United States Copyright Office
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June 27, 2013

Law Office of Paul Siegert
Attn: Paul W. Siegert, Esq.
15 East 32nd Street, 3rd Floor
New York, NY 10016

RE: GAGA
Correspondence ID: 1-5X3VEA

Dear Mr. Siegert:

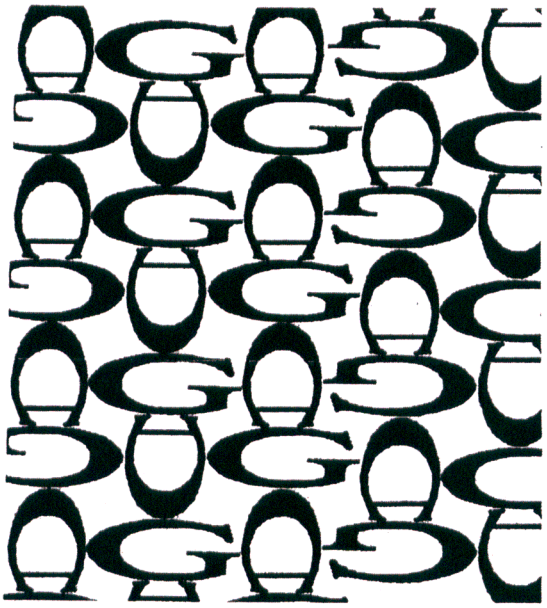
The Review Board of the United States Copyright Office is in receipt of your second request for reconsideration of the Registration and Recordation Program's refusal to register a copyright claim in a design logo entitled "GAGA." You have submitted the request on behalf of your client, Chialing Sun of Ourz Fashion, Inc. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures and budgetary restrictions, the Register of Copyrights has appointed a new Review Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has carefully examined the application, the deposit copy, and all of the correspondence in this case. After careful consideration of the arguments in your letter, the Board affirms the denial of registration of this copyright claim. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

I. DESCRIPTION OF THE WORK

"GAGA" is a graphic design consisting of stylized versions of the letters "G" and "A" to form the word "GAGA," arranged in the pattern of horizontal and vertical columns so that the word "GAGA" is spelled out continuously both across and down the columns. The word "GAGA" is not spelled out diagonally. The letter "G" and the letter "A" are sometimes depicted upside down, depending upon the vertical column in which they appear. The pattern of right side up/upside down depicted in the deposit copy is a repeating, consecutive one that alternates the "G" and the "A" every three vertical columns. The pattern begins with both the "G" and the "A" right side up, followed by the next column with the "G" upside down and the "A" right side up, followed by the third column with the

"A" upside down and the "G" right side up. The "GAGA" image is reproduced below from the submitted deposit copy.



II. THE ADMINISTRATIVE RECORD

On March 18, 2010, you were notified that the Copyright Office could not register "GAGA" because the work lacked the authorship necessary to support a copyright claim. Letter from Registration Specialist Carl Hatchett to Paul Siegert of 3/18/10. In a letter dated March 29, 2010, you requested reconsideration of the Office's refusal to register the work, setting forth your reasons as to why the work was copyrightable and should be registered, as required by 37 C.F.R. § 202.5(c).

In a letter dated August 16, 2010, the Office again refused to register the work, concluding that "the word 'GAGA' and its lettering, as well as their arrangement and configuration, simply do not contain a sufficient amount of original and creative artistic authorship to support a copyright registration." Letter from Attorney-Advisor Virginia Giroux-Rollow to Paul Siegert of 8/16/10, at 4.

In a letter dated August 30, 2010, you requested that the Office reconsider for a second time its refusal to register the copyright claim to "GAGA." Letter from Paul W. Siegert to Copyright R&P Division of 8/30/10, at 1. In support of your position that the work should be registered, you argue that the Office erred in its evaluation and analysis of the "GAGA" design. You submit an affidavit from Chialing Sun, the creator of "GAGA,"

who states that the letter "A" in "GAGA" "was made to look like a woman's face of the 1920-1930's with a Cloche hat," and attach an explanation and illustration of Cloche hats. Affidavit of Chialing Sun at 1 (March 29, 2010). Ms. Sun also states that "[i]f one carefully views the design, it can be seen that the letter G and the no-faced, Cloche-hatted woman are juxtaposed into an 'affixed' position and cannot 'slip' out of their design. This was intentional to show stability. Moreover, while the 'G' was conceived to be noticeable, one has to squint or otherwise inspect to determine what the second feature of the design actually is. One is thus 'drawn' to the work in this manner." *Id.*

