United States Copyright Office
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May 2, 2014

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

Re: **'1 For The Ages' Text**
'1 For The Ages' Non-Commemorative Layout
'1 For The Ages' Commemorative Edition Layout
'Marathon Man' with old logo
'Syracuse Marathon Man' with old logo
'Marathon Man' with new logo
'Syracuse Marathon Man' with new logo

Corresp. ID Nos.: 1-F72H3H; 1-F72F36; 1-F72H29; 1- F72F3K; 1-EOX4SF; 1-EPE49L & 1-EOX4XI

Dear Mr. Purcell:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your letter requesting that we reconsider the Registration Program's refusal to register the following works:

'1 For The Ages' Text
'1 For The Ages' Non-Commemorative Layout
'1 For The Ages' Commemorative Edition Layout
'Marathon Man' with old logo
'Marathon Man' with new logo
'Syracuse Marathon Man' with old logo
'Syracuse Marathon Man' with new logo.

You submitted this request on behalf of your client, John Groat, d/b/a HolyShirt!, on November 18, 2013.

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 all seven works. 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

'1 For The Ages' Text consists of the following short phrases:

244 POINTS
226 MINUTES
6 OVERTIMES
2 DAYS
1 FOR THE AGES.

'1 For The Ages' Non-Commemorative Layout consists of the same short phrases included in *'1 For The Ages' Text.* Below the phrases are the words and numbers "SYRACUSE 127 UCONN 117" and the date "MARCH 12 & 13, 2009."

'1 For The Ages' Commemorative Edition Layout contains all of the elements included in *'1 For The Ages' Non-Commemorative Layout.'* In addition, the work includes a logo comprised of the words "LIMITED," "EDITION," and "COMMEMORATIVE." A basketball-like shape appears in the center of the text in this logo.

'Marathon Men' with old logo contains the words "MARATHON MEN." The letter "O" in the word "MARATHON" contains a graphic outline of a basketball player cut from its center. Below is a reproduction of the work from the deposit materials.



'Syracuse Marathon Men' with old logo contains the words "SYRACUSE MARATHON MEN." The letter "O" in the word "MARATHON" contains the same graphic outline of a basketball player cut from its center as in *'Marathon Man' with old logo.* Below is a reproduction of the work from the deposit materials.



'Marathon Men' with new logo contains the words "MARATHON MEN." The letter "O" in the word "MARATHON" contains the graphic outline of a basketball player cut from its center. The graphic differs slightly from that in *'Marathon Men' with old logo*. Below is a reproduction of the work from the deposit materials.



'Syracuse Marathon Men' with new logo contains the words "SYRACUSE MARATHON MEN." The letter "O" in the word "MARATHON" contains the same graphic outline of a basketball player cut from its center as in *'Marathon Man' with new logo*. Below is a reproduction of the work from the deposit materials.



II. ADMINISTRATIVE RECORD

In February and April of 2013, the United States Copyright Office (the "Office") issued seven letters notifying John Groat, d/b/a Holy Shirt! (the "Applicant") that it had refused registration of the works titled: *'1 For The Ages' Text*; *'1 For The Ages' Non-Commemorative Layout*; *'1 For The Ages' Commemorative Edition Layout*; *'Marathon Man' with old logo*; *Marathon Man' with new logo*; *Syracuse Marathon Man' with old logo*; and *'Syracuse Marathon Man' with new logo* (collectively the "Works"). *Letters from the United States Copyright Office to Robert E. Purcell* (Feb. 8, 2012-Apr. 10, 2013). In its letters, the Office stated that it could not register these Works because they represented "less than the required minimum amount of original authorship on which to base a claim." *Id.*

In a letter dated May 6, 2013, you requested that the Office reconsider its initial refusal to register the Works pursuant to 37 C.F.R. § 202.5(b). *Letter from Robert E. Purcell to Copyright RAC Division* (May 6, 2013) ("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 artistic, graphic, or literary authorship" and again denied registration. *Letter from Stephanie Mason, Attorney-Advisor, to Robert E. Purcell* (Aug. 21, 2013).

In a letter dated November 18, 2013, you requested that the Office reconsider its refusal to register the Works for a second time pursuant to 37 C.F.R. § 202.5(c). *Letter from Robert E. Purcell to Copyright R&P Division* (Nov. 18, 2013) ("Second Request"). In arguing that the Office improperly refused registration, 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. Specifically, you claim that the Works' textual aspects, as well as the Applicant's combination of the Works' textual aspects with the Works' graphic aspects, possess a sufficient amount of creative authorship to warrant registration. *Id. passim*. You explain that "[t]he Courts have cautioned against dissecting and parsing a work into components, elements, and fragments and then concluding that the work is uncopyrightable because it is just a mere aggregation of uncopyrightable components. Such a process of analysis would lead to a conclusion that every work is uncopyrightable -- since all one needs to do is parse small enough." *Id.* at 3.

