



**United States Copyright Office**

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September 20, 2018

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**Re: Second Request for Reconsideration for Refusal to Register “Periscope Logo with Circle”; Correspondence ID: 1-2YHZ1AL; SR 1-4333385691**

Dear Ms. Richard:

The Review Board of the United States Copyright Office (“Board”) has considered Twitter, Inc.’s (“Twitter’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Periscope Logo with Circle” (“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 design that appears as a map pointer vector or “map pin” consisting of an inverse teardrop shape in blue. A white circle is positioned within the round portion of the teardrop. A smaller red circle is superimposed in the center of the white circle, with a white semi-circular portion removed from its upper left circumference. A reproduction of the Work is set forth below.



## II. ADMINISTRATIVE RECORD

On January 11, 2017, Twitter filed an application to register a copyright claim in the Work. In an August 18, 2017, letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the requisite authorship necessary to support a copyright claim.” Letter from C. Stoner, Registration Specialist, to Molly Buck Richard (Aug. 18, 2017).

In a letter dated October 25, 2017, Twitter requested that the Office reconsider its initial refusal to register the Work. Letter from Molly Buck Richard to U.S. Copyright Office (Oct. 25, 2017) (“First Request”). Twitter argued that the Copyright Office had granted registration to similar preexisting works. *Id.* at 1; *see* Appendix A. Twitter also argued that the Work is not a common representational, well-known, or commonly used symbol because “it incorporates multiple geometric elements to synthesize a grander design . . . .” First Request at 2. Finally, Twitter argued that the Work “involves the unique and unconventional manipulations of shapes to craft an image.” *Id.* at 2–3. 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 graphic or artistic authorship to support a copyright registration.” Letter from Stephanie Mason, Attorney-Advisor, to Molly Buck Richard (Mar. 29, 2018). The Office explained that there are no elements or features in the design, alone or combined, that are eligible for copyright protection. *Id.* at 3. The Office also issued a notice of intent to cancel the designs Twitter referenced in its first request for consideration. *Id.*

In a letter dated June 22, 2018, Twitter 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 Molly Buck Richard to U.S. Copyright Office (June 22, 2018) (“Second Request”). In that letter, Twitter argued that the “unique arrangement” of the uncopyrightable elements in the Work is sufficient

because the Copyright Office has registered familiar shapes in the past. *Id.* at 2. As an example, Twitter pointed to the cheerleading designs at issue in *Star Athletica v. Varsity Brands*, 137 S. Ct. 1002 (2017), arguing that “[c]ertainly the designs in the Twitter Periscope works contain at least as much originality and creativity as the common chevron designs on these uniforms.” *Id.* Twitter also argued that the artist made specific artistic choices by “elect[ing] to take a circle and arbitrarily modify it to take a circular section out of the left side and place it within a larger teardrop shape, superimposing that on another larger teardrop shape in a different color.” *Id.* at 3. Finally, Twitter contended that the variation and combination of elements is more than “merely trivial.” *Id.*

### 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 OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2017) (“COMPENDIUM (THIRD)”); *see also Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). 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.

### ***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 sufficient original authorship necessary to sustain a claim to copyright.

The Work’s constituent elements—an inverted teardrop, a white circle, a smaller red circle, and a white semi-circular shape—are standard geometric shapes and color variations that do not individually qualify for copyright protection. COMPENDIUM (THIRD) § 906.1 (listing some

of the geometric shapes eligible for copyright protection, including circles). Accordingly, the Board affirms that none of the individual elements that make up the Work exhibit a sufficient amount of original and creative authorship to support a copyright registration.

