



United States Copyright Office

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United States

**Re: Registration Decision Regarding American Airlines Flight Symbol;
Correspondence ID 1-28H4ZFK; SR 1-3537494381**

Dear Mr. Leon:

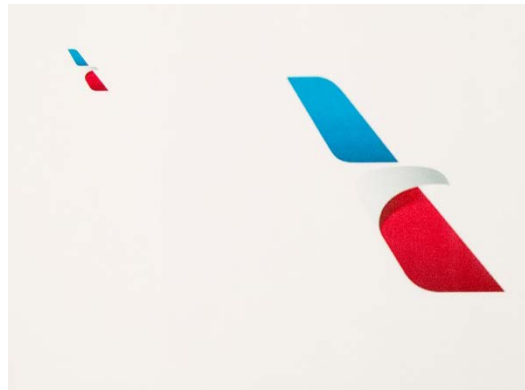
The Review Board of the United States Copyright Office (the “Board”) has reviewed the refusal of American Airlines, Inc.’s (“American’s”) second request for reconsideration to register a two-dimensional artwork claim in the work titled “American Airlines Flight Symbol” (the “Work”). The Board undertook this final review in light of additional evidence provided by American, which illustrated additional creative choices and details that were not viewable in the original deposit material. Upon further consideration of all of the materials, the Board therefore finds that the Work exhibits copyrightable authorship.

I. BACKGROUND

A. Procedural History

The matter before the Board is rather anomalous. In 2016, American filed an application to register a two-dimensional copyright claim in the Work. The deposits, as provided at the time of the application, consisted of two low-resolution and compressed images¹ of the Work as follows:

¹ As deposit material for registration, American submitted two deposits: (1) a PDF file containing the Work sized at 0.75 inches (1.9 centimeters); and (2) a JPG file containing the Work at 72 dots per inch.



In October 2016, a United States Copyright Office (“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). Disputing the decision, American 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”). In April 2017, after re-evaluating the claim, the Office 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 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 the Work pursuant to 37 C.F.R. § 202.5(c). *See* Letter from Andrew J. Avsec, Brinks Gilson & Lione, to U.S. Copyright Office (Apr. 12, 2017) (“Second Request”). In neither of those requests did American provide higher-resolution images or better depictions of the design. In January 2018, the Board considered American’s request, assessed the Work, and affirmed the refusal to register the copyright claim in the Work, finding that the Work falls just below the threshold for creativity required by the Copyright Act. *See* Letter from Catherine Zaller Rowland, Copyright Office Review Board, to Andrew J. Avsec, Brinks Gilson & Lione (Jan. 8, 2018) (“Review Board Letter”).²

In fall 2018, the Board elected to reassess its determination on American’s second request for reconsideration. To that end, the Board received additional materials from American that American contends support registration of the Work. Specifically, American provided a higher-quality, larger-format image of the Work that depicted additional details that

² American has since filed, but not served, a lawsuit under the Administrative Procedure Act regarding the Office’s refusal to register the work. Complaint, *Am. Airlines. Inc. v. Temple*, No. 4:18CV843 (N.D. Tex. Oct. 12, 2018). The Board is not considering the complaint or any other materials related to that filing in this proceeding but is instead evaluating the administrative record with respect to this application, including additional identifying material provided by American.

had not been clear from the original deposits. The higher-quality image of the Work is as follows³:



B. Basis for Additional Review

The foremost reason for the Board’s additional review of the Work is to ensure consistent application of the Copyright Act and the Office’s regulations. The Copyright Office is the expert agency created by Congress to administer the nation’s copyright law. Among other things, it reviews applications for copyright registration, issues certificates of registration when appropriate, and refuses registration when the material does not constitute copyrightable subject matter or the claim is invalid for any other reason. 17 U.S.C. § 410. Receiving over a half a million applications for copyright registration each year, the Office declines to register less than 20,000 claims annually for lack of creative authorship. In carefully examining and registering or refusing claims in deposited works, the Office maintains the “delicate

³ The image reproduced in this letter is a somewhat degraded scan of the higher-quality image American provided in physical format.

equilibrium” that Congress established in the copyright law between protecting private ownership of expression to encourage creativity, on the one hand, and enabling the free use of information for future creativity, on the other. *See Computer Assocs. Int’l v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992); *accord Twentieth Cent. Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

If an applicant disagrees with a refusal to register a work, the Office has established two opportunities for them to appeal, called requests for reconsideration. The first request for reconsideration is reviewed by a staff attorney in the Registration Policy and Practice division. The second request for reconsideration is reviewed by the Review Board, which consists of the Acting Register of Copyrights, the General Counsel, and a third individual designated by the Acting Register. 37 C.F.R. § 202.5(f).

A decision issued by the Review Board in response to a second request for reconsideration constitutes final agency action with respect to the issues addressed therein. *Id.* § 202.5(g). Thus, by electing to undertake a reconsideration of the Work in this matter, the Office is not adding an additional level to its strict two-tier appeal procedure. Rather, it is exercising its “inherent authority to revisit [its] prior decision[] . . . in a timely fashion.” *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (Kavanaugh, J.) (noting the D.C. Circuit’s “oft-repeated” principle that “the power to reconsider is inherent in the power to decide,” absent a congressional intention to displace such authority with a specific statutory mechanism) (quoting *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)); *see Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (issuing remand in light of new evidence and finding reconsideration power well within agency’s inherent permitting authority). As with all registration decisions, this decision is made on a case-by-case basis that does not bind future Review Board evaluations,⁴ and it is unlikely that the Board would undertake such a review in the vast majority of matters.

