United States Copyright Office
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July 2, 2014

Nixon & Vanderhye P.C.
Attn: Sheryl De Luca
901 North Glebe Road, 11th Floor
Arlington, VA 22203-1808

Re: ***Dyneema Wave Design***
Correspondence ID: 1-GWJTM5

Dear Ms. De Luca:

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 *Dyneema Wave Design*. You submitted this request on behalf of your client, DMS Dyneema B.V. (the "Applicant"), on February 11, 2014.

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

Dyneema Wave Design (the "Work") consists of the term "Dyneema" printed in block letters and positioned over six horizontal lines. To the right of the term "Dyneema," the six lines intersect to create a series of diamond shapes. The below image is a photographic reproduction of the Work from the deposit materials:



II. ADMINISTRATIVE RECORD

On July 9, 2013, the United States Copyright Office (the "Office") issued a letter notifying the Applicant that it had refused to register the Work. *Letter from Rhoda L. Holliman, Registration Specialist, to Sheryl De Luca* (July 9, 2013). The Office stated that it could not register this Work because it lacks the authorship necessary to support a copyright claim. *Id.*

In a letter dated July 29, 2013, you requested that, pursuant to 37 C.F.R. § 202.5(b), the Office reconsider its initial refusal to register. *Letter from Sheryl De Luca to Copyright RAC Division* (July 29, 2013) ("First Request"). 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 Stephanie Mason, Attorney-Advisor, to Sheryl De Luca* (Nov. 15, 2013).

In a letter dated February 11, 2014, you requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register. *Letter from Sheryl De Luca to Copyright R&P Division* (Feb. 11, 2014) ("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 possess a sufficient amount of creative authorship to warrant registration under the Copyright Act. Specifically, you assert that the Applicant's design "employs an artistic depiction of the word Dyneema and geometric shapes in an original and distinctive fashion" and note that "the straight line segments in the design envelop the look of the unwound Dyneema fibers after processing" and "the crisscross design envelopes the look of the Dyneema fibers wound on a spool." *First Request* at 2.

In addition to *Feist*, you cited 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." *Second Request* at 2-3. You also cited several cases that stand for the proposition that works comprised of unprotectable elements may be eligible for copyright protection if the selection and arrangement of their constituent elements displays a requisite level of creative authorship. *Id.*

III. DECISION

A. *The Legal Framework*

The Copyright Act protects "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). "Originality" requires two elements: 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 this requirement, the Supreme Court has recognized 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 set forth in the law and in 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").

Some combinations of common or standard design elements may support a copyright claim if they are juxtaposed or arranged in a sufficiently creative manner. Other combinations or arrangements do not meet this requirement. *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 depends on whether the author's selection, coordination, or arrangement is done in such a way that the work as a whole constitutes an original work of authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878 (D. D.C. 1989).

To be clear, a mere simplistic arrangement of non-protectable elements does not satisfy this requirement. For example, in *Kitchens of Sara Lee*, the Second Circuit rejected a copyright claim in a word that combined the words SARA LEE "in bold white letters" with a "bright red" background, noting that "[b]rand names, trade names slogans, and other short phrases or expressions cannot be copyrighted, *even if they are distinctively arranged or printed.*" 266 F.2d at 544 (emphasis added) (quoting the Copyright Office's regulation on words and short phrases as "a fair summary of the law"). 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 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 *Dyneema Wave Design* and applying the legal standards discussed above, the Board finds that the Work fails to satisfy the creative authorship requirement.

First, the Board finds that none of the Work's constituent elements, considered individually, are sufficiently creative to warrant protection. As noted above, 37 C.F.R. § 202.1(a) identifies certain elements that are not eligible for copyright protection. 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.* The Work is comprised of the term "Dyneema" and six horizontal lines that intersect to create a series of diamond shapes. The term "Dyneema" is a single word and the block letters used to render that word is a mere variation of typographic lettering.[1] The six horizontal lines and the diamond shapes created by the intersection of those lines are common and familiar geometric shapes that are not copyrightable.[2] Indeed, straight lines and are one of the simplest building blocks for pictorial and graphic works. Thus, we conclude 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. The Board recognizes that combinations of unprotectable elements may be eligible for copyright registration. But to be registered a work must contain some distinguishable variation in the selection, coordination, or arrangement of its constituent 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).

