The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

January 26, 2006

John W. Eldredge, Esq.
Myers, Dawes, Andras & Sherman, LLP
19900 MacArthur Blvd., Suite 1150
Irvine, California 92612

Re: **VELOCITY**
American DJ Supply Inc.
Control No. 61-217-6777(M)

Dear Mr. Eldredge:

I am writing on behalf of the Copyright Office Review Board[1] in response to your second request for reconsideration, dated May 4, 2004. After reviewing the application from American DJ Supply, Inc., and the arguments you and Kenneth L. Sherman, Esq., presented on the company's behalf, the Board affirms the Examining Division's refusal to register VELOCITY, a scratchboard for mixing and sampling music.

I. ADMINISTRATIVE RECORD

A. Initial submission

On February 20, 2003, Applicant, American DJ Supply, Inc., submitted an application to register as a three-dimensional sculpture the work VELOCITY, a scratchboard for mixing and sampling music. On July 23, 2003, Examiner Helen Livanios refused to register the work VELOCITY. She found that, although the work deposited, a useful article, contains separable design features, such separable features are not copyrightable.

B. First request for reconsideration and Office response

By letter dated November 13, 2003, your colleague, Kenneth L. Sherman, Esq., submitted a request for reconsideration for VELOCITY. He described VELOCITY as a "3-dimensional graphic and sculptural work with a commercial/utilitarian article". Letter from Sherman to Copyright Office of 11/13/03, at 1. He further stated:

---

[1] You submitted your second request for reconsideration to the Appeals Board. However, on January 27, 2005, that body became known as the Review Board. Previously, it was known as the Appeals Board. 69 Fed. Reg. 77636 (December 28, 2004).

> The product has a utilitarian function and includes controls and CD players for mixing and sampling music. The work additionally includes knobs, buttons, lights, lines, characters, circles, and a display. The display has numerous characters, lines, and bars.

Id.

Mr. Sherman set out the analysis required for examining useful articles. He asserted that VELOCITY has design elements that are both physically and conceptually separable from its functional characteristics. He argued that the work's "display" alone is copyrightable because it is separable from VELOCITY's useful aspects and "could be expressed in numerous other tangible mediums separable from the 3-dimensional work itself." *Id.* at 3. In addition, he identified particular elements that he alleged are copyrightable, stating:

> The circular jog-wheels of the work contain designs separable from the utilitarian aspects of the 3-dimensional work. In particular, they contain bumps, grooves and protrusions that do not extend to the utilitarian aspects of the article. The bumps, grooves and protrusions could exist independently, albeit conceptually, because they may be visualized on any other similarly shaped object. Therefore, copyright protection extends to the design of the jog-wheels.
>
> Additionally, the center portion, containing the words "American Audio" along with other buttons and knobs, is raised and is a unique, protectable expression.
>
> ... [T]he distinctively shaped black backgrounds behind the silver buttons, both next to the large Jog-wheels and on the center raised console. None of these elements are dictated by functional requirements.
>
> The remaining portions of the 3-dimensional work also contain words and graphic details that can exist separately from the work itself because they can be visualized, among other tangible mediums, on a sheet of paper. For example, the arrows used to indicate increasing or decreasing volume are original and protectable graphic details. Also, the placement of words, such as "VELOCITY" is protectable expression.

Id. at 4, 5.

Mr. Sherman stated that because these elements are unique expressions, they contain an exceptional amount of creativity. He also identified expressions in the work that he characterized as original and arbitrary expressions that are not in the public domain. These include "Seamless Loop," "Re Loop," "Tempo Lock," "Pitch Bend," "Flanger," "FX SEL, and "Scratch." He argued that these expressions are separable, along with their arrangement on the 3-dimensional work because they can be expressed "in any other tangible medium, such as a sheet of paper." *Id.* at 5.

By letter dated January 5, 2004, Attorney Advisor Virginia Giroux agreed that there are graphic and textual elements that are separable from the functionality of VELOCITY, although she argued that the other elements identified by Mr. Sherman are not separable. Letter from Giroux to Sherman of 1/5/04, at 2. Ms. Giroux identified as separable: words or terms appearing on the surface of the 3-dimensional work in question; arrows; plus and minus signs; vertical and horizontal lines; circular and oval shapes. *Id.* at 3. She also stated that the remaining elements of VELOCITY such as various knobs and buttons, and bumps, grooves and protrusions cannot be considered copyrightable because they are either not separable from the functionality of the useful article or cannot be conceived of separately without destroying the overall shape of the useful article. *Id.* at 4.

