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January 25, 2001

Jason J. Young, Esq.
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Ann Arbor, MI 48105-1562

Re: FOXTROT #720
Control Number 60-707-7798(Y)
JITTERBUG #721-A
Control Number: 60-707-9079(Y)

Dear Mr. Young:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated August 8, 2000, appealing a refusal to register the works entitled "FOXTROT #720" and "JITTERBUG #721-A" on behalf of your client, Bird Brain, Inc. The Board has carefully examined the applications, the deposits, and all correspondence from your firm concerning these applications and has concluded that it must affirm the Examining Division's decision to deny registration of these works. The Board concludes that JITTERBUG #721-A is embodied in the prior application of JITTERBUG #721 and as a derivative work of this prior registration, does not contain any additional creative authorship, but rather merely deletes an element from the original work. The application for the work entitled FOXTROT #720 is also denied because is does not meet the minimum level of creative authorship necessary to sustain a copyright registration.

Administrative Record

JITTERBUG #721-A

The initial applications for registration, along with the deposits for JITTERBUG #721, JITTERBUG #721-A, RHUMBA #722, and CHA CHA #724 were received by the Copyright Office on May 5, 2000. In a letter dated May 10, 2000, Visual Arts Section Examiner Helen Livanios rejected the four applications stating that they were

useful articles" which did not contain any separable features that are copyrightable.

You filed a request for reconsideration on May 17, 2000, disagreeing with the earlier refusal on all grounds. You disputed the examining attorney's characterization of the works as "useful articles" by pointing out that the sprinklers should be considered fountain sculptures. In addition, you contended that even if the works *were* considered "useful articles," they properly met both the physical and conceptual separability tests required to gain copyright protection. It was claimed that "physical separability of the sprinkling function of said works from the aesthetic elements is achieved by the ordinary means of turning off the water supply or disconnecting the article from a common garden hose." You argued that the unique sculptures that comprised the sprinklers were unnecessary to the function of the articles as sprinklers.

Examining Division Attorney Advisor Virginia Giroux responded in a letter dated June 22, 2000. Ms. Giroux agreed with your assertion that three of the four works are garden sculptures that are sold for decorative or ornamental purposes. Therefore, registration was issued as of May 5, 2000, for JITTERBUG #721, RHUMBA #722, and CHA CHA #724. However, Ms. Giroux refused to register JITTERBUG #721-A because "it is a simplified version of, and is embodied in JITTERBUG #721" and even if considered separately, it would not contain enough original sculptural authorship necessary to be registered. As further explanation for the refusal, she stated that this work was merely a combination of triangles and spheres, which are familiar and common shapes not rising to the level of the creativity and originality necessary for copyright registration.

A second appeal regarding JITTERBUG #721-A was filed on August 8, 2000, primarily to contest the rejection based on originality. You recognized that the rejection based on the "embodiment" argument was plausible, but desired the removal of the originality rejection to allow Claimant to protect against infringers who copy major portions of the original JITTERBUG #721. You also renewed the argument that the Copyright Office, in rejecting the work, has blended the concepts of "originality" and "creativity" in such a way as to improperly deny registration in this case.

FOXTROT #720

The Copyright Office received the initial application for registration of FOXTROT #720 on May 9, 2000. In a letter from Visual Arts Examiner Wayne E. Crist dated May 11, 2000, this application was rejected because the item was a "useful article" and did not contain any separable features that are copyrightable.

On behalf of your firm, Christopher A. Mitchell filed a request for reconsideration in a letter dated June 2, 2000, disagreeing with the refusal to register the work based on its status as a useful article. Mr. Mitchell asserted that the Examining Division engaged in arbitrary

application of the separability guidelines because of its earlier recognition that four sprinkler sculptures contained separable elements, even though subsequently refused for a lack of the requisite creativity in those separable elements. In addition, Mr. Mitchell argued that even if the work was deemed to be a useful article, the work in its entirety constitutes a copyrightable sculpture.

In a letter dated July 19, 2000, Ms. Giroux concluded after considering Mr. Mitchell's arguments and evidence that the work FOXTROT #720 was not a useful article because the work was a garden sculpture sold for decorative and ornamental purposes. However, even with the recognition that the item was not a useful article, Ms. Giroux concluded that the work does not contain a sufficient amount of original sculptural authorship to support copyright registration. This conclusion was supported by the fact that the work was simply made up of circles and cylinders, and arranged with various colors; this simple arrangement of common and familiar shapes did not rise to the level of original authorship necessary for registration.

