United States Copyright Office
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August 28, 2013

Squire Sanders, LLP
Attn: Philip R. Zender
275 Battery Street, Suite 2600
San Francisco, CA 94111

Re: Blue Flame
Correspondence ID: 1-DJTHE2

Dear Mr. Zender:

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: *Blue Flame*. You submitted this request on behalf of your client, Zippo Manufacturing Company, on December 5, 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 registration 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

Blue Flame (the "Work") consists of a large black rectangle, a blue oval shape, and a smaller, white oval shape. Both oval shapes have pointed tops and rounded bottoms. The Work's elements are arranged so that the blue oval is located inside the black rectangle, and the white oval is located inside the blue oval. The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On April 5, 2012, the United States Copyright Office (the "Office") issued a letter notifying Zippo Manufacturing Company (the "Applicant") that it had refused registration of the above mentioned Work. *Letter from Registration Specialist Ivan Proctor to Jonathan Pink* (April 5, 2012). In its letter, the Office stated that it could not register the Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated May 29, 2012, the Applicant requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register the Work. *Letter from Elizabeth Seals to Copyright RAC Division* (May 29, 2012) ("First Request"). Upon reviewing the Work in light of the points raised in the Applicant's request, 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, Stephanie Mason, to Elizabeth Seals* (September 6, 2012).

Finally, in a letter dated December 5, 2012, you 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 Philip Zender to Copyright R&P Division* (December 5, 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, passim.* In support of this argument, you claim that the Applicant's selection and arrangement of the Works' constituent elements possess a sufficient amount of creative authorship to warrant registration under the Copyright Act. *Id.* at 7-8. You also suggest that the Work's constituent elements are "irregular and expressive" and sufficiently creative to support copyright registration. Specifically, you assert that the Applicant's claim of copyright is directed to the "unique and inventive" arrangement of the original elements to resemble an "unattainable, imaginary concept of fire." *Id.* at 3-4.

In addition to *Feist*, your argument references several cases in support of the general principle that, to be sufficiently creative to warrant copyright protection, a work need only possess a "modicum of creativity." *Id. passim.* You also reference several cases that demonstrate works comprised of otherwise unprotectable elements are acceptable for copyright protection if the selection and arrangement of their elements satisfies the requisite level of creative authorship. *Id.*

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 unprotectable 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., Inc. v. N.Y. Arrows Soccer Team, Inc. et. al.*, 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 *Blue Flame* 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 one standard rectangle, two oval shapes with pointed ends, and the colors blue, black, and white. Consistent with the above regulations, neither the rectangle shape, the oval shapes, nor the Work's simple color scheme are eligible for copyright protection. *See Id.* (prohibiting the registration of basic symbols or designs); *see also Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim). The Board is not persuaded by your argument that the Work is comprised of anything other than common, unprotectable shapes and colors. Despite your claim that the Work's two oval shapes have both been "purposely formed so as to convey a specific abstract artistic expression," *Second Request* at 8, these elements remain simple, oval shapes, altered slightly so that their top ends are pointed and their bottom ends are rounded. We find this trivial alteration to be too *de minimis* to meet the threshold for copyright protection. Accordingly, 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 two overlapping ovals (one blue, one white) set inside a black rectangle. This basic configuration of three ordinary shapes 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. Your assertion that the Work resembles an "unattainable, imaginary concept of fire" does not add to your claim of sufficient creativity. *Second Request* at 3-4. Nor does your claim that the work is unique and expressive. *Id.* As discussed above, the Board does not assess a design's uniqueness, visual effect or appearance, symbolism, or the espoused intentions of an author in determining whether a work contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if accurate, the mere fact that the Work includes an arrangement of unprotectable shapes and unprotectable colors that can be construed as depicting a stylized blue flame would not qualify the Work, as a whole, as copyrightable. *Feist,* 499 U.S at 359; *Satava*, 323 F.3d at 811.

In sum, the Board finds that the Applicant's selection and arrangement of the 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: *Blue Flame*. 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