United States Copyright Office
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December 27, 2006

Ralph T. Lilore, Esq.
371 Franklin Avenue
Third Floor, P.O. Box 570
Nutley, New Jersey 07110

Re: DIFFRACTION GRATING - REGISTERED RAINBOW
Copyright Office Control Number: 61-202-4826 (L)

Dear Mr. Lilore:

I write on behalf of the Copyright Office Review Board ("Board") in response to your Second Request for Reconsideration in which you requested the Copyright Office ("Office") to reconsider its refusal to register a graphic design entitled "Diffraction grating - Registered Rainbow," ("Registered Rainbow").[1] The Office received your request on March 3, 2005. The Board has carefully examined the application, the deposit and all correspondence concerning this application, and affirms the denial of registration of this work.

I. DESCRIPTION OF WORK

"Registered Rainbow" consists of two rectangles (a large rectangle next to or – depending upon how the work is placed – above or below a narrow rectangle of the same length) and three small squares (placed at apparently equidistant spaces on the narrow rectangle) reproduced on a foil material, which is silver in color. Apparently due to the nature of the foil material, the large rectangle and the three small squares display, in your words, "a shimmering holographic rainbow effect exhibiting various colors of the rainbow depending upon eye placement." As your letter to the Review Board states, "the work comprises three (3) squares and two (2) rectangles, all located within a large rectangle, juxtaposed as indicated, and having a shimmering, pleasant, ever-changing rainbow effect, the colors and arrangement of which depend upon the position of

[1] In 2004, the Copyright Office published a new regulation governing reconsideration of decisions to refuse registration. Final Rule, Reconsideration Procedure, 69 Fed. Reg. 77636 (Dec. 28, 2004). Among other things, that regulation changed the name of the Copyright Office Board of Appeals, to which you addressed your letter, to the Copyright Office Review Board, and changed the name of the procedure from "appeal" to "request for reconsideration."

the work in relation to the eye of the viewer." A photographic image of "Registered Rainbow" appears below:

II. ADMINISTRATIVE RECORD

A. Initial Application and the Office's Refusal to Register

On February 23, 2004, the Copyright Office received applications, deposits and fees for registration of a claim to copyright in "Registered Rainbow" on behalf of your client Crown Roll Leaf, Inc. Although the space set aside for a title in space 1 of the application was left blank, under "Nature of this Work" the application stated, "REGISTRATION OF DIFFRACTION GRATING.[2] Space 6a of the application ("Preexisting Material. Identify any preexisting work or works that this work is based on or incorporates") stated, "High frequency diffraction grating." Space 6b ("Material Added to this Work. Give a brief, general statement of the material that has been added to this work and in which copyright is claimed") stated, "Registered eye marks are placed at specific intervals outside of the rainbow grating. They are read by a reading device to accomplish perfect registration of images and to avoid production flaws."

In a letter dated April 9, 2004, James Shapleigh, Copyright Examiner, refused registration because the design lacked the authorship necessary to support a copyright claim. (Letter from Shapleigh to Waitts of 4/9/04, at 1). Mr. Shapleigh explained that copyright protects original

[2] Subsequently, you submitted an otherwise identical application with the title "Registered Rainbow." *See* letter from Lilore to Shapleigh of 4/29/04, at 3.

works of authorship, where "original" requires the work to have been independently created and to possess a minimal degree of creativity. *Id.* at 1 (citing Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991)).

Mr. Shapleigh stated that to satisfy the creativity requirement, a work of the visual arts must contain a minimum amount of pictorial, graphic, or sculptural authorship. He clarified further that copyright did not protect familiar symbols or designs; basic geometric shapes; words and short phrases, such as names, titles, and slogans; or mere variations of typographic ornamentation, lettering, or coloring, citing regulation 202.1. Additionally, he asserted that under section 102(b) of the copyright law, copyright did not extend to any idea, concept, system, or process which may be embodied in a work. *Id.* at 1. Citing Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), and Feist, Mr. Shapleigh stated that neither the aesthetic appeal or commercial value of a work, nor the amount of time and effort expended to create a work are factors that are considered under the copyright law. The question, he asserted, was whether there was sufficient creative authorship within the meaning of the copyright statute and settled case law. Applying those standards, Mr. Shapleigh concluded the work could not support a claim to copyright. *Id.* at 1.