The Applicant's Work consists of a simple arrangement of a word superimposed on two geometric shapes. This arrangement is, at best, *de minimis*, and fails to meet the threshold for

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[1] *See, e.g., Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286-87 (3d Cir. 2004) (holding that the Office's regulation and "long-standing practice against registering short phrases" "merits deference"); *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (stating that the immediate predecessor to Copyright Office regulation 202.1(a) was "a fair summary of the law," including the refusal to register "short phrases or expressions"); *Coach, Inc. v. Peters*, 386 F. Supp.2d 495 (S.D.N.Y. 2005) (upholding the Office's refusal to register a logo consisting of a stylized letter C under regulation 202.1); *Sweet v. City of Chicago*, 953 F. Supp. 225, 229 (N.D. Ill. 1996) (citing 202.1 and stating that "[i]t is well established that titles and short phrases are not protected by copyright").

[2] *See, e.g., Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d 1074 (D.D.C. 1991) (upholding the Office's refusal to register a "gothic" dinnerware pattern consisting of a simple combination of geometric lines); *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q. 2d 1870 (S.D.N.Y. 1988) (upholding the Office's refusal to register a fabric design consisting of a small grid of squares superimposed on a series of stripes).

copyrightable authorship. *Feist,* 499 U.S. at 359; *see also Atari Games,* 888 F.2d at 883. It is precisely the type of "routine" and "garden variety" arrangement that has been found to be uncopyrightable in numerous cases. For example, the Eighth Circuit upheld the Copyright Office's refusal to register a logo for a professional soccer team that combined the word "Arrows" in a cursive script positioned above four angled lines that formed an arrow. *See John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (8th Cir. 1986). In *Forstmann Woolen Co. v. J.W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950) a district court held that a clothing label that combined the brand name FORSTMANN with the generic term "100% Virgin Wool" and a geometric design (namely, a fleur-de-lis) was not copyrightable. Likewise, in *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 959 (W.D. Pa. 1986) a district court found that envelopes printed with black stripes and a few words and lettering did not exhibit the minimal level of creativity to support a copyright registration.

The Board finds that the Work at issue in this appeal does not contain a sufficient amount of creative authorship under the standard set forth in *Feist* – even when it is viewed as a whole. The typeface that the Applicant selected for the term "Dyneema" is devoid of copyrightable authorship, and the horizontal orientation of that term is entirely typical. The juxtaposition of that term with the straight lines and diamond shapes is too minimal to support a copyright claim. For these reasons, the Work falls within the "narrow" category of works that do not demonstrate the modicum of creativity necessary for copyright protection under *Feist.* 499 U.S. at 359.

Your assertion that the Work "employs an artistic depiction of the word Dyneema and geometric shapes in an original and distinctive fashion" and that the Work's design elements represent "the look of the unwound Dyneema fibers after processing" and "the look of the Dyneema fibers wound on a spool" do not support your claim of sufficient creativity. *Second Request* at 2. In determining whether a particular work contains a requisite amount of original authorship to support a registration, the Board does not assess the uniqueness or attractiveness of a design, a design's visual effect or its symbolism, or the espoused intentions of the author. *See* 17 U.S.C. § 102(b); *see also Bleistein*, 188 U.S. 239. Thus, even if your claims are accurate, the mere fact that the Applicant's Work may be a unique, symbolic arrangement of a single word combined with geometric shapes does not mean that the Work, as a whole, is copyrightable.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register *Dyneema Wave Design.* This decision constitutes final agency action on this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

BY: _____
Erik Bertin
Member of the Review Board