United States Copyright Office
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July 29, 2013

Lathrop & Gage LLP
Attn: Amy Brozenic
Building 82, Suite 1000
10851 Mastin Blvd.
Overland Park, Kansas 66210-1669

Re: Aperum Beta Screen Displays
Correspondence ID: 1-AE33D9

Dear Ms. Brozenic:

The Review Board of the United States Copyright Office (the "Board") is in receipt of your second request for reconsideration of the Registration Program's refusal to register the work entitled: *Aperum Beta Screen Displays*. You submitted this request on behalf of your client, Sphere3, LLC (the "Applicant"), on March 7, 2012. I apologize for the delay in the issuance of this determination. After periods of inaction, staff departures, and budgetary restrictions, the Register of Copyrights has appointed a new Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has examined the application, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your second request for reconsideration, the Board affirms the Registration Program's denial of this copyright claim. The Board's reasoning is set forth below. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

I. DESCRIPTION OF THE WORK

Aperum Beta Screen Displays (the "Work") consists of three "half-moon" shapes arranged in a circular pattern. One shape is colored blue, one is colored orange, and one is colored green. The name "Sphere3" appears immediately to the right of the "half-moon" shapes. The letters that comprise "Sphere3" are colored blue and appear in a standard, somewhat slanted font.

The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On June 28, 2011, the United States Copyright Office (the "Office") issued a letter notifying you that it had refused registration of the above mentioned Work. *Letter from Registration Specialist, Sandra Ware, to Amy Brozenic* (June 28, 2011). In its letter, the Office indicated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated August 3, 2011, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Amy Brozenic to Copyright RAC Division* (August 3, 2011) ("First Request"). Your letter set forth the reasons you believed the Office improperly refused registration. *Id.* Upon reviewing the Work in light of the points raised in your letter, the Office concluded that the Work "does not contain a sufficient amount of original and creative artistic or graphic authorship" and again refused registration. *Letter from Attorney-Advisor, Virginia Giroux-Rollow, to Amy Brozenic* (December 12, 2011).

Finally, in a letter dated March 7, 2012, you requested, pursuant to 37 C.F.R. § 202.5(c), that the Office reconsider for a second time its refusal to register the Work. *Letter from Amy Brozenic to Copyright R&P Division* (March 7, 2012) ("Second Request"). In arguing that the Office improperly refused registration, you claim the Work includes at least the minimum amount of creativity required to support registration under the standard for originality set forth in *Feist Publications v. Rural Telephone Service Co*, 499 U.S. 340 (1991). *Second Request* at 2. In support of this argument, you claim that the Applicant's selection and arrangement of the Work's constituent elements demonstrates sufficient creativity to support copyright registration. Specifically, you state: " . . . the Work contains original graphics formed by the overlay of three 'half-moon' shapes with a fanciful depiction of the word 'Sphere3', an artistic treatment of colors, shapes, and elements in contrasting hues, positions and sizes, and original textual elements presented in imaginative color combinations, visual relief, shading, and shadowing." *Second Request* at 1.

In addition to *Feist*, your argument references several cases supporting the general principle that, in order to be sufficiently creative to warrant copyright protection, a work need only possess a "modicum of creativity." *Second Request* at 2-3.

III. DECISION

A. *The Legal Framework*

All copyrightable works must qualify as "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist*, 499 U.S. at 345. 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.* While only a modicum of creativity is necessary to establish the requisite level, the Supreme Court has ruled that some works (such as the telephone directory at issue in *Feist*) fail to meet this 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 nonexistent." *Id.* at 359.

The Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. *See* 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"); *see also* 37 C.F.R. § 202.10(a) (stating "[i]n order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Of course, 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 grade. *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"). Ultimately, the determination of copyrightability in the combination of standard design elements rests 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. D.C. 1989).

To be clear, the mere simplistic arrangement of non-protectable elements does not automatically establish the level of creativity necessary to warrant protection. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in a cursive script below the arrow. *See John Muller & Co.*, 802 F.2d 989 (8th Cir. 1986). Likewise, the Ninth Circuit held that a glass sculpture of a jellyfish that consisted of elements including clear glass, an oblong shroud, bright colors, proportion, 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 court's language in *Satava* is particularly instructional:

> [i]t 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) (emphasis in original).

Finally, Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design's uniqueness, its visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *see also Bleistein v. Donaldson*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or

style for purposes of aesthetic appeal does not automatically mean that the work, as a whole, constitutes a copyrightable "work of art."

B. *Analysis of the Work*

After carefully examining the Work, and applying the legal standards discussed above, the Board finds that the Work fails to satisfy the requirement of creative authorship.

First, the Board has determined that none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted, 37 C.F. R § 202.1(a), identifies certain elements that are not copyrightable. These elements include: "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring." *Id.* Here, the Applicant's Work consists of three standard "half-moon" shapes arranged in a circle, the word "Sphere3" appearing in an ordinary font, and three colors with light shading. Consistent with the above regulations, neither the "half-moon" shapes, the word "Sphere3," the font the Applicant used to create the word's lettering, nor the Work's simple color scheme are eligible for copyright protection. *See Id.* (prohibiting the registration of basic symbols or designs); *see also Racenstein & Co., Inc. v. Wallace dba ABC Window Cleaning Supply*, 51 U.S.P.Q. 2d 1031 (S.D.N.Y. 1999) (indicating a word or short phrase, alone, generally cannot support a copyright claim); *see also Coach, Inc. v. Peters*, 386 F. Supp 2d 495, 498-99 (indicating mere variations in typographic ornamentation or lettering cannot support a copyright claim); *and see Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). Thus, we conclude that the Work's constituent elements do not qualify for registration under the Copyright Act.

Second, the Board finds that the Work, considered as a whole, fails to meet the creativity threshold set forth in *Feist*. 499 U.S at 359. As explained, the Board accepts the principle that combinations of unprotectable elements may be eligible for copyright registration. However, in order to be accepted, such combinations must contain some distinguishable variation in the selection, coordination, or arrangement of their elements that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Id.*; *see also Atari Games,* 888 F.2d at 883 (finding a work should be viewed in its entirety, with individual noncopyrightable elements judged not separately, but in their overall interrelatedness within the work as a whole). Viewed as a whole, the Work consists of the side-by-side pairing of three interlocking "half-moon" shapes with the word "Sphere3" (printed in an ordinary font). The Work also incorporates three common colors with a simple, dark to light shading scheme. This basic arrangement of three familiar shapes, a word, and a simple color scheme is, at best, *de minimis*, and fails to meet the threshold for copyrightable authorship. *Feist,* 499 U.S at 359; *see also Atari Games,* 888 F.2d at 883. Accordingly, we conclude that the Work, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist,* 499 U.S at 359.

In sum, the Board finds that the Applicant's selection and arrangement of the common elements that comprise the Work lack a sufficient level of creativity to make the Work registerable under the Copyright Act.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the work entitled: *Aperum Beta Screen Displays.* This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Copyright Office Review Board