



United States Copyright Office

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Jeffrey Giunta
Fleit Gibbons Gutman Bongini & Bianco P.L.
4800 N. Federal Highway, Suite B306
Boca Raton, FL 33431
jgiunta@fggbb.com

Re: Second Request for Reconsideration for Refusal to Register Meatball (Energy Burst); Correspondence ID: 1-2WPM7K8; SR 1-5839335251

Dear Mr. Giunta:

The Review Board of the United States Copyright Office (“Board”) has considered NextEra Energy, Inc.’s (“NextEra Energy’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Meatball (Energy Burst)” (“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 graphic consisting of a grey circle with a white zig-zag line. The zig-zag line begins in the lower left portion of the circle. Beginning at an approximately 45° upward angle, the line runs through the circle five times with varying angle, length, width, and texture, terminating in the upper right portion of the circle. A reproduction of the Work is set forth below.



II. ADMINISTRATIVE RECORD

On September 22, 2017, NextEra Energy filed an application to register a copyright claim in the Work. In a September 25, 2017, letter, a Copyright Office registration specialist refused to register the claim, finding that the Work “must be refused” because it lacks “a minimum amount of creative pictorial, graphic or sculptural authorship” necessary to support a copyright claim. Letter from Wilbur King, Registration Specialist, to Jon Gibbons (Sept. 25, 2017).

In a letter dated October 10, 2017, NextEra Energy requested that the Office reconsider its initial refusal to register the Work. Letter from Jon Gibbons to U.S. Copyright Office (Oct. 10, 2017) (“First Request”). 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 “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 Jon Gibbons (Feb. 27, 2018). Further, the Office found that “the elements are not combined in any way that differentiates them from their basic shape and design components.” *Id.* A “simple circle accented with a zig-zag line” is merely “[c]entering a familiar shape within another common shape[,] a garden-variety logo configuration,” and does not exhibit the creativity to support a registration. *Id.*

In a letter dated May 25, 2018, NextEra Energy 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 Jeffrey Giunta, to U.S. Copyright Office (May 25, 2018) (“Second Request”). In that letter, NextEra Energy asked the Office to consider what it deems creative aspects of the work. *Id.* at 1. Namely, that in contrast to a simple “zig-zag line,” the work is an arrangement of lines “that have different lengths and edge characteristics,” including the middle line’s “irregular stippling and edging effects,” and the lowest line’s “irregular stippling and edging effects” accompanied by a “progressively increasing width.” *Id.* at 2. NextEra Energy argued that “[a]lthough the Work may consist of common shapes, such as crosses, circles, and lines, it is asserted that the ‘author’s use of those shapes results in a work that, as a whole, is sufficiently creative.’” *Id.* at 3 (quoting COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2017) (“COMPENDIUM (THIRD)”).

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 (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.”). 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 the requisite authorship necessary to sustain a claim to copyright. The Board accepts that the Work satisfies the first prong of the originality requirement, independent creation. The Work, however, lacks sufficient creativity to satisfy the second prong. Considering the elements of the Work individually and as a whole, the Work consists of minor variations on geometric shapes arranged in a predictable manner.

The Work’s constituent elements are not individually subject to copyright protection. The circle is a common geometric shape and not copyrightable. COMPENDIUM (THIRD) § 906.1 (noting that common geometric shapes including circles are not copyrightable). Straight lines are also common geometric shapes that are not copyrightable. *Id.* (noting that common geometric shapes, such as “straight or curved lines,” are not copyrightable). The applicant asserts that the Office ignored “several creative aspects,” exhibited in the lines. Second Request at 1. In contrast to a simple “zig-zag line,” NextEra Energy highlights that the Work “contains an arrangement of lines that have different lengths and that also have varying edge characteristics.” *Id.* at 2. The applicant argues that these variations exhibit creative selection sufficient for registration. *Id.* Those arguments are unpersuasive. In a case involving the addition of effects such as “relief, shadowing, and shading” to existing U.S. Census black and white outline maps, the Fourth Circuit agreed with the Copyright Office that such additions did not give rise to a copyrightable work and that such elements “fall within the narrow category of works that lack even a minimum level of creativity.” *Darden v. Peters*, 488 F.3d 277, 287 (4th Cir. 2007). In a similar manner, the stippling edge effects giving the Work an appearance of

roughness or of being hand drawn add only trivial variations to the common geometric shapes in the Work. COMPENDIUM (THIRD) § 313.4(J) (stating that “the Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations”).

The question then is whether the combination of elements in the Work is protectable when viewed as a whole. Some combinations of common or standard design elements may contain sufficient creativity to support a copyright, but not every combination will meet this threshold. *See Feist*, 499 U.S. at 358. Here, the Work consists of the combination of five lines arranged in a zig-zag pattern within a circle. The applicant argues that the arrangement of lines in the Work exhibit creative selection sufficient for registration. Second Request at 2. The Board does not agree. Despite the variations and effects noted above, the Work’s common zig-zag pattern is its prominent feature. The decision to fit the zig-zag pattern within a circle does not exhibit sufficient creativity to meet the bar for copyrightability. This is a predictable combination of two uncopyrightable elements and does not feature the necessary variety and composition of elements to qualify for registration. *See COMPENDIUM (THIRD) § 906.1*. Overall, the Board finds that the Work is not copyrightable. The level of creative authorship involved in its configuration of elements is, at best, *de minimis*, and too trivial to support copyright registration. *See id.* § 313.4(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.



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
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