



United States Copyright Office

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January 8, 2018

Andrew J. Avsec, Esq.
Brinks Gilson & Lione
455 N. Cityfront Plaza Dr., Suite 3600
Chicago, IL 60611-5599

Re: Second Request for Reconsideration for Refusal to Register American Airlines Flight Symbol; Correspondence ID: 1-28H4ZFK; SR#: 1-3537494381

Dear Mr. Avsec:

The Review Board of the United States Copyright Office (“Board”) has considered American Airlines, Inc.’s (“American’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “American Airlines Flight Symbol” (the “Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORK

The Work is composed of a trapezoid with two curved corners overlaid in the middle by a triangle with a curved right point, justified to the left edge of the trapezoid. The top of the trapezoid is blue, the bottom of the trapezoid is red, and the triangle is white. All of these elements have some shading. The trapezoid is reminiscent of an airplane’s tail, while the triangle could be described as an abstraction of a bird’s head. The Works is depicted as follows:



II. ADMINISTRATIVE RECORD

On June 3, 2016, American filed an application to register a two-dimensional copyright claim in the Work. In October 2016, a Copyright Office registration specialist refused to register the Work, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Ivan Proctor, Registration Specialist, to Andrew J. Avsec, Brinks Gilson & Lione 1 (Oct. 4, 2016).

American disputed this decision and submitted a request that the Office reconsider its initial refusal to register the Work. Letter from Andrew J. Avsec, Brinks Gilson & Lione, to U.S. Copyright Office (Dec. 20, 2016) (“First Request”). American asserted that the Work “far exceeds the extremely low level of creativity required to sustain a copyright claim” and described the work as consisting of “differently sized, generally trapezoidal shapes with flared edges, representing [e]agle wings disposed above and below a stylized [e]agle head shape,” which “recall[s] the shape of one leg of a capital A, referencing American Airlines, and also to suggest an eagle in flight.” *Id.* at 1–3. After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work “does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration,” stating that the work is comprised of common and familiar shapes (including “an elongated rectangle” and “scalene triangle”) and that “[c]ombining a few common shapes [resulted in] a basic, garden-variety logo configuration that demonstrate[d] insufficient creativity to support a claim to copyright.” Letter from Stephanie Mason, Attorney-Advisor, to Andrew J. Avsec, Brinks Gilson & Lione 1–3 (Apr. 12, 2017).

American then submitted a second request for reconsideration of the Office’s refusal to register work pursuant to 37 C.F.R. § 202.5(c). Letter from Andrew J. Avsec, Brinks Gilson & Lione, to U.S. Copyright Office (Apr. 12, 2017) (“Second Request”). American agreed that the Work is composed of “underlying geometric shapes,” but contended that there was “significant modification” to those shapes, qualifying the Work for registration. *Id.* at 11. American asserted that the “cases demonstrate that courts protect works that modify the contour and placement of geometric or common shapes to transform them beyond their common character,” but not “works which contain non modification, unique combination, or abstraction” *Id.* at 8, 11 (citations omitted). American further contended that the Office’ *Compendium of U.S. Copyright Office Practices* supports registration because it “differentiates between ‘[m]erely bringing together only a few standard forms or shapes with minor linear or spatial variations[,]’ which is not protectable, and expression such as the ‘linear contours of a drawing[,]’ which makes a work protectable.” *Id.* at 12 (citing U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 905 (3d ed. 2017) (“COMPENDIUM (THIRD)”).

III. DISCUSSION

A. *The Legal Framework – Originality*

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. 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. *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low threshold. *Id.* 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. It further found 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.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting 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”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”). Some combinations of common or standard design elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a copyright. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See Feist*, 499 U.S. at 358 (finding the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not”). A determination of copyrightability in the combination of standard design elements depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, vertical orientation, and the stereotypical jellyfish form did not merit copyright protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). The language in *Satava* is particularly instructive:

It is true, of course, that a *combination* of unprotectable elements may qualify for copyright protection. But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that 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.

Id. (internal citations omitted).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1. Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or its symbolism, the time and effort it took to create, or the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

B. Analysis of the Work

After careful examination of the Work and application of the legal standards discussed above, the Board finds that the Work does not contain the requisite separable authorship necessary to sustain a claim to copyright.


Simply put, the Work is a dual-colored, curved trapezoid with a bisecting, shaded and curved triangle (*i.e.*, roughly a “beak” shape). The Work thus is comprised of basic geometric shapes. As American acknowledges, copyright does not protect familiar shapes or designs, geometric shapes, or mere variations of coloring. 37 C.F.R. § 202.1(a). American asserts that when a work contains such basic shapes, the copyright in that work can be registered when the shape is transformed beyond its common character by modification, arrangement, or abstraction. *See* Second Request at 8, 11. American itself does not dispute that the Work consists of underlying geometric shapes, and although it criticizes the Office’s characterization of the Work’s shapes as containing “an elongated rectangle,” it describes the same design element of Work as “trapezoidal.” First Request at 2. Neither insignificant variations in shape, coloring, nor word choice used to describe the Work change its character; trapezoids, rectangles, and triangles are all basic geometric shapes. Further, use of the colors of the United States flag (red,

white, and blue) are exceedingly common and do not lend themselves to arguments that the Work's design choices were especially creative. Finally, to the extent the Work evokes an airplane wing or bird design, that does not propel the design into the range of copyrightability. See Second Request at 5. To the contrary, a very common design choice for an airline logo is to use the outline of a bird's anatomy. See *Birds of a feather flock together*, LOGO DESIGN LOVE, <https://www.logodesignlove.com/airline-logos> (Apr. 26, 2010). In any event, even if a bird motif were unusual in this context, the Work falls below the threshold for creativity required by the Copyright Act.

Nevertheless, American suggests that courts have protected works consisting of unprotectable elements that result in creative abstractions or representations. The Board agrees; indeed there are myriad examples of protectable works composed entirely of geometric or familiar shapes. For example, the Office's *Compendium* provides an illustration of such a work with the wrapping paper design composed of circles, triangles, and stars. COMPENDIUM (THIRD) § 906.1. American's Work, however, does not rise to the admittedly low level of creativity required by the Copyright Act. American cites to cases that are inapposite and easily distinguishable. For example, American refers to a case involving "abstract representations" in a video game, ignoring that the court considered copyrightability of the video game as an audiovisual work involving the abstractions of each screen in a series with accompanying sound. Indeed, in that case, the court "accept[ed] the Register's assertion that the individual graphic elements of each screen [which could be considered as 2D artworks comparable to the Work here] are not copyrightable." *Atari Games Corp. v. Oman*, 979 F.2d 242, 244 (D.C. Cir. 1992). American thus fails to point to any case that is on point or could persuade the Board to find the Work to be sufficiently creative. Instead, the Board is secure in determining that the Work is not protectable by the Copyright Act; while the bar for creativity is low, it does exist and the Work cannot glide over even its low heights.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY: 
Catherine Zaller Rowland
Copyright Office Review Board