United States Copyright Office
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October 21, 2009

Sylvia A. Petrosky, Esq.
2273 Smith Road
Akron, Ohio 44333

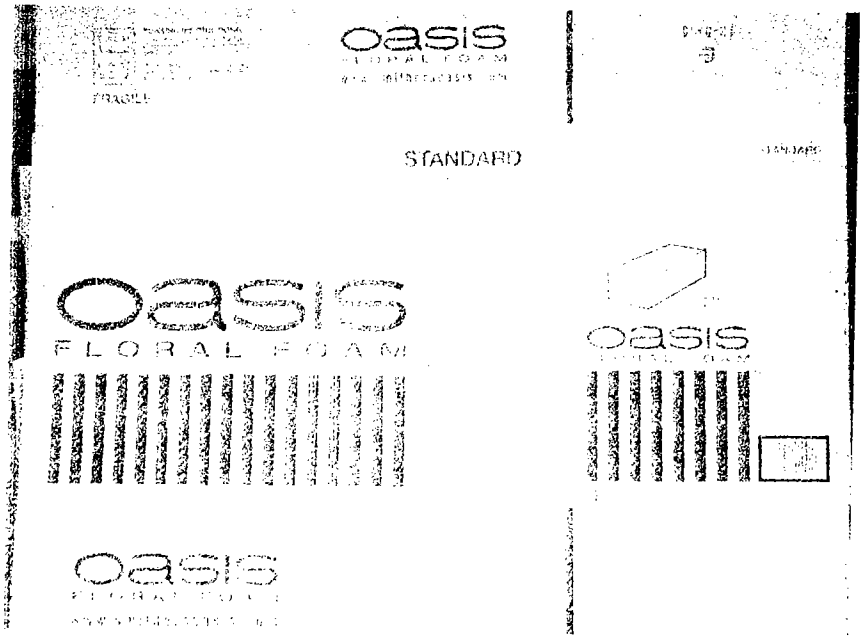
Re: VERTICAL BAR DESIGN PACKAGING
Copyright Control Number: 61-415-684.(P)

Dear Ms. Petrosky:

I write on behalf of the Copyright Office Review Board (Board) in response to your letter, received June 7, 2007, in which you requested a second reconsideration of the Copyright Office's (Office) refusal to register the design entitled VERTICAL BAR DESIGN PACKAGING. 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 THE WORK

"VERTICAL BAR DESIGN PACKAGING," a revision of carton graphics, consists of 17 black rectangular-shaped vertical bars parallel to each other on one side of the packaging carton as well as 8 other black rectangular-shaped vertical bars parallel to each other on the other side of the packaging carton. The overall design also contains a drawing of a simple, small rectangular carton or, more probably, a floral foam brick, drawn to give a 3-dimensional perspective. *See* reference in Letter from Petrosky of 10/23/2006, at 2. A photographic image of "VERTICAL BAR DESIGN PACKAGING" is reproduced below.



II. ADMINISTRATIVE RECORD

A. Initial submission and Office's refusal to register

On April 24, 2006, the Copyright Office received a Form VA application along with the required deposit and fee for the work: "VERTICAL BAR DESIGN PACKAGING" ("the Design"). The submission was made by you on behalf of your client, Smithers-Oasis Company. In a letter dated July 26, 2006, Copyright Examiner, Kathryn Sukites, refused registration of the Design (Letter from Sukites to Petrosky, of 7/26/06). Ms. Sukites found that the Design lacks the authorship necessary to support a copyright claim.

In determining that the Design was not copyrightable, Ms. Sukites cited the Supreme Court's discussion of the Copyright law's originality requirement found in *Feist Publications, Inc. v Rural Telephone Service Co.*, 499 U.S. 340 (1991). She noted that in order for a work to be copyrightable, it must be independently created by the author and contain a certain minimal amount of creative authorship. Ms. Sukites asserted that under section 102(b) of the copyright law, copyright does not extend to any idea, concept, system, or process which may be embodied in a work and that the delineation of material not subject to copyright in the Copyright Office's regulations, 37 C.F.R. § 202.1, excludes familiar symbols or designs, typographical ornamentation, lettering, coloring and mere variations thereof. Letter from Sukites of 7/26/2006, at 1.

Ms. Sukites added that the determination of whether a work is copyrightable has nothing to do with aesthetic or commercial value. Rather, the question is whether there is sufficient creative authorship within the meaning of the copyright statute and settled case law. She cited *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) and, again, *Feist*, 499 U.S. 340 (1991). In closing Ms. Sukites noted that some brand names, trade names, slogans, logos and labels may be entitled to registration under trademark laws, and/or protection under laws relating to unfair competition, and that inquiries regarding trademark protection should be addressed to the Commissioner of Patents and Trademarks. Letter from Sukites of 7/26/2006, at 1 - 2.