You filed this combined second appeal on August 8, 2000. You expressed your impression that the Examining Division was blending the concepts of originality and creativity "in a manner resulting in the misapplication of their respective standards." The assertion that FOXTROT #720 was sufficiently original to warrant copyright registration was renewed, stating that "virtually any distinguishable variation created by an author in an otherwise unoriginal work of art will constitute sufficient originality to support a copyright," *citing* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2nd Cir. 1951) and Feist Publications v. Rural Tel. Serv. Co.,,499 U.S. 340 (1991).

Your letter of appeal also disagreed with the Examining Division's refusal to register the work because it consisted of mere triangles, cylinders, and spheres, claiming that the test for a "minor variation" is applicable for *individual* simple shapes and not for more complicated works as a whole.

Discussion

JITTERBUG #721-A

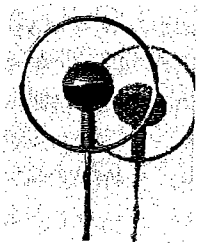
After a full review of the works and evidence submitted, the Board of Appeals concludes that the rejection of the applications for registration of both works, JITTERBUG #721-A and FOXTROT #720, must be affirmed. The basis for rejection of JITTERBUG #721-A is that this work is embodied in the prior registration for JITTERBUG #721. In failing to meet the requisite level of creativity for a derivative work, the Board finds that this work fails to add any creative authorship necessary to support a registration for a derivative work. Rather it simply removes a geometric shape from the previously registered work.

The JITTERBUG #721-A sculpture consists of a triangular shaped copper tube attached to a cylindrical shaped pole. Attach to the end of the pole and suspended within the interior of the triangle, is a silver circular sphere. The portion of the tubing below the triangle also contains some thin copper tubing wrapped around it. The accepted registration of JITTERBUG #721 similarly consists of all of these elements with three minor variations: 1) the ball appears to be a copper color; 2) there is an inverted copper triangular shape under the top triangle that is attached to the center tube; and 3) within the inverted triangle, there is additional thin, copper tubing wound around the center tube. The application for JITTERBUG #721-A merely deletes the latter two elements and alters the color of the ball. All of the elements in JITTERBUG #721-A, except for the change in color of the ball, are embodied in the registration of JITTERBUG #721. There is not, therefore, sufficient additional authorship in JITTERBUG #721-A to allow for its registration as a derivative work. Because the work is denied registration due to the insufficiency of creative authorship necessary for registration of a derivative work (the derivative nature of the work being part of the record of this application: *see*, Affidavit of Courtney A King signed May 16, 2000), the Board need not address the issue of whether this work contains sufficient authorship to support a registration as an independently created original work of authorship.*

FOXTROT #720

The Board has concluded that the Visual Arts Section correctly found that the FOXTROT #720 does not contain sufficient copyrightable authorship to support a copyright registration. Accordingly, registration for this work will be denied.

The FOXTROT #720 design consists of a round copper tube in a circular shape attached to the top of a copper pole. At the point where the round shape attaches to the copper pole, there is a coil of thin copper tubing attached to both and on which sits a round glossy blue ball. This ball is centered within the circle. On the pole below the circle, there is thin copper tubing that is loosely wound around the pole.



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* In footnote 1 of your letter dated August 8, 2000, you observe that "withdrawal of the *originality* rejection, however, would be satisfactory, allowing Claimant to protect against infringers who copy major portions of the original JITTERBUG #721 registration (which has occurred at least once already). Specifically, Claimant asks the Copyright Office to find JITTERBUG #721-A *original* in terms of its sculptural nature, even if not 'original' (and therefor not separately registrable) to derivative author Courtney King in view of its being embodied in the earlier JITTERBUG #721 registration."

The Board makes no determination whether JITTERBUG #721-A would be an original work of authorship if it had not been derived from JITTERBUG #721. This being the final agency action, that means that the Copyright Office takes no position on that issue, an issue that is not necessary to the determination of this appeal. The Board notes, however, that anyone who infringes JITTERBUG #721-A (assuming it contains copyrightable expression) is likely to be infringing JITTERBUG #721 as well, and the registration of JITTERBUG #721 would support a suit for infringement of the copyright in that underlying work.

The Board has considered your arguments pertaining to originality and creativity. The board agrees that the work is original in that it is not copied, but has concluded that the FOXTROT #720 design does not cross the threshold of creative authorship required for copyright protection.