In addition to *Feist*, you reference 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 meets 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, meaning that it must not be copied from another work. *Id.* Second, the work must possess sufficient creativity. *Id.* While only a modicum of creativity is necessary, the Supreme Court has recognized that some works (such as the telephone directory at issue in *Feist*) fail to meet this requirement. *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 copyright law and, subsequently, in the *Feist* decision. *See* 37 C.F.R. §§ 202.1(a) & (d) (prohibiting registration of "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; [or] "[w]orks consisting entirely of information that is common property"); *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").

Some combinations of common or standard design elements may contain sufficient creativity to support a copyright based on the manner in which they are juxtaposed or arranged. However, not every combination or arrangement will be sufficient to meet this requirement. *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 that the work as a whole constitutes an original work of authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not 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 forming an arrow placed above the word "Arrows" in a cursive script. *See John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (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 the Works fail to satisfy the requirement of creative authorship.

The Board finds that none of the Works' constituent elements, considered individually, are sufficiently creative to warrant protection. As noted above, 37 C.F.R § 202.1 identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring, [and] "[w]orks consisting entirely of information that is common property containing no original authorship such as . . . lists or tables take from public documents or other common sources." *Id.*

Each Work contains a series of numbers, words, and short phrases. The vast majority of these elements represent the date of a specific basketball game, statistical data related to that basketball game, a nickname for the basketball game, and a nickname for the team that played in the basketball game, and as such, they constitute common property. These elements are presented in black lettering on a white background, and the font that the Applicant selected for these elements is a mere variation of typographic ornamentation. None of these constituent elements qualify for registration under the Copyright Act. *See J. Racenstein & Co., Inc. v. Wallace*, 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); *Coach, Inc. v. Peters*, 386 F. Supp 2d 495, 498-99 (indicating mere variations in typographic ornamentation or lettering cannot support a copyright claim).

Four of the Works contain a depiction of a basketball player in the process of dribbling a basketball. In your First Request, you stated that these designs are "not original with the copyright claimant." Thus, we have considered these elements only for purposes of determining whether the Applicant's overall selection and arrangement of elements as a whole constitutes an original work of authorship. The Board has taken the same approach in considering *'1 For The Ages' Commemorative Edition Layout*, which contains a logo that combines the words "LIMITED," "EDITION," and "COMMEMORATIVE" with a basketball-shaped graphic design. In your First and Second Requests, you do not argue that these elements, taken individually, are sufficiently creative to warrant registration. Instead, you expressly state that the Applicant is seeking "copyright protection for the combination of text and graphics" (*First Request* at 2) and "the creative and ingenious selection arrangement, positioning, and relative size and prominence of the elements." *Second Request* at 2.

The Board also finds that each of the Works, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S. at 359. The Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. But in order to be registrable, 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). Below, we identify each work and explain why each Work is ineligible for registration.

'1 For The Ages' Text consists of the following short phrases: 244 POINTS; 226 MINUTES; 6 OVERTIMES; 2 DAYS; and, 1 FOR THE AGES. There is no dispute that short phrases are not subject to copyright protection. *See Murray Hill Publications v. ABC Communications*, 264 F.3d 622, 633 (6th Cir. 2001) (concluding that the phrase "Good Morning Detroit. This is J.P on JR in the A.M. Have a swell day" is "not worthy of copyright protection in its own right"); *Acuff-Rose Music, Inc. v. Jostens, Inc.,* 155 F.3d 140, 144 (2d Cir. 1998) (concluding that the phrase "you've got to stand for something or you'll fall for anything" is too common to warrant copyright protection); *CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1520 & n.21 (1st Cir.1996) (concluding that the phrases "call in, clock in, and win," "if you're still 'on the clock' at quitting time," and "clock in and make $50 an hour" lack the minimal level of originality). Moreover, all but one of these short phrases – namely, "1 FOR THE AGES" – are statistics from a specific basketball game. As such, they constitute common property that contains no original authorship. The phrases are arranged atop one another, in descending, numerical order. Viewed as a whole, this simple combination of numbers, words, short phrases, and common property is *de minimis* and fails to meet the threshold for copyrightable authorship. Accordingly, we conclude

that the individual elements of this work and the work as a whole lack the requisite creative spark necessary for protection under the Copyright Act.