B. First Request for Reconsideration

In a letter dated April 28, 2004, you responded to the initial refusal to register. You stated your belief that there was confusion over the nature of the work. (Letter from Lilore to Shapleigh of 4/28/04, at 2). You described the work as displaying "a juxtaposition of certain geometric shapes against one another. It comprises a large rectangle in which a somewhat smaller rectangle occupies most of the space. *** This somewhat smaller rectangle is a holographic rainbow diffraction grating, which exhibits various colors of the rainbow depending upon eye placement. *** Thus, the work comprises three (3) squares and two (2) rectangles, all located within a large rectangle and juxtaposed as indicated." *Id.* at 2

You argued that works of juxtaposed geometric shapes are quite well known as being registrable. You cited two artists, Piet Mondrian and Joseph Albers as using geometric shapes in their creations. *Id.* at 2. You asserted, moreover, that four other registrations made by your client consisted of similar arrangements of rectangles and squares.

After reviewing your first request for reconsideration, Examining Division Attorney Advisor Virginia Giroux responded in a letter dated November 4, 2004. Ms. Giroux began by stating that the work did not contain a sufficient amount of original and creative artistic or graphic authorship upon which to support a copyright registration. (Letter from Giroux to Lilore of 11/4/04, at 1.) Citing Feist, she stated that a work must not only be original, but must possess more than a *de minimis* quantum of creativity. *Id.* at 1. She elaborated that originality, as interpreted by the courts, meant that the authorship must constitute more than a trivial variation of public domain elements, citing Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d

Cir. 1951). *Id.* at 1-2. She stated that in applying that standard, the Copyright Office examines a work to determine whether it contains any elements, either alone or in combination, on which a copyright can be based. She added that because the Copyright Office does not make aesthetic judgments, the attractiveness of a design, its uniqueness, its visual effect or appearance, the time, effort, and expense it took to create, or its commercial success in the marketplace, are not factors in the examining process. The question, she said, is whether there is sufficient amount of original and creative authorship within the meaning of the copyright law and settled case law. *Id.* at 1.

She described the work in question as a holographic[3] design, silver in color, consisting of a large rectangle which exhibits colors of the rainbow depending on eye placement. To the right of the large rectangle is a smaller narrow rectangle of the same length and color within which is contained three small silver squares. She stated that squares and rectangles, no matter what their size or shape, or any minor variation thereof, are common and familiar geometric shapes, in the public domain, and are not copyrightable, citing Copyright Office regulation, 37 CFR § 202.1. Moreover, she further noted that the coloring per se is also not copyrightable. She elaborated that the simple combination and arrangement of the two rectangles and three squares, coupled with their coloring, did not rise to the level of copyrightable authorship necessary to sustain a copyright registration. *Id.* at 2. Finally, she noted that the design is *de minimis* consisting of public domain elements arranged in a rather simple configuration, citing Compendium II, Copyright Office Practices, sec. 503.02(a). *Id.* at 2.

Ms. Giroux stated that the above principles are confirmed by several judicial decisions. The authorities included John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F2d 989 (8th Cir. 1986)(a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below); 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 fleur-de-lis held not copyrightable); Homer Laughlin China Co. v. Oman, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register "gothic" pattern composed of simple variations and combinations of geometric designs due to insufficient creative authorship to merit copyright protection); Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988)(a design consisting of two inch stripes, with small grid squares superimposed upon the stripes); and Tompkins Graphics, Inc. v. Zipatone, Inc., 222 U.S.P.Q. 49 (E.D. Pa. 1983)(a collection of various geometric shapes held not copyrightable). *Id.* at 2.

