the following configuration of elements: (1) a large, white rectangle with a black border and the text: "PROTECT ALL OPENINGS AND PENETRATIONS" printed inside it in black lettering; (2) the text: "ATTENTION: WORKMEN CUTTING INTO WALL" and "CONTACT BUILDING ENGINEER UPON COMPLETING WORK" printed in white lettering in the upper portion of the rectangle's black border; (3) a small, white rectangle, located in the bottom portion of the black border, that contains the Applicant's physical address, web address, phone number and pre-existing logo; and (4) one of the following seven phrases, printed in red text and located inside the large, white rectangle:

"SMOKE RESISTANT SMOKE WALL" (VA 1-782-719; EDR 6/22/11, SR 1-625832799)

"2 HR FIRE BARRIER" (VA 1-782-720; EDR 6/22/11, SR 1-625832733)

"1 HR SMOKE BARRIER" (VA 1-782-721; EDR 6/22/11, SR 1-625832711)

"2 HR RATED SMOKE WALL" (VA 1-782-723; EDR 6/22/11, SR 1-625832669)

"2 HR RATED FIRE/SMOKE WALL" (VA 1-782-725; EDR 6/22/11, SR 1-625832777)

"1 HR SMOKE WALL" (VA 1-782-727; EDR 6/22/11, SR 1-625832637)

"1 HR RATED FIRE/SMOKE WALL" (VA 1-782-730; EDR 6/22/11, SR 1-625832755)

For the same reasons explained in the "*Analysis of the Works*" section (section III.B., *supra*), we find that the Applicant's selection and arrangement of the elements that comprise the seven canceled works lack a sufficient level of creativity to make the works eligible for protection under the Copyright Act. Accordingly, we affirm the Registration Program's decision to cancel the registration of the seven previously registered works.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the works entitled: *1 HR RATED FIRE WALL; 2 HR RATED FIRE WALL;3 HR RATED FIRE WALL; 4 HR RATED FIRE WALL;* and *1 HR FIRE BARRIER*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

The Board also affirms the decision to cancel the registrations for the works entitled: *SMOKE RESISTANT SMOKE WALL; 2 HR FIRE BARRIER; 1 HR SMOKE BARRIER; 2 HR RATED SMOKE WALL; 2 HR RATED FIRE/SMOKE WALL; 1 HR SMOKE WALL;* and *1 HR RATED FIRE/SMOKE WALL.*

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board