B. First request for reconsideration

In a letter dated October 23, 2006, you requested reconsideration of the decision to refuse registration of the Design. (Letter from Petrosky of 10/23/2006, at 1). In this letter, you contended that Ms. Sukites' refusal omitted specific reference to the various elements of the work at issue here and made only general statements regarding the legal criteria for copyrightability. *Id.* You then asserted that the Applicant's Design is original to it and the combination of elements found in the Design meet a sufficient minimum of creativity to warrant copyrightability. *Id.* at 2. You cited copyright's originality requirement as set out in *Feist*, which states:

> [o]riginal, as the term is used in copyright, means only that the work was independently created by the author ..., that it possesses at least some minimal degree of creativity... **To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be.**

citing *Feist*, 499 U.S. at 345 (emphasis added)

You went on to cite *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991) as support for protection of the Design at issue here. You stated that *Folio*, which relied on *Feist*, protected the repeated representation of a public domain image of a rose arranged vertically across a background of a fabric design. Citing *Folio's* acknowledgment [937 F.2d at 764] that the author's "decision to place the rose in straight rows was an artistic decision," you argued that the Design at issue here, consisting of a limited number of vertical bars arranged in a specific fashion as artistic representations of floral foam bricks contained within its packaging, contains at least a minimal amount of pictorial and graphic authorship required for copyright protection. Letter from Petrosky of 10/23/2006, at 2. You then asserted that the work does not consist simply of a familiar symbol, design, basic geometric shapes, or mere variations of typographic ornamentation, lettering or coloring. *Id.*

C. Examining Division's response to first request for reconsideration

After receiving your letter dated October 23, 2006, Attorney Advisor Virginia Giroux-Rollow of the Examining Division reexamined the application, the deposit and all correspondence concerning this application, and affirmed the denial of registration. Ms. Giroux-Rollow determined that the Design at issue here does not contain a sufficient amount of original and creative artistic expression upon which to support a copyright registration. (Letter from Giroux-Rollow to Petrosky of 3/7/2007, at 1).

Ms. Giroux-Rollow first acknowledged that some commercial labels may fall within the category of works that may be subject to copyright protection. However, she went on to cite *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F.2d 541 (2d Cir. 1959), which held that "not every commercial label is copyrightable. It must contain an appreciable amount of original text and/or pictorial material." Ms. Giroux-Rollow noted that although the instant work involves graphic expression on packaging, the general principle enunciated in the *Sara Lee* case applies, namely that "the Copyright Office's position that . . .words, short phrases and expressions... are among the works not subject to copyright protection constituted a fair summary of the law." She then pointed out that this principle is embodied in 37 C.F.R. § 202.1. *Id.*

She went on to cite *Feist* for the principle that a work must not only be original, but must possess more than a *de minimis* quantum of creativity. And, in the case of a design, a certain amount of graphic material must originate with the author. Ms. Giroux-Rollow also explained 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). Letter from Giroux-Rollow of 3/7/2007, at 1. 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 a sufficient amount of original and creative authorship within the meaning of the copyright law and settled case law. *Id.* at 1 - 2.

Ms. Giroux-Rollow further noted that when a work contains pre-existing, previously published, or previously registered material, as is the case in the work at issue here, the new material must contain a sufficient amount of original authorship to be copyrightable. Where only a few changes or additions have been made or where the changes or additions consist of non-copyrightable elements such as common and familiar shapes, words or short phrases, and coloring, or a change in layout or format, registration is not possible. *Id.* at 2. She pointed out that the application submitted

for registration for this work indicates that the new material consists of a "revision of the carton graphics," and that your October 23, 2006, Letter seeks copyright for graphics consisting of a limited number [17] of black rectangular-shaped vertical bars parallel to each other on one side of the packaging as well as 8 other black rectangular-shaped vertical bars parallel to each other on the other side of the packaging. Ms. Giroux-Rollow pointed out that despite your assertion that the bars represent the floral foam bricks contained inside the packaging, the rectangular shapes are common and familiar geometric shapes, or minor variations thereof, which are in the public domain, and therefore, not copyrightable in accordance with 37 C.F.R. § 202.1. She concluded that the simple parallel arrangement of these bars is not sufficient to constitute a copyrightable work of art, but instead constitutes *de minimis* expression; she also cited *Compendium of Copyright Office Practices II,* § 503.02(a) (1984).