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[3] It is not clear to the Board whether "holographic" accurately describes the nature of the rainbow image or any other aspect of the work. *See* The American Heritage Dictionary 839 (2000) (defining "holographic" as "of or relating to holography or holograms," and defining "holography" as "A method of producing a three-dimensional image of an object by recording on a photographic plate or film the pattern of interference formed by a split laser beam and then illuminating the pattern either with a laser or with ordinary light.") The Board can discern no three-dimensional image produced by viewing the work in question, but considers the question of whether the "rainbow" image is three-dimensional or holographic to be immaterial to the issues of copyrightability and registrability.

She conceded that while it is true that even a slight amount of creativity will suffice to obtain copyright protection, the Nimmer treatise, 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 2.01(B)(1998), provided: "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." She concluded the work in issue fell within this narrow area. *Id.* at 2.

Likewise, she stated that the Copyright Office believed even the low requisite level of creativity required by Feist was not met by the artistic and graphic elements of the surface of the work, together with their simple coloring and arrangement. *Id.* at 2. Moreover, she acknowledged that the Copyright Office accepted the principle enunciated in Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir.1989) that a work should be viewed in its entirety. However, she stated that even under the Atari standard of review, the arrangement and combination of the two rectangular and three square shapes coupled with their coloring, did not rise to the level of copyrightability necessary to support a copyright registration. *Id.* at 2-3. Furthermore, she stated that it was not relevant that "Registered Rainbow" involved choices, because it was not the possibility of choices that determined copyrightability, but whether particular resulting expression contained copyrightable authorship. In this case, it did not. *Id.* at 3.

Finally, Ms. Giroux declined to consider the four submitted certificates of registration of allegedly similar works as being pertinent to considering registration of the design at issue. *Id.* at 3. She stated that each work is examined independently and on its own merits. Nevertheless, she added that the Office had retrieved the deposit copies of each work and determined each work contained sufficient copyrightable authorship to support a registration. The work in issue, however, did not. *Id.* at 3.

C. Second Request for Reconsideration

In a letter dated February 28, 2005, you submitted a second request for reconsideration. Accompanying you letter was a declaration of John Hazard, Esq. which likewise asserted that the work in issue was copyrightable.[4] Your letter described the work as "three (3) squares and two (2) rectangles, all located within a large rectangle, juxtaposed as indicated, and having a shimmering, pleasant, ever-changing rainbow effect, the colors and arrangement of which depend upon the position of the work in relation to the eye of the viewer." (Letter from Lilore to the Review Broad of 2/28/05 at 1).

You argue in your letter that Feist held that the selection, arrangement, or compilation of otherwise uncopyrightable elements is copyrightable. *Id.* at 2. With respect to the work at issue, you argue that there is an original selection and arrangement of squares and rectangles with a

[4] It appears that Mr. Hazard's declaration was intended to be considered as expert testimony in support of registration. The Board does not view copyrightability to be an issue on which expert testimony would be helpful or appropriate in Copyright Office proceedings. However, the Board will consider Mr. Hazard's declaration as additional argument of counsel.

placement in one of the large rectangles of a shimmering rainbow hologram which changes its visual impact with changes in location of the viewer. You claim this meets the test set out in Feist. *Id.* at 2.

You also cite the case of Prince Group, Inc. v. MTS Products, 967 F. Supp. 121 (S.D.N.Y. 1997), as supporting registration of "Registered Rainbow." You contend that case involved a pattern of polka dots in an apparent randomized selection, and the polka dots were slightly non-circular. You state that the court found that the plaintiff's placement of the polka dots in a pattern of imperfect and conflicting diagonal lines, giving the appearance of randomness, established a sufficient level of creativity for copyright validity. *Id.* at 3.

Finally, as noted above, you submitted a supporting undated declaration from attorney John Hazard asserting that your client's work was copyrightable. (Declaration of John W. Hazard) Mr. Hazard describes "Registered Rainbow" as diffraction gradient foil containing numerous color designs as well as basic geometric shapes (squares and rectangles). *Id.* at 2.

