



United States Copyright Office

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July 19, 2016

Venable LLP
Attn: Justin E. Pierce
575 Seventh Street, NW
Washington, DC 20004

**Re: Second Request for Reconsideration for Refusal to Register SPLAT Design;
Correspondence ID: 1-PY74W8**

Dear Mr. Pierce:

The Review Board of the United States Copyright Office (the "Board") has examined BlackBerry Limited's ("BlackBerry's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork copyright claim in the work titled "SPLAT Design." After reviewing the application, deposit copy, and relevant correspondence in the case, 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

"SPLAT Design" (the "Work") is a two-dimensional, graphic logo design. The design consists of a white, five-pointed asterisk or star symbol positioned in the center of a red circle.

A photographic reproduction of the Work is set forth below:



II. ADMINISTRATIVE RECORD

On October 15, 2013, BlackBerry filed an application to register a copyright claim in the Work. In a December 18, 2013 letter, a Copyright Office registration specialist refused to register the Work, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Sandra Ware, Registration Specialist, to Justin E. Pierce, Venable LLP (Dec. 18, 2013).

In a March 18, 2014 letter, BlackBerry requested that the Office reconsider its initial refusal to register the Work. Letter from Justin E. Pierce, Venable LLP, to U.S. Copyright Office (Mar. 18, 2014) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Work does not contain a sufficient amount of original and creative artistic authorship to support a copyright registration. Letter from Stephanie Mason, Attorney-Advisor, to Justin E. Pierce, Venable LLP (July 7, 2014).

In an October 8, 2014 letter, BlackBerry requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Letter from Justin E. Pierce, Venable LLP, to U.S. Copyright Office (Oct. 8, 2014) (“Second Request”). In that letter, BlackBerry disagreed with the Office’s conclusion that the Work, as a whole, does not include the minimum amount of creative authorship required to support registration under the Copyright Act. Specifically, BlackBerry claimed that the selection and arrangement of the Work’s constituent elements possesses a sufficient amount of creative authorship to warrant copyright protection. In support of its claim, BlackBerry argued that its claim of copyright is directed to the “unique shape and design that reflects creativity in terms of its artful arrangement and use of a five-point styled star design juxtaposed on top of a circular red button or disc.” *Id.* at 1.

III. DECISION

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 long-standing requirements of originality and creativity in the law, as affirmed by the *Feist* decision. *See* 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) (“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. However, 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, 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) (emphasis in original).

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3d ed. 2014) (“COMPENDIUM (THIRD)”). They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design’s visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not necessarily mean that the work, as a whole, constitutes a copyrightable work of art.

B. Analysis of the Work

After careful examination, the Board finds that the Work fails to satisfy the requirement of creative authorship and thus is not copyrightable.

Here, it is undisputed that the Work’s constituent elements—a circle or disc shape, a common asterisk or star symbol, and a red and white color scheme—are not individually subject to copyright protection. The question then is whether the combination of those elements is protectable. In evaluating this question, the Copyright Office follows the principle that works should be judged in


their entirety and not based solely on the protectability of individual elements within the work. See *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). Works composed of public domain elements may be copyrightable, but only the selection, coordination, and/or arrangement of those elements reflect choice authorial discretion that is not so obvious or minor that the “creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Feist*, 499 U.S. at 359.

BlackBerry contends that its claim of copyright is directed to the “unique shape and design that reflects creativity in terms of its artful arrangement and use of a five-point styled star design juxtaposed on top of a circular red button or disc.” Second Request at 1. The Board, however, finds that, viewed as a whole, the selection, coordination, and arrangement of the colors and symbol that compose the Work are insufficient to render the Work original. The Work consists of little more than a white asterisk or star symbol centered within a red circle or disk. As explained in the *Compendium of U.S. Copyright Office Practices*, familiar symbols or designs, such as “[s]ymbols typically found on a keyboard, such as asterisks” or “[c]ommon representational symbols, such as a . . . star . . . or the like” are not copyrightable. COMPENDIUM (THIRD) § 913.4(J). Further, “mere use of . . . functional colors, frames, or borders, either standing alone or in combination,” cannot satisfy the requirements for copyright registration. *Id.* § 913.1; see also *Coach*, 386 F. Supp. 2d at 498 (upholding the Office’s determination that designs consisting of little more than “variations and arrangements of the letter ‘C’” were not sufficient to warrant registration on grounds that “letters of the alphabet cannot be copyrighted” and “the mere arrangement of symbols and letters is not copyrightable”). Likewise, the Eastern District of Pennsylvania has found that basic geometric shapes are not protectable; as such shapes “have long been in the public domain and therefore cannot be regulated by copyright.” *Tompkins Graphics, Inc. v. Zipatone, Inc.*, 1983 U.S. Dist. LEXIS 14631 (E.D. Pa. Aug. 15, 1983).

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.

SIGNED:



Catherine Rowland
Review Board Member