Ms. Giroux-Rollow pointed out that the principle referred to in *Compendium II* is confirmed by several judicial decisions, including *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986)(a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below lacked the minimal required creativity to support registration); *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)(upholding refusal to register a design consisting of two inch stripes, with small grid squares superimposed upon the stripes). Letter from Giroux-Rollow of 3/7/2007, at 2 - 3.

Ms. Giroux-Rollow then addressed the suggestion that the arrangement and placement of the vertical bars deserves protection (this suggestion is found both in page 2 of your October 23, 2006, first request for reconsideration, which describes the work as "consisting of a limited number of vertical bars arranged in a specific fashion as artistic representations of floral foam bricks contained within its packaging" as well as in a facsimile communication from Petrosky to Sukites sent on 10/10/2006). Ms. Giroux-Rollow stated that the placement of these elements is in the nature of layout and format and therefore is not copyrightable, citing *Compendium II,* §§ 305.06 and 305.07). She further noted that as a result of a hearing in the Copyright Office in 1981, the Office decided not to change its practice of not registering claims to book designs and concluded that the arrangement, spacing, sizing, and juxtaposition of textual matter which is in book design fell "within the realm of uncopyrightable ideas or concepts." She also pointed out that this practice regarding uncopyrightable ideas or concepts also extends to other simple arrangements of text and/or graphics on a printed page, pages, or entire publications such as that embodied on the packaging for which registration is sought. Letter from Giroux-Rollow of 3/7/2007, at 3, citing ML 260 (enclosed in previous correspondence).

Ms. Giroux-Rollow conceded that it is true that even a slight amount of creativity will suffice to obtain copyright protection. However, she went on to cite 1 M.B. & D. Nimmer, *Nimmer on Copyright* § 2.01(B) (2002) [hereinafter *Nimmer*], which states that "there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright." She also cited *Feist* for its confirmation that some works fail to meet this admittedly low standard. She then concluded the Design at issue here fell within this narrow area. In explaining this conclusion, she stated that the Copyright Office believed even the low requisite level of creativity required by *Feist* was not met by the rectangular-shaped vertical bars added to this work. Letter from Giroux-Rollow of 3/7/2007, at 3.

Moreover, she pointed out that in *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991) the court found that an arrangement of "clip art" roses placed in horizontal rows **facing in different directions against an ornate background** was sufficiently original and creative to be copyrightable. (emphasis in original) Letter from Giroux-Rollow of 3/7/2007, at 3. She then stated that the Office found no comparable authorship in the work at issue here which consists of two sets of rectangular-shaped vertical bars in a simple parallel arrangement against a plain background. *Id.* at 2 - 3.

D. Second request for reconsideration

In a letter dated June 4, 2007, you submitted a second request for reconsideration. Letter from Petrosky of 6/4/2007. After briefly recounting the communications involving the first request for reconsideration, you repeated your assertion that the Applicant's design is original to it and the combination of elements found on its work meet the sufficient minimum of creativity to warrant copyrightability. Additionally, you reiterated the Copyright Act's originality requirement as set out in *Feist*. Letter from Petrosky of 6/4/2007, at 1 - 2, citing *Feist*, 499 U.S. at 345 (1991) (emphasis added).

You then addressed your previous citation of *Folio* in support of protection for the Design at issue here. You asserted that the Office's conclusion that "the *Folio* case involved clip art roses **facing in different directions against an ornate background**" is in error. You argued that the "work" at issue in *Folio* is really only the arrangement of the roses. Letter from Petrosky of 6/4/2007, at 2. You contended that while the court states "against the background" in its consideration of the copyrightability of the arrangement of the *Folio* roses, it also states that the background itself was not considered to be original enough to be copyrightable on the basis that it was likely a hand drawn copy of public domain material. You further cited from *Folio* addressing the background component of Pattern # 1365:

> Even crediting the above testimony, *Folio* insists the district court erroneously found its background simply a photocopy from a public domain document. But, there was ample evidence to support the finding that Sadjan copied the background of Pattern # 1365 from a public domain document. Ms. Bruckert testified that the studio created "documentary designs" from public domain material, and that she believed the source for the background in # 1365 was a document in her studio's possession. Professor Stewart stated that the design was too consistent and regular to have been done by hand in less than several days and concluded that, since Sadjan completed the work in one day, he contributed nothing, not even a trivial variation to the background of Pattern # 1365.
>
> All of this proof was properly relied on by the trial court. As a consequence, it was not clearly erroneous for him to find the background of Pattern # 1365 was not original. *See* Fed. R. Civ. P. 52(a). Judge Newman correctly concluded therefore that the background to design Pattern # 1365 was not copyrightable. *See Feist Publications, Inc.*, 111 S. Ct. at 1287; *L. Batlin & Son, Inc.*, 536 F.2d at 490.