'1 For The Ages' Non-Commemorative Layout consists of the same short phrases included in *'1 For The Ages' Text* arranged atop one another, in descending, numerical order. Below these phrases are the words and numbers "SYRACUSE 127 UCONN 117" and the date "MARCH 12 & 13, 2009," which are statistics from a specific basketball game. Thus, all but one of the elements in this Work consist of common property that contains no original authorship. Viewed as a whole, the simple combination of the unprotectable text from *'1 For The Ages' Text* and two additional, unprotectable short phrases that constitute common property is *de minimis*, and fails to meet the threshold for copyrightable authorship. *See Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980) ("the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the [preexisting] work in some meaningful way"). Accordingly, we conclude that the individual elements of the work and the work as a whole lack the requisite creative spark necessary for protection under the Copyright Act.

'1 For The Ages' Commemorative Edition Layout consists of the same selection and arrangement of numbers, words, and short phrases included in *'1 For The Ages' Non-Commemorative Layout.'* In addition, the work includes a basketball-shaped graphic design and the words "LIMITED," "EDITION," and "COMMEMORATIVE." Viewed as a whole, this work is *de minimis* for the same reasons as stated in the Board's analysis of *'1 For The Ages' Non Commemorative Layout*. As discussed above, the Applicant has not asserted a claim in the graphic design, and the simple combination of these elements with the unprotectable numbers, words, short phrases, and common property is insufficient to meet the threshold for copyrightable authorship. *See John Muller & Co.*, 802 F.2d at 990 (upholding the Office's refusal to register a logo consisting of four angled lines forming an arrow combined with the word "arrows" in a cursive script, noting that the design lacked the minimal creativity necessary to support a copyright); *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964, 971 (E.D.N.Y. 1950) (concluding that a label containing the words "Forstmann 100% Virgin Wool" interwoven with three fleur-de-lis was not copyrightable); *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769, 772 (W.D. Pa. 1986) (concluding that envelopes printed with black stripes and a few words and lettering did not exhibit the minimal level of creativity to support a copyright registration). Accordingly, we conclude that the individual elements of the work and the work as a whole lack the requisite creative spark necessary for protection under the Copyright Act.

'Marathon Men' with old logo and ***'Marathon Men' with new logo*** contain the words "MARATHON MEN." The lettering that the Applicant selected for these words is a mere variation of typographic ornamentation, and there is no dispute that the individual words are not subject to copyright protection. *See Syrus v. Bennett,* 455 Fed. Appx. 806, 809 (10th Cir. 2011) (concluding that "Go Thunder" and "Let's Go Thunder" "do not reflect the minimal creativity required for copyright protection"). The letter "O" in the word "MARATHON" contains a graphic outline of a basketball player cut from its center, but as discussed above, the Applicant did not create this aspect of the Works. Viewed as a whole, this simple combination of unprotectable words and an unoriginal graphic design is *de minimis*. Indeed, it is precisely the type of "routine" and "garden variety" arrangement that has been found to be uncopyrightable in cases involving similar types of works. *See John Muller & Co.*, 802 F.2d at 990; *Forstmann Woolen Co.*, 89 F. Supp. at 971; *Magic Marketing, Inc.*, 634 F. Supp at 772. Accordingly, we conclude that the individual elements of these Works and the Works as a whole lack the requisite creative spark necessary for protection under the Copyright Act.

'Syracuse Marathon Men' with old logo and ***'Syracuse Marathon Men' with new logo*** are nearly identical to *'Marathon Men' with old logo* and *'Marathon Men' with new logo*. In both cases, they combine the short phrase "SYRACUSE MARATHON MEN" with a graphic outline of a basketball player superimposed on the letter "O" in the word "MARATHON." Viewed as a whole, these Works are *de minimis* for the same reasons stated in the Board's analysis of *'Marathon Men' with old logo* and *'Marathon Men' with new logo*. The simple addition of the word "SYRACUSE" does not make these Works sufficiently creative to satisfy the threshold for copyrightable authorship. *See Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) ("the only aspects of [a derivative work] that are entitled to copyright protection are the non-trivial, original features, if any, contributed by the author or creator"). Accordingly, we conclude that the individual elements of these Works and the Works as a whole lack the requisite creative spark necessary for protection under the Copyright Act.

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: *'1 For The Ages' Text*; *'1 For The Ages' Non-Commemorative Layout*; *'1 For The Ages' Commemorative Edition Layout*; *'Marathon Man' with old logo*; *Marathon Man' with new logo*; *Syracuse Marathon Man' with old logo*; and *'Syracuse Marathon Man' with new logo*. This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
Erik Bertin
Copyright Office Review Board