Mr. Hazard states that in his opinion, "Registered Rainbow" is original and copyrightable. *Id.* at 3. He cites Feist or the proposition that the threshold of originality for copyrightable works is relatively low in that even a slight amount of originality is sufficient for copyright protection. Citing Catalda, 191 F.2d at 102-03 (2d Cir. 1951), he states that all "that is needed to satisfy [the originality requirement under] both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own'." Citing his own treatise,[5] Mr. Hazard asserts that originality requires a stamp of one's own individuality. *Id.* at 3.

Mr. Hazard cites a number of attributes of "Registered Rainbow" which he contends establishes the requisite individuality to constitute originality. He describes the work as projecting colors that appear in swirling, interweaving and zigzag line designs that are unique and distinguishable from the glint of plain metallic surfaces. He contends that the originality contributed by the author is the instilled spectrum ability that produces the shining colors made apparent by an inspection of the work from any angle. *Id.* at 4. The foil work, he contends, may be compared with works of modern art and stained glass creations in churches and other buildings.

Mr. Hazard also argues that the selection and arrangement of the work satisfies the requirements of Feist. He asserts that the selection (i.e. the intertwining, mixing, blending, and merging) and arrangement of the colored lines contained in the work resulted in the creation of an original work. *Id.* at 5. He further argues that Crown Roll Leaf's work is not a result of any manufacturing method, but rather of the conscious and artistic efforts of Crown's designers, who

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[5] John Hazard, Copyright Law in Business and Practice, para. 2:5 (Supp)(2005).

created a multi-colored design.[6] *Id* at 6. He asserts that this work compares favorably with the work found copyrightable in Folio Impressions, Inc. v. Byer of California, 937 F.2d 759 (2d Cir. 1991), which consisted only of a straight row of roses. Likewise, Mr. Hazard states that in Boisson v. Banian, Ltd., 273 F.3d 262 (2d Cir. 2001) the court held that an original combination or arrangement of colors could support copyright protection. *Id.* at 7.

Mr. Hazard argues further that the work is purely a decorative product which is purchased by people interested in color projecting foil, and this fact should be considered as strong evidence of its originality. *Id.* at 7. Finally, Mr. Hazard contends that works found lacking in copyrightable authorship are rare, citing Atari, 888 F.2d 879.

III. DECISION

After reviewing the application and deposit submitted for registration and the arguments that you have presented, the Copyright Office Review Board affirms the Examining Division's refusal to register "Registered Rainbow." The Board concludes that the work does not contain sufficient creative authorship to support registration.

A. Analysis of the Work

1. Multicolor designs produced by physical properties of the materials utilized by Crown Roll Leaf

Of the elements of "Registered Rainbow" cited by you and Mr. Hazard as supporting copyrightable authorship, one of the most prominent elements is the multi-colored patterns produced by shifting eye angle and lighting source. However, this aspect of the work appears to have been disclaimed on the application, and in any event does not qualify for copyright protection because it is not "fixed" within the meaning of Section 102(a) of the copyright law and is simply a function of the physical properties of the material from which the work is made.

As noted above, the application for registration stated, in Space 6a, that "Registered Rainbow" was based on a preexisting work: "High frequency diffraction grating." In Space 6b, the application described the material added to the work – i.e., the matter in which copyright is

[6] It does not appear that Mr. Hazard, an attorney in private practice, actually has personal knowledge of these factual assertions, nor can the Board find anything in the record that provides factual information on this matter.

claimed: "Registered eye marks are placed at specific intervals outside of the rainbow grating. They are read by a reading device to accomplish perfect registration of images and to avoid production flaws."

It appears to the Board that the multi-colored patterns cited by you and Mr. Hazard are part and parcel of the preexisting "high frequency diffraction grating," and therefore not part of the claim submitted for registration. They certainly do not appear to be described in Space 6b, which sets forth the new matter in which copyright was claimed.

