



United States Copyright Office

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June 27, 2016

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**RE: Second Request for Reconsideration for Refusal to Register Apple Icon - iAd;
Correspondence ID: 1-14EC9VH**

Dear Mr. Jennison:

The Review Board of the United States Copyright Office ("Board") has considered Apple Inc.'s ("Apple's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork copyright claim in the work titled "Apple Icon - iAd" ("Work"). 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

The Work is a two-dimensional, graphic logo design. The design consists of a square with rounded edges. In the top-middle of the square is the word "iAd" in white. At the bottom-middle of the square is the top portion of the Apple logo in solid white.¹ Near the middle of the square is a line curving up at each end. Above this line, the blue inside the square is shaded in a light blue. Below this line, the blue inside the square is in a dark blue shade that fades to a light blue as the color approaches the bottom of the square.

A photographic reproduction of the Work is set forth below:



¹ Apple has procured U.S. trademark registrations for its logo of an apple with a bite taken out of it, the top of which is part of the claimed work. *See, e.g.*, APPLE, Registration No. 2,715,578.

II. ADMINISTRATIVE RECORD

On September 5, 2014, Apple filed an application to register a copyright claim in the Work. In an October 9, 2014 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 Guy Messier, Registration Specialist, to John N. Jennison, Jennison & Schultz, P.C. (Oct. 9, 2014).

In an undated letter received on January 9, 2015, Apple requested that the Office reconsider its initial refusal to register the Work. Letter from John N. Jennison, Jennison & Schultz, P.C., to U.S. Copyright Office (Jan. 9, 2015) (“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 lacked a sufficient amount of original and creative artistic authorship to support copyright registration. Letter from Stephanie Mason, Attorney-Advisor, to John N. Jennison, Jennison & Schultz, P.C. (June 4, 2015).

In an undated letter received on September 14, 2015, Apple 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 John N. Jennison, Jennison & Schultz, P.C., to U.S. Copyright Office (Sept. 14, 2015) (“Second Request”). In that letter, Apple disagreed with the Office’s conclusion that the Work, as a whole, did not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, Apple argued that the claim in the Work “is based on the technical complexity of the 2-D artwork design, using originally designed components, selected, arranged and coordinated into a compilation that surpasses the creative spark standard.” *Id.* at 11. Further, Apple claimed that the creative process “require[d] choices involving the size, coloring, orientation, proportion, configuration, perspective and other constituent elements of the work.” *Id.* at 2.

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 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* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, § 310.2 (3d ed. 2014) (“COMPENDIUM (THIRD)”). 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 the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See* 17 U.S.C. § 102(b); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Thus, the fact that a work required effort to create, or has commercial or aesthetic appeal, does not necessarily mean that the work 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.

The Work’s constituent elements—a square with rounded edges, the word “iAd” in white, the Apple logo in white, a curved line, and blue shading—are not individually subject to copyright protection. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of “words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic

ornamentation, [and] lettering or coloring”). The question then is whether the combination of the Work’s elements is protectable under the legal standards described above.

The Board finds that, viewed as a whole, the selection, coordination, and arrangement of the elements that comprise the Work are not sufficient to render the Work original. As explained in the *Compendium of U.S. Copyright Office Practices*, “the Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations.” COMPENDIUM (THIRD) § 313.4(J). Further, the Office will not register works that consist only of “[m]ere spatial placement or format of trademark, logo, or label elements,” or “[u]ncopyrightable use of color, frames, [or] borders.” *Id.* § 913.1; *see also Coach* at 386 F. Supp. 2d at 498 (“the mere arrangement of symbols and letters is not copyrightable”). Similarly, the familiar symbol or designs that make up the work are not copyrightable. *See* 37 C.F.R. §202.1(a); *see also* COMPENDIUM (THIRD) § 313.4(J) (familiar symbols include “[l]etters,” “[c]ommon representational symbols,” and “[w]ell-known and commonly used symbols,” or “[s]tandard industry designs”). Here, the combination of a symbol, a word, and common design elements, considered as a whole, lacks the requisite amount of creativity to warrant copyright protection. *See Feist*, 499 U.S. at 359.

More specifically, while Apple takes issue with referring to the Work as being shaped like an “app icon,” it is clear that the outline of the Work is in the shape of a rounded square, a common shape generally and also a common shape for app icons. Second Request at 2. A work that contains a common or familiar shape can still be registered, but only “if the work as a whole contains a sufficient amount of creative expression.” COMPENDIUM (THIRD) § 313.4(J). That portion of the Work is not original whether described as an “app icon” or a “rounded square.”

Apple also claims that creation of the Work “require[d] choices involving the size, coloring, orientation, proportion, configuration, perspective and other constituent elements of the work.” Second Request at 2. Apple advocates for the Work’s originality, including by deconstructing the Work into its constituent elements and claiming that each deconstructed portion results from a creative choice. *Id.* at 8-10. The intangible attributes that Apple ascribes to the Work—including the professional skills and choices of the Work’s designer in selecting design elements—cannot be assessed in an objective manner because they are not evident in the deposit itself. Even if these attributes were present in the deposit, the Board does not assess the espoused intentions of a design’s author, or a design’s visual impact, in determining whether a design contains the requisite minimal amount of original authorship necessary for registration. *See Bleistein*, 188 U.S. at 251. Despite its efforts to impart originality by deconstructing the Work and describing it in a more complex manner, Apple still recognizes that “there is no claim for copyright based on the amount of time, effort or commercial value of the work.” Second Request at 11. Accordingly, the fact that the Work was the fruit of a professional design process does not alone qualify the Work for copyright protection.

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.

BY:



Catherine Rowland
Copyright Office Review Board