Ms. Giroux further determined, however, that the textual and graphic elements which may be conceived as separable are not copyrightable, either in themselves or in combination within the overall VELOCITY work itself. Such separable elements as the arrows, individual words or phrases, horizontal and vertical lines, circular and oval shapes do not have sufficient creativity to be copyrightable because they are public domain elements or variations of such commonplace elements and, thus, are categorized as *de minimis* authorship in itself. *Id.* at 3, 4. She also pointed out that "as a graphic design, even the combination and arrangement of the shapes on the surface of this work do not rise to the level of copyrightable authorship necessary to support a copyright registration" and she cited the *Compendium of Copyright Office Practices II,* (1984) (*Compendium II*), § 503.02(a) and (b). Letter from Giroux of 1/5/04, at 3. Finally, Ms. Giroux explained that, even conceding that the arrangement and placement of some of the elements on the surface of the work are not predetermined, the "placement, positioning, and arrangement of the graphic and textual elements on this work are in the nature of layout and format, and, therefore, not copyrightable," citing *Compendium II*, §§ 305.06, 305.07. Letter from Giroux of 1/5/04, at 4.

C. Second request for reconsideration

By letter dated May 4, 2004, you requested that the Copyright Office Review Board again reconsider the refusal to register the work entitled VELOCITY, arguing that it has elements that are separable from its function and that these elements possess sufficient originality to be copyrightable. You essentially restated the arguments previously set forth by Mr. Sherman in his November 13, 2003, letter, referring to the work in question as "a 3-dimensional graphic and

sculptural work embodied within a commercial/utilitarian article known as a DJ Scratchboard." Letter from Eldredge to Board of Appeals of 5/4/04, at 1. In particular, you argued that the Copyright Office should consider alternative separability theories, citing *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 418-419 (2d Cir. 1985), and *Brandir Int'l v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987), both of which explain separability in terms different from the tests found in the Office's *Compendium II*.

You have stated that the "display portion of the article is undoubtedly separable from the useful article itself. The artistic features within the display could be expressed in numerous other tangible mediums separable from the 3-dimensional work itself. The display alone is not a utilitarian article." Letter from Eldredge of 1/5/04, at 3. You go on to argue that the display, separable from the article itself, is a graphical work which reflects design elements of the designer's artistic judgment exercised independently of functional influences and, thus, are conceptually separable and copyrightable. *Id.* at 3-4. Your position is that all of the features and elements of the display which you cite are "artistic and decorative features" and, thus, are separable from the useful article itself: "none of the 'artistic and decorative' features are required for the article's utility and, as such, are 'conceptually separable' under the Denicola test." *Id.* at 4. Finally, referring to, and distinguishing, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), you put forth the position that the decorative elements in VELOCITY have been "selected, coordinated, designed, and arranged in such a way as to create an original work of authorship." Letter from Eldredge of 1/5/04, at 5.

II. DECISION

Having reviewed the arguments and application materials presented on behalf of your client, American DJ Supply, Inc., the Review Board affirms the Examining Division's refusal to register Velocity.

A. Description and analysis of the useful article

The Review Board has determined that Applicant's work VELOCITY is a useful article as that category is defined in the statute: a useful article has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. §101. Also, any article that is "normally a part of a useful article is considered a 'useful article.' " *Id.* The statute also provides that registration of a work is possible only if, and to the extent that, a work contains pictorial, graphic or sculptural features that are separable from the useful article. 17 U.S.C. §101 (definition of "pictorial, graphic and sculptural works").

You have stated that the work at issue here, VELOCITY, is "a 3-dimensional graphic and sculptural work embodied within a commercial / utilitarian article known as a DJ Scratchboard"

and that the product "includes controls and CD players for mixing and sampling music." Letter from Eldredge of 5/04/04, at 1. The Board recognizes that the work which you have submitted for a second reconsideration is an electrical device, normally called a scratchboard, and that this device contains speakers, controls and digital read-outs; the scratchboard is used for playing and editing music, and additionally displays knobs, buttons, lines, character symbols, and circles which are all utilized in the functioning of the device. Under §108.05(b) of *Compendium II* (1984), the Board may take administrative notice that VELOCITY is a useful article. We here provide a reproduction of the photograph sent for deposit copy purposes.



