United States Copyright Office
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September 5, 2013

The Law Office of Robert E. Purcell, PLLC
Attn: Robert E. Purcell
211 West Jefferson Street, Suite 24
Syracuse, New York 13202

Re: BEAT 'NOVA SOLD OUT
BEAT 'NOVA SOLD OUT (with graphics)
BEAT 'NOVA
BEAT 'NOVA (with graphics)
Correspondence ID: 1-DPSARG

Dear Mr. Purcell:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your letter requesting that we (1) reconsider the Registration Program's refusal to register the works entitled: *BEAT 'NOVA SOLD OUT* and *BEAT 'NOVA SOLD OUT (with graphics)*; and, (2) reverse its decision to cancel the works entitled: *BEAT 'NOVA* and *BEAT 'NOVA (with graphics)*. You submitted this request on behalf of your client, John Groat, d/b/a HolyShirt!, on December 14, 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 decisions to deny registration of *BEAT 'NOVA SOLD OUT* and *BEAT 'NOVA SOLD OUT (with graphics)*; and upholds its decision to cancel the registrations of *BEAT 'NOVA* and *BEAT 'NOVA (with graphics)*. 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

BEAT 'NOVA SOLD OUT and *BEAT 'NOVA SOLD OUT (with graphics)* consist of the following short phrases:

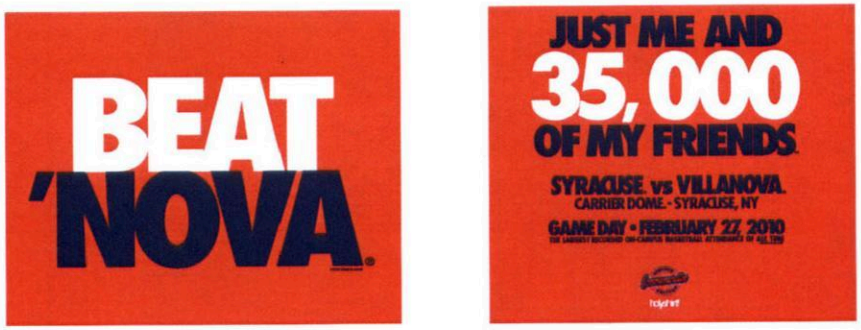
- BEAT 'NOVA
- SOLD OUT
- JUST ME AND 34,616 OF MY FRIENDS
- SYRACUSE VS VILLANOVA

- CARRIER DOME • SYRACUSE, NY
- GAME DAY • FEBRUARY 27, 2010
- THE LARGEST RECORDED ON-CAMPUS BASKETBALL ATTENDANCE OF ALL TIME

The phrases are printed in dark blue and white text and set against an orange background. The phrase "SOLD OUT" is surrounded by a white rectangle. Two pre-existing graphics (one including the word "Commemorative," the other including the "Holyshirt!" logo) appear below the phrases.[1] The below images are photographic reproductions of the works from the deposit materials:



The works *BEAT 'NOVA* and *BEAT 'NOVA (with graphics)* do not include the short phrase "SOLD OUT", do not include the white rectangle, and use the number "35,000" instead of "34,616." Otherwise, they are identical to the above works.[2] The below images are photographic reproductions of the works from the deposit materials:



[1] The claim to copyright in *BEAT 'NOVA SOLD OUT* concerns the work's textual aspects. The claim to copyright in *BEAT 'NOVA SOLD OUT (with graphics)* concerns the combination of the work's textual and graphic aspects.

[2] Like the above works, the claim to copyright in *BEAT 'NOVA* concerns the work's textual aspects. The claim to copyright in *BEAT 'NOVA (with graphics)* concerns the combination of the work's textual and graphic aspects.

II. ADMINISTRATIVE RECORD

On May 11, 2012, the United States Copyright Office (the "Office") issued a letter notifying John Groat, d/b/a Holy Shirt!, (the "Applicant") that it had refused registration of the works *BEAT 'NOVA SOLD OUT and BEAT 'NOVA SOLD OUT (with graphics). Letter from Registration Specialist Mary Svrjcek to Robert E. Purcell* (May 11, 2012). In its letter, the Office stated that it could not register these two works because they represented "less than the required minimum amount of original authorship on which to base a claim." *Id.*

In a letter dated June 7, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the works. *Letter from Robert E. Purcell to Copyright RAC Division* (June 7, 2012) ("First Request"). 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 graphic and literary authorship" and again denied registration. *Letter from Attorney-Advisor, Stephanie Mason, to Robert E. Purcell* (September 27, 2012). The Office further concluded that it had erroneously registered the works *BEAT 'NOVA* and *BEAT 'NOVA (with graphics)* and informed you that it intended to cancel their registrations. *Id.* at 3

