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June 30, 2000

Elio F. Martinez, Jr. Esq.
Lucio, Mandler, Croland, Bronstein
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701 Brickell Avenue
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Miami, FL 33131

Re: VERSUS GIANNI VERSACE DESIGN
GIANNI VERSACE DESIGN
ESTANTE DESIGN
GIANNI VERSACE COUTURE DESIGN
Control No. 60-601-7440(S)

Dear Mr. Martinez:

I am writing on behalf of the Copyright Office Board of Appeals in response to your letter dated August 19, 1998, appealing a refusal to register four Versace labels. The letter was addressed to the Board and constituted the second appeal to the refusal to register the four works entitled: VERSUS GIANNI VERSACE DESIGN; GIANNI VERSACE DESIGN; ESTANTE DESIGN; and GIANNI VERSACE COUTURE DESIGN.

The Board has examined the four claims and considered all correspondence from your firm concerning these works. After carefully reviewing the claims, the Board affirms the Examining Division's decision to refuse registration.

Administrative Record

On November 5, 1996, seven applications, fees, and deposit copies were submitted seeking registration of seven label designs. In a letter dated March 13, 1997, Visual Arts Examiner William Briganti wrote the applicant refusing registration for six of the designs. The designs refused registration were considered to lack the "minimum amount of original artistic material." Ideas, words, short phrases, familiar symbols and designs could not support a copyright.

In a letter dated July 9, 1997, signed by Mr. Stiphany, an appeal was made of the six rejections. The appeal letter began with a discussion of the minimal level of creativity required to support a copyright, citing, among others, Feist Publications, Inc. v. Rural Tel.Serv. Co., 499 U.S. 340 (1991), and three fabric cases, Softra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092 (2nd Cir. 1974); Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315 (2nd Cir. 1969); and Design v. Lynch Knitting Mills, Inc., 689 F.Supp. 177 (S.D.N.Y. 1988). The letter continued that layout of individual elements may also support a copyright, citing Reader's Digest Assoc. Inc. v. Conservative Digest, Inc., 821 F.2d 800 (D.C. Cir 1987). The letter then addressed the creativity present in each of the six designs, and ended with a conclusion that they were similar to the one design which had been registered.

In a letter dated April 6, 1998, Attorney Advisor Virginia Giroux, reaffirmed the refusal to register four of the labels, while authorizing the registration of two. After describing the four labels which were refused registration, Ms. Giroux stated that simple variations of standard designs and their simple arrangement could not support a copyright claim, citing John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986), and Jon Woods Fashions Inc. v. Curran, 8 USPQ 2d 1879 (S.D.N.Y. 1988). The labels in this case failed to meet even the low threshold established in Feist, supra, and other cases cited, such as Reader's Digest, supra, and the fabric cases, involved works which were more complex.

In a letter dated August 19, 1998, you appealed to the Board of Appeals the refusal to register the four labels. After recounting the prior administrative activity regarding these four claims, your letter asserts that the level of creativity required to support a copyright is low, citing the same cases identified in the first letter. The Copyright Office's conclusion that "[e]ven the simple arrangement of these familiar shapes and designs together with the letter and coloring " is insufficient to "rise to the level of copyrightability" is criticized as contrary to the cited case law. The letter also argues that there was no distinction between the four labels which were refused registration, and the three labels which were registered.

De Minimis Authorship

The Board of Appeals has determined that the design elements in the four labels denied registration do not exhibit copyrightable authorship. As you state, originality for copyright purposes requires only a minimum level of creativity. Feist Publication, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) (only a modicum of creativity is necessary for copyrightable expression). However, the Board cannot agree that these four labels meet even that minimum requirement. The 1991 Supreme Court ruling in Feist, supra, confirmed that although there is a low standard for determining the copyrightability of a work, some works fail to meet that standard. The Court held that the originality required for copyright protection consists of "independent creation plus a modicum of creativity." Id. at 346. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimus quantum of creativity," Id. 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. The Court also recognized that some works, such as a "garden-variety white pages directory devoid of even the slightest trace of creativity," are not copyrightable. Id. at 362.

Section 202.1(a) of the Copyright Office regulations, 37 C.F.R. § 202.1(a), codifies a longstanding application of these principles. Section 202.1 provides:

> The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:
> (a) Words 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;...

Most of the design elements of these four labels are not copyrightable under the above standards. VERSUS GIANNI VERSACE DESIGN consists of the word "VERSUS" in large lettering under which is the signature of Gianni Versace in his own handwriting all surrounded by a border of two concentric thick and thin lined rectangles. GIANNI VERSACE DESIGN consists of the name "GIANNI" above the name "VERSACE" in block lettering surrounded by a rectangle border consisting of a checkered pattern around a thin line rectangle. ISTANTE DESIGN consists of the "ISTANTE" in red lettering superimposed upon the work "ISTA" in black lettering, all of which are placed on a black background. GIANNI VERSACE COUTURE DESIGN consists of the name "GIANNI" above the name "VERSACE" in block lettering beneath which is place the word "COUTURE" in gold letters, all of which is surrounded by a rectangular border consisting of a checkered pattern surrounding two thin lined rectangles, one gold, and one white. All the elements in these works consist of names, lettering, and familiar geometric shapes and designs, and as such, cannot support a copyright claim.

A long line of cases supports the principle set forth in section 202.1(a) and the decision in this case not to register the four labels. 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 angles lines forming an arrow, with the work "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'); DBC of New York, Inc. v. Merit Diamond Corp., 768 F.Supp. 414, 416 (S.D.N.Y. 1991)(upholding refusal to register jewelry design and noting that "familiar symbols or designs are not entitled to copyright protection," citing 37 C.F.R. §202.1); 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, 22 USPQ 2d 1074 (D.C.DC 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 USPQ 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., 1984 Copyright Law Decisions (CCH) section 25,698 (E.D. Pa. 1983) (collection of various geometric shapes not copyrightable).

Copyright Office registration decisions made on the merits of each work.

Applicant initially submitted seven labels for registration, of which only one was registered. On the first appeal, Ms. Giroux registered two of the labels, and continued the denial of registration on four of the labels. In your appeal letter, you argue there is no distinction between the labels which were registered, and those which were refused registration.

As an office of expertise, the Copyright Office does try to maintain consistent and uniform standards. However, the registration decision on each work must be made on the specific merits of each work, and the Copyright Office does not generally compare works in making its determinations. Nevertheless, since you have raised this argument, the Board will address the issue.

Your appeal letters cite three fabric cases involving simple geometric patterns: Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092 (2nd Cir. 1974); Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315 (2nd Cir. 1969); Design v. Lynch Knitting Mills, Inc., 689 F.Supp. 177 (S.D.N.Y. 1988). Your letters are essentially correct that these cases establish a low level of creativity for simple geometric patterns. The reviewing officials believed the borders of the three labels which were registered met this low threshold. The Board of Appeals has not revisited whether these registrations should have been made, and it should not be presumed that the Board would have made the same decision.

The four labels denied registration do not meet even this low threshold of creativity. Either they lack borders entirely, or the borders consist merely of straight lines and/or a checkered pattern. As a result, these labels are distinguishable from the labels which were registered.

This letter constitutes final agency action.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
U.S. Copyright Office