Because the Board has determined that the work at issue is a useful article, it must examine the work to determine whether it has any physically or conceptually separable elements. If the Board identifies a separable element, the next step in its review is to analyze the element to determine whether it satisfies the originality requirements that are necessary for copyrightability. The Board's analysis of those two factors, separability and originality, as applied to VELOCITY is set forth below.

B. Separability analysis

Congress established the principle that copyright protection is prohibited for utilitarian aspects of useful articles when it enacted the Copyright Act of 1976. Only elements that are physically or conceptually separable features of a useful article may be copyrighted. The legislative history of the Copyright Act of 1976 states:

> [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be

> copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design — that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the overall configuration of the utilitarian article as such. (emphasis added)

H.R. Rep. No. 94-1476, at 55 (1976).

Therefore, Copyright Office examination procedures follow a separability analysis to ensure that the utilitarian aspects of useful articles are not registered. Written guidelines for the separability analysis are found in § 505.02 of *Compendium II*, which states:

> Registration of claims to copyright in three-dimensional useful articles can be considered only on the basis of separately identifiable pictorial, graphic, or sculptural features which are capable of independent existence apart from the shape of the useful article. Determination of separability may be made on either a conceptual or physical basis. (emphasis added)

In the case of physical separability, *Compendium II*, § 505.04, states:

> The physical separability test derives from the principle that a copyrightable work of sculpture which is later incorporated into a useful article retains its copyright protection. ... However, since the overall shape of a useful article is not copyrightable, the test of physical separability is not met by the mere fact that the housing of a useful article is detachable from the working parts of the article.

In the case of conceptual separability, *Compendium II*, § 505.03, states:

> Conceptual separability means that the pictorial, graphic and sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as pictorial, graphic or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, as another example, independent of the shape of the useful article, *i.e.*, the

> artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. The artistic features and the useful article could both exist side by side and be perceived as fully realized, separate works– one an artistic work and the other a useful article. (emphasis added)

In opposition to the Office's *Compendium II* tests for separability, you have cited alternative tests from case law. Such tests include that proffered by Judge Newman in his dissent in *Carol Barnhart*, 773 F.2d 411 (2d Cir. 1985)[2] and that proffered by Professor Denicola.[3] Another one often mentioned is that proffered by Professor Goldstein.[4] Unfortunately, many of these tests offer no objective standard that can be applied with consistency by the Office in its statutorily-required examination of claims to registration. These alternative separability tests essentially rely on the exercise of subjective judgment; such judgment would likely lead to arbitrary decision-making if any particular one of the alternative tests were applied by examiners. The tests you have mentioned (and other tests) may engender problems of consistent examining practices, premised as these tests are, at least partly, on subjective perception: *e.g.*, when, how, and to what degree is the utilitarian purpose of an article displaced in a viewer's mind by the artistic purpose; when, how, and to what degree do the aesthetic and functional considerations underlying the design of a useful article merge.

Because such alternative tests might result in registration of works in conflict with the expressed congressional intent to deny copyright protection to the design of useful articles which

---

[2] Judge Newman's test, sometimes referred to as a "temporal displacement" test, would take into consideration whether the observer of the article in question would be able to arrive at a "separate non-utilitarian concept that can displace, at least temporarily, the utilitarian concept." *Id.* at 423.

[3] The Second Circuit in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F. 2d 1142 (2d Cir. 1987), adopted Professor Denicola's test for determining conceptual separability. That test considers whether or not a given feature or aspect of a useful article "reflects a merger of aesthetic and functional considerations;" if so, the artistic features of the useful article cannot be said to be conceptually separable; if not, conceptual separability may exist. *Id.* at 1145. Professor Denicola's test encompasses a consideration of the design process involved in the useful article in question as well as the artistic choices of the creator of the article and whether the artistic aspects of the article were significantly influenced by the functionality requirements. 67 Minn. L. Rev. 707 (1983). Professor Denicola argued that "the statutory directive requires a distinction between works of industrial design and works whose origins lie outside the design process, despite the utilitarian environment in which they appear." *Id.* at 742. He advocates that copyrightability "ultimately should depend on the extent to which the work reflects artistic expression uninhibited by any functional considerations." *Id.*

