



August 17, 2022

David M. Kramer, Esq.
DLA Piper LLP (US)
500 8th Street NW
Washington, DC 20004

Re: Second Request for Reconsideration for Refusal to Register Whirl Design Logo (SR # 1-8536940141; Correspondence ID: 1-4KH6AI4)

Dear Mr. Kramer:

The Review Board of the United States Copyright Office (“Board”) has considered Jamba Juice Franchisor SPV LLC’s (“Jamba Juice”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Whirl Design Logo” (“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 refusal of registration.

I. DESCRIPTION OF THE WORK

The Work is a two-dimensional graphic design consisting of four curved shapes, each colored respectively in orange, yellow, light green, and green. The shapes are curved spiraling bands with tapered ends with the right side of the band looping toward the left side to form a curled open-ended oval. The curved shapes are vertically stacked, evenly spaced, and identical in appearance with each shape and oval loop decreasing in size as the design narrows towards the bottom, creating a geometric cone shape. The curved shape at the bottom of the design foregoes the oval loop leaving only a curved dash. The Work is as follows:



II. ADMINISTRATIVE RECORD

On February 11, 2020, Jamba Juice filed an application to register a copyright claim in the Work. In an April 2, 2020, letter, a Copyright Office registration specialist refused to register the claim, finding that it “lack[ed] the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to David Kramer at 1 (Apr. 2, 2020).

In a July 2, 2020, letter, Jamba Juice requested that the Office reconsider its initial refusal to register the Work. Letter from David Kramer to U.S. Copyright Office (July 2, 2020) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that it “does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office to David Kramer at 1 (Dec. 4, 2020). The Office concluded that the Work was a combination of unprotectable elements that consisted only of common geometric shapes, and as such “simply making minor alterations to these otherwise standard shapes will not inject the requisite level of creativity.” *Id.* at 2–3.

In a letter dated March 3, 2021, Jamba Juice requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Jamba Juice argued that “[b]ecause the [Work] is the result of a creative combination of common elements, composed in such a manner to create a unique and unmistakable impression on viewers . . . it is entitled to registration.” Letter from David Kramer to U.S. Copyright Office at 3 (Mar. 3, 2021) (“Second Request”).

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board finds that the Work does not satisfy the statutory requirements for copyright protection.

Under the Copyright Act, a work can be registered if it is an “original work[] of authorship.” 17 U.S.C. § 102(a). As the Supreme Court has explained, the statute requires that works contain “some minimal degree of creativity” to qualify for copyright protection. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). Though only a “modicum” of creativity is necessary, copyright will not protect works in which “the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Id.* at 346, 359.

In its application of these principles, the Office implements longstanding practices and guidelines as established in case law and the Copyright Act regarding the assessment of creativity and originality. Those well-established guidelines steadily maintain that some material is so common and uncreative that it cannot meet the statutory requirement for copyright. As set out in the Office’s regulations, copyright does not protect “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering or coloring.” 37 C.F.R. § 202.1(a); *see also Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (describing these regulations as “a fair summary of the law”). Accordingly, when a work only consists of unprotectable elements, it

must combine or arrange those elements in a sufficiently creative way to meet the requirements of the statute. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (stating that the combination of unprotectable elements is protected “only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship”).

The Board concludes that neither the Work’s individual elements nor the Work as a whole exhibit copyrightable authorship. The Office has consistently found that familiar symbols and common geometric shapes, reproduced in either two or three dimensions, are not protected by the Copyright Act. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 906.1, 906.2 (3d ed. 2021) (“COMPENDIUM (THIRD)”). Here, the Work comprises four basic repeating spiraling bands with tapered ends, positioned vertically, with each band decreasing in size. These elements are ineligible for copyright protection. *Id.* § 906.1 (noting that common geometric shapes, such as straight or curved lines, circles, ovals, spheres, triangles, squares, cubes, rectangles, pentagons, and hexagons are not protectable). The only remaining element is the Work’s color variation of orange, yellow, and two shades of green, which is also ineligible for copyright protection because it fails to demonstrate creative and original authorship. *See* 37 C.F.R. § 202.1(a) (identifying “familiar symbols or designs” and “mere variations of . . . coloring” as examples of works not subject to copyright); COMPENDIUM (THIRD) § 906.3 (“Merely adding or changing one or relatively few colors in a work, or combining expected or familiar pairs or sets of colors is not copyrightable. . . .”).

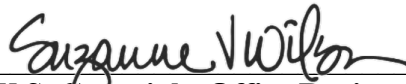
Additionally, after considering the Work as a whole, the Board finds that the selection and coordination of the unprotectable elements that comprise the Work are insufficiently creative to sustain copyright protection. Though some combinations of non-protectable elements may contain sufficient creativity with respect to how they are arranged to support a copyright, not every combination will be numerous enough and their arrangement original enough to constitute an original work of authorship. *See Satava*, 323 F.3d at 811; COMPENDIUM (THIRD) § 905; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989). Jamba Juice’s simplistic arrangement of abstract lines and shapes in varied coloring in the shape of an inverted cone does not establish sufficient creativity to meet the authorship requirement. COMPENDIUM (THIRD) §§ 905, 906.1 (“Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy this requirement.”) (“[T]he U.S. Copyright Office will not register a work that merely consists of common geometric shapes unless the author’s use of those shapes results in a work that, as a whole, is sufficiently creative.”); *see also John Muller & Co. Inc. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986) (affirming that a logo consisting of four nested, angled lines and one word lacked the level of creativity needed for copyrightability).

Moreover, Jamba Juice asserted that the Work is entitled to registration “[b]ecause the [Work] is the result of a creative combination of common elements, composed in such a manner to create a unique and unmistakable impression on viewers. . . .” Second Request at 3. However, when examining a work for copyrightable authorship, the Office only focuses on the actual appearance of the work that was submitted for registration and will not consider any meaning or significance that the work may evoke. COMPENDIUM (THIRD) § 310.3 (“The fact that creative thought may take place in the mind of the person who encounters a work has no bearing on the issue of originality.”).

Finally, Jamba Juice points to other works registered by the Office, arguing that the Office “should act consistently” when applying the same standard of creativity here. First Request at 4; Second Request at 2–3. The Office does not compare works that have been previously issued or refused registration. COMPENDIUM (THIRD) § 309.3 (“The fact that the U.S. Copyright Office registered a particular work does not necessarily mean that the Office will register similar types of works or works that fall within the same category.”). Because determinations of copyrightability are made on a case-by-case basis, the Board declines to engage in a side-by-side comparison with other works.

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.



U.S. Copyright Office Review Board

Suzanne V. Wilson, General Counsel and

Associate Register of Copyrights

Maria Strong, Associate Register of Copyrights and

Director of Policy and International Affairs

Jordana Rubel, Assistant General Counsel