Feist confirmed that, as you acknowledge, there is a low standard for determining the copyrightability of a work. The ruling also explicitly recognized, however, that some works, such as white-page, alphabetical listings of phone books, fail to meet that low standard for copyrightability. 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 works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* At 359.

Even prior to Feist, Copyright Office registration practices recognized that works with only a *de minimis* amount of authorship are not copyrightable. See Compendium of Copyright Office Practices, Compendium II, § 202.02(a)(1984). With respect to pictorial, graphic & sculptural works, the class within which this sprinkler design would fall, the Compendium 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)(1984). The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability, *id.*, and that "registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. ... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations." *Id.*

Common geometric shapes, simple designs and mere coloring are not subject to copyright. 35 C.F.R. §202.1(a). The blue colored ball centered in the circular shape and sitting on a common spring-like shape does not reveal a minimal level of creative authorship. These constitute a simple combination of a few simple shapes joined in a symmetrical manner.

While, as you argue, the selection and combination of elements may rise to the level of copyrightability even though the individual elements would not be copyrightable, standing on its own, the FOXTROT #720 design does not "possess more than a *de minimis* quantum of creativity." At best, what creativity may be found in the design appears to the Board to be, in the words of Feist, 499 U.S. at 359, so trivial as to be virtually nonexistent.

The Board finds support for this conclusion in other case law as well. In John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986), the court

upheld a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form". *See also* Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for display not copyrightable `work of art'); Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc., 634 F. Supp. 769 (W.D. Pa. 1986) (envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection); Forstmann Woolen Co., v. J. W. Mays, Inc., 89 F. Supp. 964 (E.D.N.Y. 1950) (label with words "Forstmann 100 % Virgin Wool" interwoven with three fleurs de lis held not copyrightable); The Homer Laughlin China Co. v. Oman, 1991 U.S. Dist. LEXIS 1068; 22 U.S.P.Q. 2d (BNA) 1074; 1991 Copyright Law Decisions (CCH) ¶ 26,772 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection); Jon Woods Fashions v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright); Tompkins Graphics, Inc. v. Zipatone, Inc., 1983 U.S. Dist. LEXIS 14631; 222 U.S.P.Q. (BNA) 49; 1984 Copyright Law Decisions (CCH) ¶ 25,698 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable).

Although you state that the Copyright Office's "error lies in its failure to recognize that even a 'simple arrangement' meets the *creativity* standard by virtue of it *originality*," the Board disagrees. Originality, as explained in Feist, is not simply the absence of copying. In addition to the requirement that a work not be copied, it also entails the presence of some creative spark. Creativity is an integral quality of originality. While the threshold for creative authorship is low, that threshold does exist and is not met by the FOXTROT #720 design.

It is true that, as you argue, the case law supports registration of works based on the selection and arrangement of individual uncopyrightable elements that are combined into a copyrightable whole. The Board, however, finds that this particular work is distinguishable from the works in the cases that you cite. As the court in one of the cases upon which you rely states: "The degree to which a particular jewelry item will contain protected arrangements of elements will certainly vary, and it goes without saying that not all jewelry pieces will contain the spark of originality that is required by our copyright law." Yurman Design, Inc. v. PAJ, Inc., 93 F. Supp.2d 449, 457- 458 (S.D.N.Y. 2000). In each of the cases cited, there was a finding that the quantum of creativity in the selection and arrangement reached a level that supported the copyright. That quantum is not met by the selection or arrangement in the FOXTROT #720. Like the alphabetical arrangement in Feist, the symmetrical arrangement of these unprotected geometric shapes is "entirely typical" and "garden variety." While a "simple arrangement" *may* meet the creativity standard, as Feist holds, some selections and arrangements fall short of the mark. The Board is unable to recognize in the FOXTROT #720 design any contribution by the designer that is "more than merely trivial." The standard

shapes are merely centered in the design. Similarly, the circle, the blue ball, the spring-shaped wire and the straight copper tube are simple geometric shapes arranged in a common and completely symmetrical manner. The combination of the shapes form a simple arrangement which reveals a *de minimis* amount of creativity.

For the foregoing reasons, the Copyright Office must again refuse registration for a claim to copyright in the work entitled FOXTROT #720 and the work entitled JITTERBUG #721-A. This constitutes final agency action with respect to this claim.

Sincerely,

Nanette Petruzzelli

Nanette Petruzzelli
Chief of the Examining Division
for the Appeals Board
United States Copyright Office