You cite *Kieselstein-Cord v. Accessories by Pearl, Inc.* , 632 F.2d 989 (2d Cir. 1980); *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F.Supp. 142 (S.D.N.Y. 1959); *Spectravest, Inc. v. Mervyn's, Inc.* 673 F.Supp. 1486 (N.D. CA 1981); and *Sherry Mfg. Co. v. Towel King of Fla., Inc.* 753 F.2d 1565 (11th Cir. 1985) in support of your request to register. In a letter dated August 22, 2012, inquiring as to the status of this appeal, you cite and attach the decision in *Scholtz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182 (2d Cir. 2012).

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. *Feist Publications, Inc. v. Rural Telephone Service Co.,* 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. Second, the work must possess sufficient creativity. While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) 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 that an *de minimus* quantum of creativity." *Id.* at 363. 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; *see also* 37 C.F.R. § 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.").

The Copyright Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. The regulations prevent registration of "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring" 37 C.F.R. § 202.1(a). In *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F.2d

541, 544 (2d Cir. 1959), the Court concluded that the Office's regulatory bars to registering short phrases and typographic ornamentation was a "fair summary of the law."

Of course, some combinations of common or standard design elements may contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See, Feist,* at 358 (the Copyright Act "implies that some 'ways' [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not." The determination of copyrightability rests on whether the selection, coordination, or arrangement was done in "such a way" as to result in copyrightable authorship). However, not every combination or arrangement will be sufficient to meet this grade. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *John Muller & Co*, 802 F. 2d 989 (8th Cir. 1986). *See also, Satava v. Lowry*, 323 F. 2d 805, 811 (9th Cir. 2003) ("It is true, or course, that a *combination* of unprotectible elements may qualify for copyright protection. But it is not true that any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible 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.") (citations omitted) (emphasis in original).

Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. Likewise, 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. 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 work "GAGA"*

After carefully examining the work "GAGA" and applying the legal standards discussed above, the Copyright Review Board determines that "GAGA" fails to satisfy the requirement of creativity. As discussed above, the Copyright Office regulations do not permit registration of words, nor the typeface used to create them. There can be no copyright protection in the word "Gaga," nor can there be protection in the letters "G" and "A" used to create them, despite their stylistic typeface. Ms. Sun's characterization of the letter "A" as invoking a woman's Cloche hat, and your assertion that this makes the work sufficiently creative for copyright purposes, are unavailing. While the intention of the author may have been to present an abstract rendition of a woman's hat, the fact remains that the design depicts the letter "A," as evidenced by the cross-bar that is necessary to form the

letter and portray that it is, indeed, the letter "A." While the particular depiction of the letter "A" may be unique in its typeface, the law and the regulations make clear that typeface – no matter its stylistic form or uniqueness – is not copyrightable.

The Board also does not discern sufficient creativity in the repeating column arrangement of letters "G" and "A." Laying the letters out in such a fashion as to spell the word "Gaga" horizontally as well as diagonally is nothing more than creation of a simple ambigram. Ms. Sun's description of the juxtaposition of the letters such that they cannot "slip" out of their design is a subjective description and analysis that it not relevant to a copyrightability inquiry.

None of the cases that you cite in your second request support a registration for "GAGA." While the "GAGA" logo design may be intended to be placed on handbags, the logo itself, which is the subject of the registration application, is not a useful article. You suggest in your August 22, 2012, letter inquiring as to the status of your second appeal that Second Circuit's decision in *Scholtz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182 (2d Cir. 2012) requires registration of "GAGA." In the Board's view, however, *Scholtz* is not on point. The case involved three front-elevation architectural drawings of home that were registered by the Copyright Office, not a stylized design logo for handbags. *Id.* at 183. A case which is on point is *Coach, Inc. v. Peters*, 386 F.Supp. 2d 495 (S.D.N.Y. 2005) which involved a stylized logo arrangement of the letter "C" designed for inclusion on handbags. The Copyright Office rejected registration of the design for reasons similar to those articulated in this letter and the Court upheld the rejection. *Id.* at 498.

In sum, the combination of elements that comprises "GAGA," as well as their selection and arrangement, lack a sufficient level of creativity to make them registrable under the Copyright Act. 37 C.F.R. § 202.5(g).

IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the work entitled "GAGA." This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board