[4] In his treatise on copyright, I Paul Goldstein, *Copyright* § 2.5.3 (2000), Professor Goldstein offers an alternative separability test which affords copyright protection to a "pictorial, graphic or sculptural feature incorporated in the design of a useful article if it can stand on its own as a work of art traditionally conceived and if the useful article in which it is embodied would be equally useful without it."

happen to be aesthetically pleasing, the Copyright Office has not accepted as a registration practice any of the particular alternative separability tests you have mentioned; nor has the Office found sufficient for its examination and registration purposes any other separability test advanced by any particular copyright scholar or commentator. The test applied by the Office must be one consistent with the expressed intention of Congress as it was set forth in the substantial legislative history that accompanied the 1976 major revision of the copyright law. Although one of the various alternative separability theories you cite may ultimately be endorsed by a majority of courts as the theory that is most consistent with expressed congressional intent ["courts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article's utilitarian function," *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663, 670 (3d Cir. 1990)], no such separability test alternative to the current registration practices of the Copyright Office has yet emerged.

Thus, we return to the Office's separability tests. Section 505 of *Compendium II*, *supra* at 6, is a direct successor to the Copyright Office regulation that was affirmed in *Esquire, Inc. v. Ringer*, 591 F.2d. 796 (D.C. Cir. 1978), as a valid interpretation of copyright law. *Esquire* enunciated the rule that is the basis for the Office's analysis of whether a pictorial, graphic or sculptural work may be considered separable from the utilitarian object in which it is incorporated. Relying on explicit statements in legislative history, the *Esquire* court found that the Office's regulation was an authoritative construction of the copyright law. *Id.* at 802-803. *Esquire* and later cases held that, despite an aesthetically pleasing, novel or unique shape, the overall design or configuration of a utilitarian object may not be copyrighted if it is not "capable of existing as a work of art independent of the utilitarian article into which [it is] incorporated." *Id.* at 803-804. In *Esquire*, the court held that the Copyright Office properly refused registration for a useful article, in that case a light fixture, notwithstanding how aesthetically pleasing the useful article's shape or configuration may have been. *Id.* at 800. As noted above, the legislative history states that:

> The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design--that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable.

H.R. Rep. No. 94-1476, at 55 (1976).

Based on the principles discussed above, the Review Board has determined, and agrees with you, that the elements on VELOCITY'S circular jog wheels that are described in your May 4, 2004, second request for reconsideration as "bumps, grooves and protrusions" are conceptually separable from the usefulness of the article. Letter from Eldredge of 5/4/04, at 3. The Board has

not located within the work VELOCITY, however, any other features which may be classified or analyzed as physically or conceptually separable from its utility. In arriving at this conclusion, we offer the following.

You particularly identify the center portion of the scratchboard containing the words "American Audio," along with "certain other buttons and knobs," which forms a raised portion as a "unique protectable expression." Further, you point out the "distinctively shaped black backgrounds behind the silver buttons." You identify "words and graphic details that can exist separately from the work itself because they can be visualized apart from the article" and you give the example of "arrows used to indicate increasing and decreasing volume" as "original and protectable graphical details." Letter from Eldredge of 5/4/04, at 4. The Board considers the buttons and knobs, the words appearing on the buttons and knobs, and the graphic symbols such as arrows to be part of the overall utility of the work VELOCITY: bottons and knobs are meant to be selected and pushed or turned for purposes of using the work; the words appearing on these are meant for identification for the user's understanding and knowledge in using VELOCITY; the graphic symbols are also meant for purposes of guiding the user. We will address the black backgrounds behind the silver buttons, which we are willing to concede as conceptually separable, in the next portion of our analysis on copyrightability.

Having agreed to the conceptual separability of the bumps, grooves, and protrusions of the circular jog-wheels as well as to the black background of the large buttons, we point out that neither physical nor conceptual separability, alone, automatically qualifies any authorship for copyright protection. Separable elements must also possess a sufficient amount of creativity to be entitled to copyright protection. Therefore, although the Board agrees that the bumps, grooves and protrusions on the jog wheels and the black-coloration background on the silver buttons are conceptually separable, it must still refuse registration because these features do not, in themselves, exhibit a sufficient amount of creativity to satisfy the originality requirement that all works must satisfy in order to be copyrightable.

