



United States Copyright Office

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**Re: Second Requests for Reconsideration for Refusal to Register
Globe Design – Black and White and Globe Design – Color
Correspondence ID: 1-18PUG44**

Dear Ms. Nuehring:

The Review Board of the United States Copyright Office (“Board”) has considered United Airlines, Inc.’s (“United’s”) second requests for reconsideration of the Registration Program’s refusal to register two-dimensional artwork copyright claims in the works titled “Globe Design – Black and White” and “Globe Design – Color” (“Works”). After reviewing the applications, deposit copies, and relevant correspondence in the cases, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denials of registration.

I. DESCRIPTION OF THE WORKS

The Works are two-dimensional, graphic designs consisting of curved white lines depicting a stylized globe on either a black or blue square background. The globe is offset, emerging from the bottom left-hand corner of the design, and fills up approximately three-quarters of the available space. The Works are depicted below.



II. ADMINISTRATIVE RECORD

On April 11, 2014, United filed applications to register copyright claims in the Works. In February 25, 2015 and March 10, 2015 letters, Copyright Office registration specialists refused to register the claims, finding that the Works “lack[] the authorship necessary to support a copyright claim.” Letter from Wilbur King, Registration Specialist, to Gregory Chinlund, Marshall, Gerstein

& Borun (Feb. 25, 2015) (Globe Design – Black and White); Letter from Wilbur King, Registration Specialist, to Gregory Chinlund, Marshall, Gerstein & Borun (Mar. 10, 2015) (Globe Design – Color).

In letters dated May 19, 2015 and June 5, 2015, United requested that the Office reconsider its initial refusals to register the Works. Letter from Kate Nuehring, Marshall, Gerstein & Borun, LLP, to U.S. Copyright Office (May 19, 2015) (Globe Design – Black and White); Letter from Kate Nuehring, Marshall, Gerstein & Borun, LLP, to U.S. Copyright Office (June 5, 2015) (Globe Design – Color) (collectively, the “First Requests”). After reviewing the Works in light of the points raised in the First Requests, the Office reevaluated the claim and again concluded that the Works “do[] not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” Letters from Stephanie Mason, Attorney-Advisor, to Kate Nuehring, Marshall, Gerstein & Borun, LLP (Sept. 14, 2015) (separate letters were sent for each application on the same date).

In letters dated December 9, 2015, United requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letters from Kate Nuehring, Marshall, Gerstein & Borun, LLP, to U.S. Copyright Office (Dec. 9, 2015) (collectively, the “Second Requests”). In these nearly identical letters, United disagreed with the Office’s conclusion that the Works, as a whole, do not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, United claimed that the numerous design choices made in the creation of the Works, including “the amount of sphere to depict; the angle at which the sphere should be depicted; the position of the sphere within the box or frame and the amount of colored space around the sphere to include; the specific appearance of the sphere, for example, the number, width, and shape of the longitudinal and latitudinal stripes on the sphere as well as the spacing of the longitudinal and latitudinal stripes; and the decision to only use [black or blue] and white” led to “a particular resultant expression that contains sufficient creativity to merit copyright protection.” *Id.* at 3. United also claimed that the Works are compilations and can consist of “known items, such as geometric shapes.” *Id.* at 4. United further alleged that the Works are “not a mere arrangement of two standard geometric shapes (a globe and a square) because the globe itself requires the arrangement of a number of geographic [sic] shapes – a sphere, longitudinal curves, and longitudinal [sic] curves.” *Id.* at 6. United concluded that the Works “display[] greater than the level of creativity necessary to qualify for copyright registration.” *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 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 Ninth Circuit rejected a claim of copyright in a piece of jewelry where the manner in which the parties selected and arranged the work's component parts was more inevitable than creative and original. *See Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971). 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.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, § 906.1 (3d ed. 2014) (“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 Works

After careful examination, the Board finds that the Works fail to satisfy the requirement of creative authorship and thus are not copyrightable.

The Works' constituent elements—a square background, a sphere (or globe) consisting of latitudinal and longitudinal curves, and a black or blue and white color scheme—are standard geometric shapes and color variations that do not individually qualify for copyright protection. *See* 37 C.F.R. § 202.1(a) (registration is not allowed for “familiar symbols or designs; . . . or coloring”); *see also* COMPENDIUM (THIRD) § 313.4(K) (“the Office cannot register mere variations in coloring”); *id.* 906.1 (copyright “does not protect common geometric shapes, either in two-dimensional or three-dimensional form . . . including . . . curved lines, . . . spheres, . . . [or] squares”). The question then is whether the combination of the Works' elements are 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 Works are not sufficient to render either of the Works original. While United is correct that common geometric shapes can be used as a part of a copyrightable work, as explained in the *Compendium of U.S. Copyright Office Practices*, the Office “will not register a work that merely consists of common geometric shapes unless the author's use of those shapes results in a work that, as a whole, is sufficiently creative.” *Id.* § 906.1. United submitted examples of registered two-dimensional graphic works and suggested that because its Works are at least as creative as those registered works, the Office should register its copyright claims in its Works. Second Requests at 2-5. Notwithstanding that each of the registered works are distinguishable and more creative than the Works here, none of the registered works are comprised solely of public domain, common geometric shapes.

United contends that specific design choices, including the angle of the sphere, the amount and position of the sphere within the frame, and the black or blue and white color scheme, resulted in a sufficiently creative expression. Second Requests at 3. But, as the *Compendium* instructs, “merely bringing together only a few standard forms or shapes with minor linear or spatial variations” does not satisfy the creativity requirement. COMPENDIUM (THIRD) § 905. The decision to angle and offset a focal shape is a minor spatial variation. Moreover, “combining expected or familiar pairs or sets of colors is not copyrightable.” *Id.* § 906.3.

United further contends that the complexity of the globe design, which “itself requires the arrangement of a number of geographic [sic] shapes,” bring the Works beyond the “mere arrangement of two standard geometric shapes” to a requisite level of creativity. Second Requests at 6. Despite referring to its designs as being composed of a “sphere” or a “globe,” United would have the Office deconstruct those designs into their constituent parts, attribute creativity to the arrangement of those parts, and ultimately register the Works. *See* Second Requests at 3. The Board is unable to do so; both because the Works are each considered as a whole and because the arrangements of the curved lines that comprise the spheres are standard design features. The Board cannot protect expression that constitutes either the only, or one of a limited number of ways to express an idea. COMPENDIUM (THIRD) § 313.3(B). This includes “standard expressions that naturally follow from the idea for a work of authorship.” *Id.*; *see also Satava*, 323 F.3d at 811. A standard way to depict a globe involves using the geometric elements employed by the Works—a sphere depicted through the use of latitudinal and longitudinal curves. To extend copyright protection to these Works would effectively accord to United a copyright in the *idea* of a globe, which is impermissible under 17 U.S.C. § 102(b).

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