



United States Copyright Office

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January 31, 2018

Hiersche, Hayward, Drakeley & Urbach, P.C.
Attn: D. Wade Cloud, Jr.
15303 Dallas Parkway, Suite 700
Addison, TX 75001

**Re: Second Request for Reconsideration for Refusal to Register UAC Triangle Design;
Correspondence ID: 1-25K4EEH; SR 1-3120971803**

Dear Mr. Cloud:

The Review Board of the United States Copyright Office (“Board”) has considered Id Software, LLC’s (“Id Software”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “UAC Triangle Design” (“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 two-dimensional design. The Work appears at first to be a triangle, but upon closer inspection it is hexagonal, with three long sides equal in length and three short sides equal in length. The outer edges are black, as is a circle that sits in the middle of the Work. Between the circle and the outer edges is a white interior shape; it also appears like a triangle but has eighteen sides. A reproduction of the Work is set forth below.



II. ADMINISTRATIVE RECORD

On January 25, 2016, Id Software filed an application to register a copyright claim in the Work, as well as three other related works not before the Board.¹ In a letter dated August 10, 2016, a Copyright Office registration specialist refused to register all four claims, finding that they “lack the authorship necessary to support copyright.” Letter from Paula Gillaspie, Registration Specialist, to D. Wade Cloud, Jr., Hiersche, Hayward, Drakeley & Urbach, P.C. (Aug. 10, 2016).

In a letter dated November 10, 2016, Id Software requested that the Office reconsider its initial refusal to register the Work, as well as the three related works not before the Board. Letter from D. Wade Cloud, Jr., Hiersche, Hayward, Drakeley & Urbach, P.C., to U.S. Copyright Office (Nov. 10, 2016) (“First Request”). In that letter, the applicant referred to the UAC Triangle as “the creative triangular ‘A’ design” and claimed that the combination of the outer edges and the inner circle “helps to achieve the appearance or impression that it is a letter ‘A.’” First Request at 3. After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claim and again concluded that the Work could not be registered because the Work lacked sufficient originality and, in particular, “the shape, stylization, and positioning of the letter ‘A’ . . . do not transform this letter into a copyrightable work of art.” Letter from Stephanie Mason, Attorney-Advisor, to D. Wade Cloud, Jr., Hiersche, Hayward, Drakeley & Urbach, P.C. at 2 (Mar. 23, 2017).

In a letter dated June 15, 2017, Id Software requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work.² Letter from D. Wade Cloud Jr., Hiersche, Hayward, Drakeley & Urbach, P.C., to U.S. Copyright Office (June 15, 2017) (“Second Request”). In that letter, Id Software argued that the Work satisfies copyright law’s low threshold for originality and, specifically, that “the UAC Triangle Design falls within the category of works involving uncopyrightable individual elements that form a protectable work when combined.” Second Request at 2. Further, Id Software claimed that the Office’s treatment of the Work as a “stylized Capital letter ‘A’” was incorrect and likely the result of the Office reviewing the Work in conjunction with the other three related works not before the Board. *Id.* at 2–3. Finally, Id Software argued that the Work is distinguishable from the unregistrable logos in *John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986), and *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495 (S.D.N.Y. 2005). Second Request at 3–4.

¹ Id Software’s first request for reconsideration related to the denial to register four works: UAC Triangle Design, which is the subject of this letter, and UAC Design (SR 1-3120971906), UAC Triangle Design with Union Aerospace (SR 1-3120971844), and UAC Triangle Design with Union Aerospace Corporation (SR 1-3120971865). *See* First Request at 1.

² Id Software did not request a second reconsideration for the three related works. *See* Second Request at 1.

III. DISCUSSION

A. *The Legal Framework*

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 *Feist*. *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*, 386 F. Supp. 2d at 496; *see also John Muller*, 802 F.2d at 990 (upholding the Office’s refusal to register a logo “consist[ing] of four angled lines which form an arrow and the word ‘Arrows’ in cursive script below the arrow”). 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 (THIRD) § 906.1; *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.”); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, No. 82-5438, 1983 WL 398, at *2 (E.D. Pa. Aug. 15, 1983) (“Variations of . . . circles and ellipses” are not protectable, as “[s]uch basic geometric shapes have long been in the public domain and therefore cannot be regulated by copyright.”). 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.]

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. 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 requisite authorship necessary to sustain a claim to copyright.