C. Originality analysis: Feist

After finding that any element of a useful article is separable, the Board of Review then evaluates whether that element is sufficiently original to be copyrightable. Copyright protection is only available for "original works of authorship." 17 U.S.C. 102(a). The Supreme Court has stated that originality consists of two elements, "independent creation plus a modicum of creativity." *Feist*, 499 U.S. at 346. *See also Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) "'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary."; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) The court defined "author" to mean the originator or original maker and described copyright as being limited to the creative or "intellectual conceptions of the author." The Board of Review accepts that VELOCITY was

independently created. However, the separable elements of VELOCITY fail to satisfy the creativity requirement.

Even prior to *Feist*, courts interpreted the creativity aspect of "original" as being very low. Any "distinguishable variation" of a work constitutes sufficient originality as long as it is the product of an author's independent efforts, and is "more than a 'merely trivial' variation." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903): "... a very modest grade of art has in it something irreducible, which is one man's alone."

However, at the same time that the Supreme Court reaffirmed, in *Feist*, the precedent that only a modicum of originality is required for a work to be copyrightable, it also emphasized that there are works in which the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist* at 359. Such works are incapable of sustaining copyright protection. *Id.*, citing 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, 2.01[B]. 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," *Feist* at 363, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. A work that reflects an obvious arrangement fails to meet the low standard of minimum creativity required for copyrightability. *Id.* at 362-363. An example would be alphabetical listings in white pages of telephone directories, the type of work at issue in *Feist*, which the Supreme Court characterized as "garden variety...devoid of even the slightest trace of creativity." *Id.* at 362. The Board disagrees with your assertion that *Feist* is not applicable to its examination of VELOCITY. Letter from Eldredge of 5/4/04, at 5. While the facts are different, the fundamental principles are relevant.

1. Office registration practices

Copyright Office registration practices have always recognized that some works of authorship exhibit only a *de minimis* amount of authorship and, thus, are not copyrightable. *See Compendium II*, § 202.02(a) (1984). With respect to pictorial, graphic and sculptural works, which are Class VA [visual arts] works, § 503.02(a) of *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." Further, there is no protection for familiar symbols, designs or shapes such as standard geometric shapes. 37 C.F.R. 202.1. *Compendium II* essentially provides detailed instructions for Copyright Office registration procedures and reflects the principle that creative expression is the basis for determining whether a work is copyrightable, not an assessment of aesthetic merit. Section 503.02(a) of *Compendium II* states that:

> Copyrightability depends upon the presence of creative expression in a work, and not upon aesthetic merit, commercial appeal, or symbolic value. Thus, registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the

> attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. ... The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.

Section 503.02(a) reflects one of the most fundamental principles of copyright law: common ordinary shapes and designs, and minor variations of those, may not be copyrighted because that could limit their availability to the general populace. Basic, common and ordinary shapes, designs, and symbols are in the public domain for use by all since they form the building blocks for creative works.

2. Separable design elements of VELOCITY lack minimum creativity

The Review Board has determined that the bumps, grooves and protrusions of the jog wheels as well as the black background coloration associated with the large silver buttons, lack sufficient creativity– considered either individually or as a whole. Even assuming further that the other elements you have identified are separable, either physically or conceptually, they would also lack sufficient creativity to be copyrightable. Those other elements are the textual, graphic, and color elements on VELOCITY which, if, for the sake of argument, we were to consider separable, do not have the minimum amount of creativity required to be copyrightable. As stated above, names, titles, words, short phrases, numbering and lettering are not copyrightable. 37 C.F.R. 202.1. Nor are common and familiar shapes copyrightable because they are in the public domain. *Id.* Wording that appears on VELOCITY, such as "velocity" and "American Audio," and words that, in reality, describe functions or commands, such as "in," "out," "flash," "cue," "enter," "track," for example, fall into the category of authorship that is not copyrightable *per se*. Thus, although we could, arguendo, consider the words to be conceptually separable, we could not register them because they are *de minimis* in themselves. And, the words do not represent sufficient textual narrative. Nor can they be considered a compilation of individual terms because of the choice of fairly few words or terms, insufficient in quantum to sustain a registration.

Other elements which the Board has conceded are conceptually separable– the jog wheel bumps, grooves and protrusions– lack sufficient creativity, either individually or taken as a whole. Those elements are made up of a very few common shapes, circles, and lines that are repeated in a simple, symmetrical pattern. Other graphics, such as the straight-line unit marks for the sliding nobs, are commonplace. The black-color background behind the silver buttons is conceptually separable from the utilitarian buttons but the black color essentially follows the

outline of the buttons, stacked one on top of the other. Color per se is not copyrightable, *Compendium II*, § 503.02(a), *supra,* at 10-11, and the trivial coloration between the vertical buttons, with the black color slightly curved between buttons but not extending beyond the button area of the scratchboard, is insufficient to sustain a claim.