Letter from Petrosky of 6/4/2007, at 2, citing *Folio*, 937 F.2d at 764.

You then cited from *Folio* addressing the copyrightability of the arrangement of the Folio Roses:

> We next discuss the copyrightability of the arrangement of the Folio Roses against the background in Pattern # 1365. The roses were placed in straight lines and turned so that the roses faced in various directions. The pattern thereby made was one of only slight originality. It was derived from an application of a popular mechanical process called "clip art," which consists of a designer cutting out photocopies of the rose, pasting them over the background, and photocopying the result.
>
> Folio argues that Sadjan's placement of the roses was not copied from another source and not done for manufacturing ease, but was the result rather of artistic decision making; hence, original and protectible. In the copyright context, originality means the work was independently created by its author, and not copied from someone else's work. The level of originality and creativity that must be shown is minimal, only an "unmistakable dash of originality need be demonstrated, high standards of uniqueness in creativity are dispensed with." *Weissmann*, 868 F.2d at 1321; *see Feist Publications, Inc.*, 111 S. Ct. at 1287.
> ...
> ...Sadjan's decision to place the roses in straight rows was an artistic decision. Further, there is no evidence that Sadjan copied the placement of the roses from any source. Consequently, the district court's finding that the particular arrangement given the Folio Rose in Pattern # 1365 was not original was clearly erroneous. Although the arrangement may have required little creative input, it was still Sadjan's original work and, as such, copyrightable. *See Feist Publications, Inc.*, 111 S. Ct. at 1287.

Letter from Petrosky of 6/4/2007, at 2 - 3, citing *Folio,* 937 F.2d at 764-765.

You argued that these passages illustrate "just how little creativity supports the mere arrangement of a public domain design - in this case a rose - which was held to be copyrightable." *Id.* You then repeated your assertion that the vertical bars that the Applicant created are artistic representations of the floral foam bricks contained within its packaging. You argued that, as artistic representations, they involve "more creativity than simply the selection of the already existing public domain rose design at issue in *Folio*." In recognition of the Office's previously stated opinion that the vertical bars do not constitute artistic representations of floral foam bricks but instead are public domain rectangles, you offered the alternative argument that since the Applicant has created a limited number of those bars vertically in a specific fashion on its packaging similar to what

occurred in the *Folio* case, the work contains at least a minimum amount of creativity under the *Feist* standard. Letter from Petrosky of 6/4/2007, at 3.

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 the design entitled "VERTICAL BAR DESIGN PACKAGING." The Board concludes that the Design does not contain sufficient creative authorship to support registration.

A. Analysis of the work

1. Preexisting authorship

As an initial matter, the Review Board notes that the application for this work states that the claim is in 2-dimensional artwork in the form of derivative [revised] graphics authorship appearing on a carton. The written text and illustration within the previously referenced facsimile communication from Petrosky to Sukites sent on 10/10/2006, as well as your first and second request for reconsideration, indicate that the "revised carton graphics" consist of the creation and arrangement of a limited number of vertical bars in a specific fashion on the Applicant's packaging.

A derivative work is defined in the statute as one which abridges, condenses, recasts, transforms, or adapts one or more preexisting works. 17 U.S.C. § 101 (definitions). Despite the fact that we do not know what specific preexisting authorship was abridged, condensed, recast, transformed, or adapted and, thus, despite the fact that we cannot say for certain what part[s] of the parallel bars drawing or, perhaps, of the small, simple outline graphic of the rectangular brick were changed or modified, this is of little significance because we find the entire work, *i.e.*, the overall design of the parallel bars appearing in two places and, if this element is being claimed, the simple outline graphic of the brick appearing above one of the sets of parallel bars, uncopyrightable.

2. Feist's originality threshold

As is indicated in the reiteration of arguments made in your second request for reconsideration, any claim in the nature of layout and format of the work that may have been suggested is not at issue in this reconsideration. As such, the originality of the 17 black rectangular-shaped vertical bars parallel to each other on one side of the packaging carton as well as 8 other black rectangular-shaped vertical bars parallel to each other is the critical factor in determining copyrightability. Whether we include or not the simple outline drawing of a brick as an element within the 2-dimensional drawings [and your October 23, 2006, Letter, at 2, does not seem to indicate that to be a claimed pictorial element], the overall drawing would still not rise to copyrightable authorship.

