United States Copyright Office
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December 31, 2019

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450 West Fourth Street
Royal Oak, MI 48067-2557

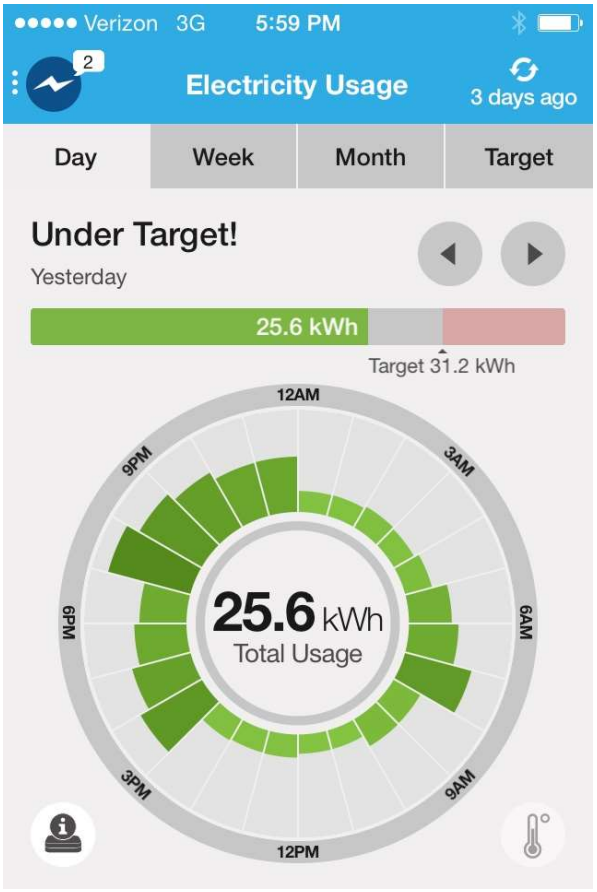
Re: Second Request for Reconsideration for Refusal to Register 24 Hour Energy Dial Design Version 2; Correspondence ID: 1-3GJBJ5D; SR # 1-6843478531

Dear Mr. Grove:

The Review Board of the United States Copyright Office ("Board") has considered Insight Energy Ventures LLC's ("IEV's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the work titled "24 Hour Energy Dial Design Version 2" ("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 a graphic interface design for a mobile application. At the top of the interface design is a blue rectangular band with the phrase "Electricity Usage," a message notification icon, and a refresh icon. The body of the design has a tab for "day," "week," "month," and "target." The tab for "day" displays energy usage information graphically with a horizontal stacked bar chart and a circular bar chart divided into 24-hour segments. The Work is depicted as follows:



II. ADMINISTRATIVE RECORD

On August 8, 2018, IEV filed an application to register a copyright claim in the Work. In an August 10, 2018, letter, a Copyright Office registration specialist refused to register the claim, finding that it "lacks the authorship necessary to support a copyright claim." Letter from LP, Copyright Examiner, to Andrew Grove, Howard & Howard 1 (Aug. 10, 2018).

In a September 25, 2018, letter, IEV requested that the Office reconsider its initial refusal to register the Work, stating that the Work "selects and arranges facts and opinion information in a way that includes much more originality than is required under the law." Letter from Andrew M. Grove, Howard & Howard Attorneys PLLC, to U.S. Copyright Office, at 2 (Sept. 25, 2018) ("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 the Work "does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration." Letter from Stephanie Mason, Attorney-Advisor, to Andrew M. Grove, Howard & Howard at 1 (Mar. 22, 2019). The Office found that the Work was an uncopyrightable combination of a circle, rectangles, and polygons, which are common and familiar designs. *Id*. at 3. The Office also stated that "[a]rranging information graphically, such as using 24 polygons arranged in a circle to represent a day, is an inevitable configuration lacking any creativity." *Id*.

In response, IEV 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 Andrew M. Grove, Howard & Howard, to U.S. Copyright Office (June 5, 2019) ("Second Request"). In that letter, IEV argued that facts presented in bar charts and in columned and lined tables are copyrightable subject matter, and thus, the design, which "selects and arranges facts to present, and makes original, creative choices in how to present them," is sufficiently creative. *Id*. at 2. Further, IEV contended "[t]here are many types of information a designer could have selected, and many ways of presenting that information," and noted that IEV "devised an appealing and engaging way to present relevant information." *Id*. at 3.