To be clear, there are no third requests for reconsideration. Typically, if the Board upholds a refusal to register following a second request for reconsideration, an applicant may appeal that decision under the Administrative Procedure Act (“APA”) by instituting judicial action against the Register of Copyrights in federal district court. *See* 5 U.S.C. § 500 *et seq.*

⁴ Indeed, because the Office generally “does not compare works that have gone through the registration process,” each decision of the Review Board rests upon its own unique factual circumstances. *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 499 (S.D.N.Y. 2005); *see* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 309.3 (3d ed. 2017) (“COMPENDIUM (THIRD)”) (“The determination of copyrightability will be made on a case-by-case basis. . . . A decision to register a particular work has no precedential value and is not binding upon the Office when it examines any other application.”).

II. RECONSIDERATION OF THE WORK

American has now provided additional materials to supplement the arguments asserted in the first and second requests for reconsideration, including identifying material consisting of images that are higher quality than those American originally submitted for registration. After careful examination of the Work, as well as the first and second requests for reconsideration and the additional higher-quality images, the Board finds that the Work contains a minimal, but sufficient amount of original and creative authorship to sustain a claim to copyright.

In essence, the Work at hand is composed of a small number of elements (one blue and red element conforming to the contours of an aircraft tail and one white and gray triangular element evoking the head of an eagle), with multiple variations in shading. Copyright law does not protect basic geometric shapes. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.1. Still, works that combine nonprotectable elements into a larger design may be registered if the overall design is sufficiently creative. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991) (finding the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not”). The Office may register a work that consists merely of geometric shapes where the “author’s use of those shapes results in a work that, as a whole, is sufficiently creative.” COMPENDIUM (THIRD) § 906.1; *see Atari Games Corp. v. Oman*, 888 F.2d 878, 883 (D.C. Cir. 1989) (“[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 (“The [Copyright Office] will register this claim because it . . . goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement.”); *see e.g., Prince Group, Inc. v. MTS Prod.*, 967 F. Supp. 121, 125 (S.D.N.Y. 1997) (finding polka dot fabric design sufficiently creative where dots were “irregularly shaped,” placed at varying distances and “‘shaded,’ that is, there [was] a crescent of white around half of the perimeter of each of the dots which [was] different from the standard” polka dot).

Upon careful re-evaluation of the record as a whole, including the supplementary identifying material, the Board concludes that the Work modifies and combines these elements in a way that provides for the minimum amount of creativity necessary for copyright protection. The aircraft tail element is oriented on an angle (rather than the parallel orientation of a trapezoid or rectangle), and curved. The bird-head element hovers just below the center of the aircraft tail element. Importantly, and more apparent in the identifying material provided for this review, is the three-dimensional appearance that causes the bird-head element to appear to be above and separated from the aircraft tail. Like the work in *Prince Group*, American’s

supplemental identifying material reveals simple shapes that have been slightly transformed by shading. At four points, axial color gradients progress from dark blue to royal blue, from burgundy to red, and from gray to white. The shading is more sharply detailed under the bird-head shape than at the edges of the blue and red portions, further heightening the illusion of depth. Additionally, whitespace cuts through the center of the design to define and elevate the bird-head shape from the rest of the design. Ultimately the design illustrates creative choice in the shading of the elements in the overall Work, in connection with the combination of various familiar, but slightly adjusted shapes. Under *Feist*, copyright protection is available so long as there is at least “some creative spark, ‘no matter how crude, humble or obvious’ it might be.” *Feist*, 499 U.S. at 345 (“[T]he requisite level of creativity is extremely low; even a slight amount will suffice.”) (internal citations omitted). Thus, considered as a whole, the Work meets the *Feist* threshold. The Board is *only* able to make this determination now, with the addition of more precise images of the Work.

That said, the overall design of the Work is still quite simple, predominated by its two simple elements (the most common depiction of an aircraft tail and a familiar abstraction of a bird’s head) and familiar colors (the American flag’s red, white, and blue). Accordingly, the resulting protection is thin, protecting only the Work’s original and creative elements “against only virtually identical copying.” *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003); *see also Beaudin v. Ben and Jerry’s Homemade, Inc.*, 95 F.3d 1, 2 (2d Cir. 1996) (noting the “thin” copyright protection afforded to a design where the “quantum of originality is slight”). In other words, none of the Work’s individual elements, such as the colors or shapes, are sufficient on their own. The Work can only receive protection for its overall specific appearance.

The Board reaches this conclusion without any regard to the Work’s public reception. When examining a work for copyrightable authorship, the Copyright Office evaluates only whether a work is sufficiently creative for copyright protection. The symbolic meaning or impression that a work conveys is irrelevant to whether a Work contains a sufficient amount of creativity. COMPENDIUM (THIRD) § 310.3. Equally irrelevant is the intent of the author. *Id.* § 310.5 (“The fact that a creative thought may take place in the mind of the person who created a work . . . has no bearing on the issue of originality unless the work objectively demonstrates original authorship.”).

Finally, in determining whether a work contains sufficient original authorship, the Office does not consider the time and effort used in creating a design, its novelty, aesthetic appeal, or commercial value. *See* COMPENDIUM (THIRD) §§ 310.1, 310.2, 310.7, 310.10. To the extent American asserts these arguments, they are also irrelevant to assessing originality under settled case law and registration practices. *See generally Feist*, 499 U.S. at 359-60 (rejecting “sweat of the brow” doctrine); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903); *see also* COMPENDIUM (THIRD) § 310.10 (noting that the Office will not consider commercial success because “[w]orks may experience commercial success even without originality and works with

originality may enjoy none whatsoever.”) (quoting *Paul Morelli Design, Inc. v. Tiffany & Co.*, 200 F. Supp. 2d 482, 488 (E.D. Pa. 2002)).

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claim in the Work. The Board now refers this matter to the Registration Policy and Practice division for registration of the Work, provided that all other application requirements are satisfied.

No response to this letter is needed.



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
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