Even if the multi-colored patterns are part of the claim submitted for registration, however, they are not eligible for copyright protection. They are ephemeral, and relate to the diffractionating properties of the foil. Thus, it appears that the colors and patterns produced are not created by Crown Roll Leaf, but are produced by the ability of the material to diffract ordinary light into the spectrum of the rainbow, and the patterns produced relate directly to eye placement, available reflective images, and the source and direction of the light. When the eye placement or light source is changed, the color pattern disappears. Possibly, if light remains available, a new pattern will appear, but the new pattern will be solely the result of the light source and eye placement. Claiming copyright in such multicolored patterns would be the same as claiming copyright in pictorial images created by a mirror, or in a spectrum produced by light passing through a prism. Such images produced by a mirror are not created by manufacturers of the mirror or prism, but by the physical properties of the mirror or prism. While Crown Roll Leaf may consciously be taking advantage of the laws of physics, it cannot claim exclusive rights in the results of those natural laws. Indeed, it is difficult to imagine that any of the particular patterns of color that one sees, depending upon the light source and the angle at which one holds the work, were "authored" by Crown Roll Leaf or anyone. Indeed, if there were an "author" it would more likely be the person holding the work (just as the person who holds a mirror or a prism would more likely be the "author" of the image in the mirror or the spectrum displayed by the prism.[7]

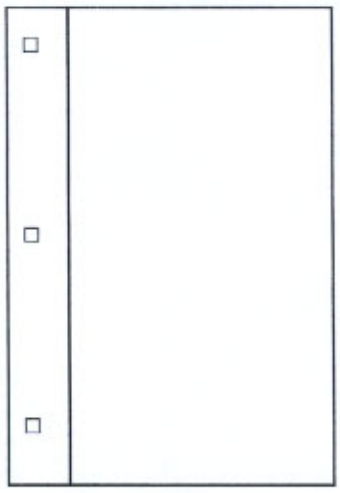
Section 102(a) of the copyright law requires that works of authorship which are eligible for copyright be "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." The House Report concerning the 1976 Copyright Revision Bill, H.R. Report No. 94-1476, p. 52 (1976), provided: "an unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102." Likewise, *Nimmer* § 2.03(B) states that "certain works of conceptual art stand outside of copyright protection." In footnote 23a of the

[7] The Board does not mean to suggest that those persons could actually claim authorship in such images, but only to point out the frailty of Crown Roll Leaf's claim of authorship in what one sees when one looks at "Registered Rainbow."

above section, Nimmer states: "An example occurred when an Anti-Object artist threw colored streamers into the sky from an airplane, calling 'attention to the higher spirit of mankind' by 'sculpting in space'." *(Id.)* Since the color patterns created by the foil in "Registered Rainbow" are never fixed in the copyright sense, this feature cannot be considered in assessing the authorship in the work.

2. Combination of two rectangles and three squares

Given that the color patterns produced by the diffraction of light must be excluded from consideration of copyrightable authorship due to the reasons cited above, the subject work consists of a simple arrangement of two rectangles and three squares. One of the rectangles is large, and the other is a smaller narrow rectangle of the same length containing three small squares. All the elements are silver in color. As such, the work can be depicted as follows:



For the reasons stated below, copyright protection is simply not available for basic geometric shapes, and simple combinations of such shapes.

B. The Creativity Threshold

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in Feist, 499 U.S. at 345, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. The Court noted that the "requisite level of creativity is extremely low; even a slight amount will suffice." *(Id.)*

However, the Feist Court also ruled that some works (such as the work at issue in that case) fail to meet the standard. 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 a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also,* 37 CFR § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); *Nimmer* § 2.01(B) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support copyright.").

Even prior to the Feist Court's decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium of Copyright Office Practices II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a). With respect to pictorial, graphic and sculptural works, *Compendium II* 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).