To begin, the Work is a combination of simple shapes: a hexagon, a circle, and a triangle-like shape that comprises the negative space between the hexagon and circle. The Office cannot register common geometric shapes or familiar symbols. *See* 37 C.F.R. § 202.1(a); *see also*

COMPENDIUM (THIRD) § 906.1 (stating that common geometric shapes are not copyrightable); *id.* at § 313.4(J) (noting that familiar symbols and designs cannot be registered). Thus, the individual elements of the overall Work are not independently copyrightable. Indeed, Id Software acknowledged that “when separated, the individual elements of the UAC Triangle Design could be uncopyrightable.” Second Request at 5; *see also* First Request at 3.

Id Software correctly states that “the appropriate review is the combination of those elements.” Second Request at 5. However, as the Ninth Circuit explained in *Satava*, “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.” 323 F.3d 805 at 811. Based on this standard, examining the Work as a whole still reveals a lack of copyrightable authorship. The Work consists of three geometric shapes. Together, these geometric shapes are stacked—one inside of the other—and are not arranged in a way that creates a new, unfamiliar shape. The combination of the shapes, even if one among many possibilities, does not demonstrate enough creativity to sustain a copyright claim. This is true regardless of whether the Board assumes, *arguendo*, that the Work is “a creative triangular ‘A’ design,” as Id Software asserted in its First Request or that it is *not*, as Id Software asserted in its Second Request. *See* First Request at 2; Second Request at 3. Either way, the Work is too basic in form. *See* COMPENDIUM (THIRD) § 905 (“Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy this requirement.”).³

Finally, Id Software’s claims are not aided by its attempt to distinguish the works that were denied copyright registration in *Coach* and *John Muller*. To begin, *Coach* and *John Muller* are not the only relevant cases supporting a denial of registration, nor does the Board’s determination rely solely on similarity or lack thereof between the Work and the works at issue in *Coach* and *John Muller*. In any event, the Board does not agree that the works are, in fact, materially distinguishable. Although Id Software initially described the Work to the Office as a “creative triangular ‘A’ design,” First Request at 3, in its Second Request, Id Software reversed course by ceasing to refer to the Work as a stylized letter “A”—an apparent attempt to distinguish the Work here from that in *Coach*. But the designs in *Coach* were not rejected merely because they consisted of the letter “C.” They also were refused registration because the “variations and arrangements of the letter ‘C’ were simply not sufficient to establish the necessary amount of creativity required for copyright protection.” *Coach*, 386 F. Supp. 2d at 496. For the reasons just discussed, the elements of UAC Triangle Design lack sufficient creativity regardless of how the applicant tries to characterize them. As the *Coach* court stated:

³ On this point, Id Software claims that the Second Circuit has held that “[t]o be uncopyrightable, the level of variation applied must be as insignificant as merely capitalizing the letter.” Second Request at 3 (citing *Matthew Bender & Co. v. West Publishing, Co.*, 158 F.3d 674, 683–89 (2d Cir. 1998)). However, in *Matthew Bender* the Second Circuit upheld a district court finding that changes to legal opinions, including “the decisions to shorten the titles or capitalize certain letters,” were not copyrightable. 158 F.3d at 683. The court did not say whether any additional variation to a letter would be copyrightable.

“Although plaintiffs contend that the design is one of linked and unlinked ‘elements’ which ‘do not comprise any basic geometric shapes, lettering or typography,’ they cannot seriously maintain that defendant acted arbitrarily and capriciously in interpreting these ‘elements’ as the letter ‘C.’” 386 F. Supp. 2d at 498 (internal citation omitted). Similarly, no matter how Id Software tries to frame the Work now, it is reasonable to interpret the Work as either a triangle or a stylized letter “A.”

The arrow design in *John Muller* is similarly on point. In *John Muller*, the Eighth Circuit upheld the Copyright Office’s refusal to register a logo that “consists of four angled lines which form an arrow and the word ‘Arrows’ in cursive script below the arrow.” *John Muller*, 802 F.2d at 990. Common geometric shapes—a pair of lines meeting at an acute angle, like an acute triangle with an invisible third edge—comprised the arrows design. The design consisted of four such shapes, of varying sizes, stacked inside each other, as if the largest was eating the second largest and so on. Some creative decisionmaking was clearly exercised in the selection of the shapes, as they were not symmetrical but rather each had a longer horizontal edge and a shorter diagonal edge, to the point where the diagonal of the smallest line looked like the bent end of a staple. The cursive script below the shape further invited the interpretation that the elements together formed an arrow or arrows. The *John Muller* design is similar to the Work in several regards. First, both combined simple shapes to achieve a slightly modified, but still familiar, combined shape. Second, both the arrows design and the Work evoke common shapes or familiar designs: an arrow in *John Muller* and either a triangle or a letter “A” or both in the matter before the Board. Third, both reflect a *de minimis* amount of creative expression. As such, neither can sustain a claim for copyright registration.

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: 
Chris Weston
Copyright Office Review Board