United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

September 20, 2013

Haynes Boone, LLP
ATTN: Lisa A Garano
2033 Gateway Place, Suite 300
San Jose, CA 95110

RE: IATAN ID Card
Correspondence No. 1-BAYYYO

IATAN Accreditation Card
Correspondence No. 1-BHIG4L

IATAN Certificate of Accreditation
Correspondence No. 1-BHIG7A

Dear Ms. Garano:

The Review Board of the United States Copyright Office is in receipt of your second requests for reconsideration of the Registration Program's refusal to register a copyright claims to the above-captioned works.[1] You have submitted the request on behalf of your client, International Air Transport Association. I apologize for the lengthy delay in the issuance of this determination. After periods of inaction, staff departures and budgetary restrictions, the Register of Copyrights has appointed a new Review Board and we are proceeding with second appeals of registration refusals as expeditiously as possible.

The Board has carefully examined the applications, the deposit copies, and all of the correspondence in this case. After careful consideration of the arguments in your letters, the Board affirms the denial of registration of these copyright claims. This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

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[1] Because of the similarities between the works and the arguments made by you in favor of registration, this letter addresses all three requests.

I. DESCRIPTION OF THE WORK

"IATAN ID Card" is a standard 3" x 2" photograph identification card presented in prototype form but containing a photograph of a woman.[2] The background for the card is white with two logos in the top left hand corner, one for the International Air Transport Association (IATA) and the other for the International Airlines Travel Agent Network, with the white letters "I" and "D" appearing together in the top right corner, outlined in blue. The center of the card contains a blue-colored rectangle within which is located the identifying information for the person issued the card. The information included is the name and address of the travel agency, the seven character identification number, name of the person, the 13 character verification number and validity dates. The photograph of the person issued the card appears in the right portion of the blue-colored rectangle, with the words "Accredited Travel Agent" appearing above the photograph. Also contained in the blue-colored rectangle, and forming a background (which you identify in your second request as the "Watermark Logo") is an expanded portion of the IATA, appearing to be the lower right-sided portion of that logo. On the bottom lower left portion of the card is a two-banded identification bar code. An image of the "IATAN ID Card," taken from the deposit copy, is reproduced below:



"IATAN Accreditation Card" is a rectangular card that contains nine bands of color at the top (black, white, and shades of blue) that you identify as the "Horizon Logo," under which is located the IATA logo. At the center of the card are the words "Accredited by the International Airlines Travel Agent Network," with the IATAN logo adjacent. At the bottom of the card are the words "Global Recognition for Professional Travel Agencies."

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[2] The application for "IATAN ID Card" excludes any claim to authorship in the photograph. SR 1-668125929.

An image of "IATAN Accreditation Card," taken from the deposit copy, is reproduced below:



"IATAN Certificate of Accreditation," like the "IATAN Accreditation Card," contains bands of color at the top (again, black, white, and shades of blue) that you identify as the "Extended Horizon Logo." The IATA logo, in white, is located in the center of these bands. Below that are the words "Certificate of Accreditation, Present to:" followed by a blank space for the entry of the name of the recipient. At the bottom of the certificate is the statement "This is to certify that the above entity has provided evidence of its commitment to the travel industry and has met the Accreditation Requirements as established by the International Airlines Travel Agent Network." Below this certification are the signatures and identifiers of the regional director and assistant director, with the IATAN logo placed between them and a space to provided the issue date of the certificate. Below is an image of "IATAN Certificate of Accreditation," taken from the deposit copy:



II. THE ADMINISTRATIVE RECORD

On November 8, 2011, the Copyright Office notified Jeffrey Becker that it could not register "IATAN ID Card" because the work lacked the authorship necessary to support a copyright claim. *Letter from Ivan Proctor, Registration Specialist to Jeffrey Becker* of 11/08/2011, at 1. Similar letters were sent the following month for "IATAN Accreditation Card" and"IATAN Certificate of Accreditation." In a letter dated February 3, 2012, Lisa N. Congleton of your law firm requested reconsideration of the Office's refusal to register the work, setting forth your reasons as to why the work was copyrightable and should be registered, as required by 37 C.F.R. § 202.5(c). She submitted similar requests for "IATAN Accreditation Card" and "IATAN Certification of Accreditation" on February 24, 2012.