Finally, in a letter dated December 14, 2012, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register *BEAT 'NOVA SOLD OUT* and *BEAT 'NOVA SOLD OUT (with graphics). Letter from Robert E. Purcell to Copyright R&P Division* (December 14, 2012) ("Second Request"). You also requested that the Office reconsider its decision to cancel *BEAT 'NOVA* and *BEAT 'NOVA (with graphics). Id.* In arguing that the Office improperly refused to register all four works (hereinafter the "Works"), you claim 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 3. In support of this argument, you claim that the Works' textual aspects, individually, as well as the Applicant's combination of the Works' textual aspects with their graphic aspects possess a sufficient amount of creative authorship to warrant registration under the Copyright Act. *Id.* Specifically, you argue the Works include "selective coloring/shading of certain wording, as well as background coloring, include[] different, selective spacings between wording, include[] different typeface among the wording, include[] a selection and arrangement of different sizes and heights of the wording, etc. It will be appreciated that such graphics are not ***only*** a common shape, ***only*** coloring, or ***only*** typeface." *Id.* at 3.

In addition to *Feist*, your argument references several cases in support of the general principle that works comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of their elements satisfies the requisite level of creative authorship. *Id.* at 4-5.

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. NY 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 Works*

After carefully examining the Works, and applying the legal standards discussed above, the Board finds that *BEAT 'NOVA SOLD OUT*; *BEAT 'NOVA SOLD OUT (with graphics)*; *BEAT 'NOVA*; and, *BEAT 'NOVA (with graphics)* all fail to satisfy the requirement of creative authorship.

First, the Board finds that none of the Works' 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: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the Works are comprised of the following elements: (1) a rectangle; (2) a series or short phrases; (3) the colors dark blue, white, and orange; and, (4) two pre-existing graphic designs[3]. Consistent

[3] The first design consists of the word "commemorative" overlapping a circle with the phrase "LIMITED EDITION" printed inside it. The second design is a logo used by, "HolyShirt!", the Applicant's company. In his original applications, the Applicant claims "text" and "artwork" as "Material excluded from this claim." In the First and Second Requests, you do not argue that these two designs, alone, are sufficiently creative to warrant registration. Thus, we have treated these designs as pre-existing works and evaluated them only for purposes of determining whether their inclusion in the Applicant's overall selection and arrangement

with the above regulations, the rectangle shape, the simple short phrases (consisting of a date, statistical data, and a popular regional slogan), the fonts the Applicant used to create the short phrases, and the Works' color scheme are all ineligible for copyright protection. *See Id.* (prohibiting the registration of basic symbols or designs); *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); *see also Coach, Inc. v. Peters*, 386 F. Supp 2d 495, 498-99 (indicating mere variations in typographic ornamentation or lettering cannot support a copyright claim); *and see Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). Thus, we conclude the Works' constituent elements do not qualify for registration under the Copyright Act.

Second, the Board finds that each Work, considered as a whole, fails 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 of the Works consists of the simple configuration of a rectangle, two pre-existing designs, and a few short phrases (a date, statistical data, and a slogan popular in the Syracuse community). This configuration appears in three basic colors (dark blue, white, and orange) is intuitively designed so that it can be reproduced on the back of a t-shirt. Such an ordinary arrangement of unprotectable text, a rectangle, a logo, and an unprotectable color scheme is, at best *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that each of the Works, as a whole, lacks the requisite "creative spark" necessary for protection under the Copyright Act. *Feist,* 499 U.S at 359; *Satava*, 323 F.3d at 811.

In sum, regarding the works *BEAT 'NOVA* and *BEAT 'NOVA SOLD OUT*, the Board has individually considered each works' text and concludes that the Applicant's combination of short phrases is not sufficiently creative to warrant registration. Regarding the works *BEAT 'NOVA (with graphics)* and *BEAT 'NOVA SOLD OUT (with graphics)*, the Board has considered both the individual elements that comprise the works, as well as the Applicant's selection, organization, and arrangement of those elements, and concludes that they lack the sufficient level of creativity to make them eligible for registration.

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qualify any of the Works, as a whole, for copyright protection. Our approach is supported by the fact that your First and Second Requests do not specifically mention these designs. Rather, they expressly maintain that the Applicant's claim to copyright is directed towards "selective coloring/shading of certain wording", "background coloring", "selective spacings between wording", use of "different typeface among the wording", and "selection and arrangement of different sizes and heights of the wording." *First Request* at 2; *Second Request* at 3.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the Registration Program's refusal to register the works entitled: *BEAT 'NOVA SOLD OUT* and *BEAT 'NOVA SOLD OUT (with graphics)*; and, affirms the Registration Programs decision to cancel the registrations of the works entitled: *BEAT 'NOVA* and *BEAT 'NOVA (with graphics)*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____

William J. Roberts, Jr.
Copyright Office Review Board