III. DISCUSSION

A. The Legal Framework

1) *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 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. *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).

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3d ed. 2017) ("COMPENDIUM (THIRD)"). 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 carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work does not contain the necessary authorship to sustain a claim to copyright.

Both the Work's individual elements and the Work as a whole fail to demonstrate copyrightable authorship. First, the specific elements of the Work consist of common and familiar symbols (*i.e.*, message notification, refresh, information, and temperature icons) and geometric shapes (*i.e.*, triangles, rectangles, circles, and quadrilaterals) that are not protected by copyright. 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) §§ 313.4(J), 906.1, 906.2; *see also Tompkins Graphics, Inc. v. Zipatone, Inc*., No. 82-5438, 1983 U.S. Dist. LEXIS 14631, at *4 (E.D. Pa. Aug. 15, 1983) ("[B]asic geometric shapes have long been in the public domain and therefore cannot be regulated by copyright."). The Work also contains words and short phrases (*i.e.*, ELECTRICITY USAGE, UNDER TARGET!, YESTERDAY, DAY, WEEK, MONTH, and TARGET) that do not warrant protection. 37 C.F.R. § 202.1(a).

Moreover, the Work's common symbols, shapes, and phrases are garden variations of established ways of depicting information. The Tabs line at the top of the interface is a common mobile application interface design. The standard horizontal bar graph with a mere selection of green, grey, and pink is also a common design. And below the horizontal graph, the circular bar

graph visualizes data accumulation over time; displaying time as a circular concept is standard, and the color and shape variations are *de minimis* modifications. 37 C.F.R. § 202.1(a) ("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").

Second, the Work as a whole is not protectable. Works comprised of public domain elements—like this Work—may be copyrightable only if the selection, arrangement, and modification of the elements reflects choices and authorial discretion that are not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist*, 499 U.S. at 359. The arrangement of the Work's graphics does not amount to sufficient creative expression because the graphics are arranged to create a basic layout; the overall design choices simply relate to creating a general and utilitarian format. Claiming copyright protection for this arrangement would be tantamount to claiming protection for the general spatial format and layout, which are not copyrightable. COMPENDIUM (THIRD) § 906.5 ("The general layout or format of a book, a page, a website, a webpage, a poster, a form, etc., is not copyrightable, because it is merely a template for expression and does not constitute original expression in and of itself.").

IEV cites *University of Colorado Foundation v. American Cyanamid* for the proposition that facts "coordinated and arranged . . . in bar chart fashion and in columned and lined tables" constitute copyrightable subject matter. Second Request at 2 (citing 880 F. Supp. 1387, 1402 (D. Colo. 1995)). The Board does not dispute that creative graphical compilations of data constitute copyrightable subject matter. 17 U.S.C. § 103. Indeed, the Office will register any copyrightable expression presented in a graph, chart, table, or figure, such as a copyrightable compilation of data, facts, or information. COMPENDIUM (THIRD) § 921. But copyright does not protect "the ideas for graphs, charts, tables, and figures or the overall design of a graphing, charting, or tabling method or template." *Id.*; *see* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); 37 C.F.R. § 202.1(c).

Here, IEV does not seek protection for the compilation of facts that appear in the Work. Rather, its claim is for two-dimensional graphic artwork, which includes two chart designs that are not themselves copyrightable. IEV highlights the Work's "unusual 24-hour circular bar chart" and the horizontal bar chart's "gray, green, and pink shading" (apparently used to signal the amount of electricity usage by green, red, or unused portions) to contend that the Work "makes original, creative choices." Second Request at 3. The design choices in the Work, however, are calculated to achieve the layout and format of a standard mobile application interface. The Work is merely a "template of expression" that arranges public domain graphic elements in a standard and expected way. COMPENDIUM (THIRD) § 313.3(E) ("The general layout or format of a book, a page, a slide presentation, a website, a webpage, a poster, a form, or the like, is not copyrightable because it is a template of expression."). The Work ultimately lacks the creativity required by *Feist*.

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.

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