In implementing this threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes, such as a square, are not sufficiently creative to sustain a copyright claim. *Compendium II*, § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . ."); *Id.* § 202.02(j) ("Familiar symbols or designs . . . or coloring, are not copyrightable."). *See also, Id.* § 503.03(b) and 37 CFR § 202.1(a).

Moreover, making simple alterations to otherwise standard shapes or familiar designs will not inject the requisite level of creativity. Catalda, 191 F.2d at 102-03 (What "is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"); *Compendium II*, § 503.02(a) ("[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.").

The case law confirms these principles. *See* Forstmann, 89 F. Supp. 964 (reproduction of standard *fleur-de-lis* could not support a copyright claim without original authorship); Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958) (cardboard star with two folding flaps allowing star to stand for retail 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 protection); and Homer Laughlin, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations of geometric designs due to insufficient creative authorship to support copyright registration).

You cite Prince Group, Inc. v. MTS Products, 967 F.Supp. 121 (S.D.N.Y. 1997) as supporting registration of "Registered Rainbow." While the work in that case resembled a polka dot design, as you note in your letter, the design differed from standard polka dots in a number of ways. The polka dots were irregularly shaped, and they were shaded through creation of a crescent of white around half of the perimeter of each of the dots. The dots also consisted of several different colors. The court ultimately concluded that the shape and shading of the dots were sufficiently original to meet the threshold of creativity. 967 F.Supp. at 125. In "Registered Rainbow," color is limited to metallic silver, and the shapes are two basic rectangles and three identical squares. This work is far less complex than the work involved in Prince Group.

Likewise, the cases cited by Mr. Hazard either involve works of greater complexity, or are cited for legal principles not applying to "Registered Rainbow." In Folio Impressions, 937 F.2d 759, the court carefully analyzed the copyrightable content of the work in issue, and found both the Folio rose and the arrangement of the rose in horizontal rows so that the roses face in different directions was sufficiently original to be copyrightable. The nature of the work was substantially different from the simple arrangement of two rectangles and three squares reproduced in "Registered Rainbow." The case of Boisson v. Banian, Ltd., 273 F.3d 262 (2nd Cir. 2001), was cited by Mr. Hazard as providing that a combination of colors can support a copyright registration. This case is inapplicable to "Registered Rainbow" because the Board has concluded that the diffractionating of light due to the physical properties of the foil cannot be regarded as authorship for the reasons stated above. Atari, was cited by Mr. Hazard as establishing the rarity of judicial findings of uncopyrightability in copyright cases. But whatever the percentage of cases may be in which a work is found to be uncopyrightable, the fact remains that, as in Feist and other cases cited herein, findings of uncopyrightability are made with some regularity. In any event, the regularity of judicial findings of uncopyrightablity is not the issue. The issue is solely whether the simple arrangement of two rectangles and three squares in "Registered Rainbow can support a copyright claim. The Review Board concludes that it cannot.

C. Selection, Coordination and Arrangement

It is true that some combinations of common or standard shapes or other unprotectible elements can embody sufficient creativity with respect to how the elements are combined or arranged to support a copyright. *See,* Feist, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination or arrangement). However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. For example, in Jon Woods Fashions, Inc. v. Curran, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988), the district court upheld the Register of Copyrights' decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctly arranged and printed, did not contain the minimal amount of original artistic material to merit copyright protection. Similarly, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines

which formed an arrow and the word "Arrows" in cursive script below the arrow. John Muller & Co. v. New York Arrows Soccer Team, Inc., 802 F.2d 989, 990 (8th Cir. 1986). As the court held in Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003) (rejecting copyright claim in glass-in-glass jellyfish sculptures), "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." Similar to these cases, the Board has determined that "Registered Rainbow" design does not embody the requisite level of creativity with respect to the simple combination of two adjacent rectangles with three squares placed on the narrower of the two rectangles.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the Examining Division's refusal to register "Registered Rainbow." This decision constitutes final agency action in this matter.

Sincerely,

/s/

David O. Carson
General Counsel
for the Review Board
United States Copyright Office