You have argued that the artistic expression of VELOCITY consists of elements which are "selected, coordinated, designed, and arranged in such a way as to create an original work of authorship." Letter from Eldredge of 5/4/04, at 5. It is true that public domain elements may satisfy the requirement for copyrightable authorship as a compilation, through their selection, coordination and arrangement. Works based on public domain elements may be copyrightable if there is some distinguishable element in their selection, arrangement or modification that reflects choice and authorial discretion and that is not so obvious or so minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist* at 359. *See also* 17 U.S.C. 101 (definitions of "compilation" and "derivative work"). Although the individual components of a given work may not be copyrightable, the Copyright Office follows the principle that works should be judged in their entirety and not judged in terms of the protectibility of individual elements within the work. *Atari Games Corp. v. Oman*, 979 F.2d 242, 244-245 (D.C. Cir. 1992).

The Board, however, has determined that the placement of most of the elements on VELOCITY is most likely dictated by its functions as a scratchboard and thus the overall design of the elements of the scratchboard is such that it is subsumed within the functionality of a scratchboard. Even if the author, American DJ Supply, Inc., has exercised judgment about where to place the features on the instrument panel, the placement of the elements– elements which, in their essence, are functional, and thus not separable– is in the nature of layout and format, for which copyright protection is not available. *Compendium II*, §§ 305.06, 305.07. The placement and clustering of elements on VELOCITY appears to be a logical arrangement that is based on its functioning and use. The selection and arrangement are identical on the panel's left and right sides with a symmetrically arranged panel between them. The elements do not exhibit sufficient creativity considered individually or as a whole.

The Review Board also finds that when VELOCITY is viewed as a whole and all separable elements are considered in their overall combination, the entirety of the work still does not meet the requisite level of creative authorship to sustain a copyright registration. Since most of the elements contained in VELOCITY are not merely expressive but are, rather, functional components of the useful article, those must be filtered out when the overall work is considered as a whole for copyrightability. That which remains when the inseparable features are filtered out are bumps, grooves and protrusions, and, for the sake of argument, the black background surrounding the silver buttons. When these conceptually separable features are considered together, i.e., as an entirety, they still represent a *de minimis* embellishment on the inseparable features, i.e., trivial ornamentation of functional elements. As *Compendium II* states, it is not possible to copyright "a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spacial variations." *Compendium II*, § 503.02(a). Here, the

combination of a few basic shapes that are circular or spherical, square or rectangular, and straight does not rise to the level of creative authorship.

There is substantial support in case law for the Board's conclusions that the graphic and textual elements of Applicant's works are not copyrightable: in *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D. D.C. 1991), upholding refusal to register chinaware design pattern composed of simple variations or combinations of geometric designs due to insufficient creative authorship to merit copyright protection; in *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D. N.Y. 1988), upholding refusal to register fabric design consisting of striped cloth with small grid squares superimposed on the stripes where Register concluded design did not meet minimal level of creative authorship necessary for copyright; in *John Muller & Co., Inc. v. N.Y. Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986), upholding a refusal to register a logo consisting of four angled lines forming an arrow, with the word "arrows" in cursive script below, noting that the design lacked the minimal creativity necessary to support a copyright and that a "work of art" or a "pictorial, graphic or sculptural work ... must embody some creative authorship in its delineation of form." *See also Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F.Supp. 769 (W.D. Pa. 1986), envelopes with black lines and words "gift check" or "priority message" did not contain minimal degree of creativity necessary for copyright protection; *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958), cardboard star with two folding flaps allowing star to stand for retail display not copyrightable work of art; and *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F.Supp. 964 (E.D. N.Y. 1950), label with words "Forstmann 100% Virgin Wool" interwoven with three *fleur-de-lis* held not copyrightable.

For the reasons stated in this letter, the Review Board affirms the Examining Division's refusal to register VELOCITY. This decision constitutes final agency action.

Sincerely,

/s/

Nanette Petruzzelli
Special Legal Advisor for Reengineering
for the Review Board
United States Copyright Office