The question then is whether the combination of the Work's elements is protectable under the legal standards described above. The Board recognizes that although the individual components of a given work may not be copyrightable, these components may be protectable if selected or combined "in a distinctive manner indicating some ingenuity." *Atari Games Corp.*, 888 F.2d at 883. The Board notes, however, that "familiar symbols or designs" remain uncopyrightable. 37 C.F.R. § 202.1(a); *see also* COMPENDIUM (THIRD) § 313.4(J) (listing navigational symbols, common representational symbols, commonly used symbols, and standard industry designs as examples of familiar symbols and designs and stating that "the Office cannot register a work consisting of a simple combination of a few familiar symbols or designs"). Hence, the Board finds that the selection and combination of the Work's design elements are not sufficient to render the Work original, because the Work is a mere variation of a standard map pointer vector, as depicted below:<sup>1</sup>



Further, to the extent that the removal of a small portion of the red circle by placement of a white semi-circle causes the interior of the Work to represent an eyeball, the depiction is simplistic and does not exhibit sufficient creativity to render the Work copyrightable. Rather, the evocation of an eyeball in the Work does not amount to materially more than the layering of one uncopyrightable geometric shape upon another. *See Feist*, 499 U.S. at 359 ("There remains a narrow category of Works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent."). Therefore, this basic and elemental rendering of an eyeball does not generate the necessary creative expression. Relatedly, the decision to center common and familiar shapes within a standard industry design does not exhibit the creativity to support a registration. *See* COMPENDIUM (THIRD) § 906.1.

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<sup>1</sup> ArcTina, *Map pin flat icon vector image*, VECTORSTOCK, <https://www.vectorstock.com/royalty-free-vector/map-pin-flat-icon-vector-21269313> (last visited Aug. 2, 2018).

Twitter contends that the author made specific design choices by “elect[ing] to take a circle and arbitrarily modify it to take a circular section out of the left side and place it within a larger teardrop shape, superimposing that on another larger teardrop shape in a different color.” Second Request at 3. This argument is not persuasive. The creative process often requires the author to make “many choices involving the size, coloring, orientation” of the work. COMPENDIUM (THIRD) § 310.8. The Office will only consider the actual work that the author created to determine whether it contains a sufficient amount of original and creative authorship. *Id.*

Twitter also asserts that, because the Office has registered similar works, such as the two aforementioned previously registered works (for which the Office has issued a notice of intent to cancel, *see* Letter from Stephanie Mason, Attorney-Advisor, to Molly Buck Richard (Mar. 29, 2018) at 3), and the uniforms in *Star Athletica*, the Office also should register the Work at issue here. The Board disagrees. Each claim to copyright is examined on its own merits, with the Office applying uniform standards of copyrightability throughout the examination process. Because copyrightability involves a mixed question of law and fact, minor differences between any two works can lead to different results. Thus, the fact that an individual registration specialist might have previously registered a particular work does not require the Board to reverse the denial of an allegedly comparable work that it finds lacks sufficient creative authorship. *See* COMPENDIUM (THIRD) § 309.3 (“A decision to register a particular work has no precedential value and is not binding upon the Office when it examines any other application.”); *see also Homer Laughlin China Co. v. Oman*, No. 90-3160, 1991 WL 154540, at \*2 (D.D.C. July 30, 1991) (noting that the court was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable”); *Coach*, 386 F. Supp. 2d at 499 (stating that the Office “does not compare works that have gone through the registration process”).

#### 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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**U.S. Copyright Office Review Board**

Karyn A. Temple, Acting Register of Copyrights  
and Director, U.S. Copyright Office

Regan A. Smith, General Counsel and  
Associate Register of Copyrights

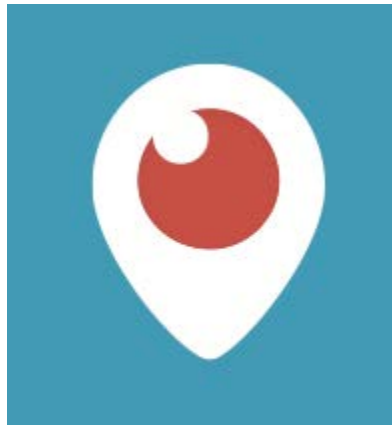
Catherine Zaller Rowland, Associate Register of  
Copyrights and Director, Public Information and  
Education

# Appendix A





**PERISCOPE DESIGN VA 1-972-818**



**PERISCOPE COLOR DESIGN VA 1-972-550**