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the previously referenced standard set forth in *Feist*, which notes that the "requisite level of creativity is extremely low; even a slight amount will suffice." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 369 (1991). Despite this low requirement level, the *Feist* Court 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," *Id.* 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 C.F.R. § 202.1(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 II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a); and, with respect to pictorial, graphic and sculptural works, a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Id.*, § 503.02(a).

In asserting authority for the Design's copyrightability, you heavily rely on *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 12991) and you correctly make note of the fact that the background for the roses in the *Folio* case design was not considered original enough for copyright protection in its own right. Letter from Petrosky of 6/4/2007, at 2. However, you mistakenly assert that the image of the rose was also not subject to copyright. *Id.* at 3. In fact, the court explicitly addressed the copyrightability of the Folio Rose and found that "*Folio* owned a copyright in the Folio Rose and was entitled to be protected from infringement" *Folio*, 937 F.2d at 763.

You are also correct that the *Folio* case and the Design at issue here both involve the placement of figures across a straight line. Letter from Petrosky of 6/4/2007, at 3. However, the *Folio* court explicitly made note of the fact that the arrangement that it evaluated involved roses that were "turned so that the roses faced in various directions" *Folio*, 937 F.2d at 764. These two distinctions, the copyrightability of the rose itself combined with the fact that the roses were turned in different directions, contributed to the *Folio* court's finding of originality. However, the Design at issue here does not posses these additional levels of artistic authorship. Unlike the image of the rose in *Folio*, the component figures in the instant case are common and familiar geometric shapes–simple rectangular bars. These basic geometric shapes in themselves are not capable of copyright protection despite your assertion that the bars "represent floral foam bricks." Letter from Petrosky of 6/4/2007, at 3. *See* 37 C.F.R. § 202.1 for the Copyright Office's guiding principle regarding uncopyrightable elements. Similarly, the simple vertical placement of these bars, in an unvarying fashion in a straight line, at two distinct points within the overall design, does not reflect pictorial authorship comparable to that appearing in the *Folio* design. In fact, the simple vertical arrangement of the Design at issue here does not meet the low threshold requirement level for creativity indicated in the *Feist* case.

As we have pointed out, protection is not available for common and/or geometric shapes or symbols. 37 C.F.R. § 202.1(a): copyright not available for familiar symbols or designs, for mere variations of standard lettering or for coloring per se. Copyright is available for authorship–textual, pictorial, or works of the performing arts–not necessarily dependent on individual elements, *e.g.*, words themselves within narrative text (no word per se may be copyrighted) but rather, on whether the relationship of sufficient words in text or the relationship of sufficient graphic elements in 2-dimensional artwork evinces the modicum of creativity–granted, very low–required by *Feist*. The Board agrees with the principle that public domain elements may satisfy the requirement for copyrightable authorship as, or in the form of, a *compilation*, through their selection, coordination, or arrangement. Although the individual components of a given work may not be copyrightable, the Copyright Office follows the principle that works should be judged in their entirety and not judged in terms of the protectibility of individual [possibly uncopyrightable] elements within the work. *See, e.g., Atari Games Corp. v. Oman*, 979 F.2d 242, 244-245 (D.C. Cir. 1992). Works based on public

domain elements may be copyrightable if there is some distinguishable variation in their selection, arrangement, or modification that reflects choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist* at 359. *See also* 17 U.S.C. § 101 (definitions of "compilation" and "derivative work")

There may have been other ways in which the elements of this Design, their shape, size, positioning, orientation, configuration and number could have been chosen. However, it is not the possibility of choices that determines copyrightability; rather, it is whether the resulting expression contains copyrightable authorship. The elements which constitute the Design at issue here, 17 black rectangular-shaped vertical bars parallel to each other on one side of the packaging carton design as well as 8 other black rectangular-shaped vertical bars parallel to each other, individually and in their particular placing and configuration within the overall design appearing on the surface of a carton, do not contain a sufficient amount of creative artistic expression to support a copyright registration. Simple vertical rectangles [bars], placed one next to the other, in two different positions within a given spatial field of possibility, with the possible addition of one small rectangular brick in bare-bones outline form so as to show a third dimension [and the small brick may not even be part of the Design at issue here]–all of this does not rise to the admittedly low level of creativity required by *Feist*.

For the reasons stated above, the Copyright Office Review Board concludes that the "VERTICAL BAR DESIGN PACKAGING" cannot be registered. This decision constitutes final agency action in this matter.

Sincerely,
/s/

Nanette Petruzzelli
Associate Register,
Registration & Recordation Program
for Review Board,
United States Copyright Office