On June 1, 2012, the Copyright Office notified Ms. Congleton, in two separate letters, that the works could not be registered. *Letters from Attorney Advisor Stephanie Mason to Lisa N. Congleton* of 6/1/2012. Thereafter, on September 4, 2012, you submitted requests for second reconsideration of the refusals, with separate letters for each of the three works offering legal argument as to why they should be registered. For "IATAN ID Card," you argue that the "arrangement and size of the lines, shapes, angles, colors, and text, as well as the proportion, form, contour, and configuration of the work itself results in an original and creative artistic work." *Letter from Lisa A. Garano to Copyright RAC Division* of 9/1/2012, at 2. You state that "IATAN ID Card" is a derivative work bearing the pre-existing IATA logo, which you state was excluded from the present claim, but submit that the "arrangement of the Watermark Logo, the IATAN Logo, the layout, colors, phot display and fonts contained in the work are more than trivial," and therefore warrant registration. *Id.* at 3-4. You also argue that Ms. Mason did not correctly distinguish the cases that were cited in the first request for reconsideration, including *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800 (D.C. Cir. 1987), *Amplex Mfg. Co. v. ABC Plastic Fabricating, Inc.*, 684 F. Supp. 285 (E.D. Pa. 1960), *Fabrex Corp. v. Scarves by Vera, Inc.*, 129 U.S.P.Q. 392 (1961), *Soptra Fabric v. Stafford Knitting Mills, Inc.* 490 F. 2d 1092 (2d Cir. 1974), *In Design v. Lynch Knitting Mills, Inc.*, 689 F. Supp. 176 (S.D.N.Y. 1988), and *Pantone, Inc. v. A.I. Friedman, Inc.*, 294 F. Supp. 545 (S.D.N.Y. 1968).

For "IATAN Accreditation Card," you argue that the "work contains several protectable elements: i) the IATA Logo (pre-existing and excluded from the claim); ii) the IATAN Logo which was not excluded from the claim , iii) Applicant's Horizon Logo which was not excluded from the claim; iv) the arrangement, color, fonts and placement of text which were also not excluded from the claim. Each of the three logos is entitled to copyright protection." *Letter from Lisa A. Garano to Copyright RAC Division*, of 9/4/2012 at 2-3. As with "IATAN ID Card," you state that "IATAN Accreditation Card" is a derivative work and that the arrangement of the logos, the fonts and the colors makes the work copyrightable. *Id.* at 4. Attached to your letter are ten exhibits that contain

reproductions of the works of well known painters and graphic artists, each with combinations of various colors mostly depicted in bands or bar-type arrangements.

With respect to "IATAN Accreditation Certificate," you make the same arguments in support of registration, including identifying "IATAN Accreditation Certificate" as a derivative work, and attaching the same ten exhibits submitted for "IATAN Accreditation Card."

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. *Feist Publications, Inc. v. Rural Telephone Service 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. Second, the work must possess sufficient creativity. 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 the standard. The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more that an *de minimus* quantum of creativity." *Id.* at 363. 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; *see also* 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form.").

The Copyright Office's regulations implement the long-standing requirements of originality and creativity set forth in the law and, subsequently, the *Feist* decision. The regulations prevent 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" 37 C.F.R. § 202.1(a). In *Kitchens of Sara Lee v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959), the Court concluded that the Office's regulatory bars to registering short phrases and typographic ornamentation was a "fair summary of the law."

Of course, some combinations of common or standard design elements may contain sufficient creativity with respect to how they are combined or arranged to support a copyright. *See, Feist,* at 358 (the Copyright Act "implies that some 'ways' [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that others will not." The determination of copyrightability rests on whether the selection, coordination, or arrangement was done in "such a way" as to result in copyrightable

authorship). However, not every combination or arrangement will be sufficient to meet this grade. 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. *John Muller & Co*, 802 F. 2d 989 (8th Cir. 1986). *See also, Satava v. Lowry*, 323 F. 2d 805, 811 (9th Cir. 2003) ("It is true, or course, that a *combination* of unprotectible elements may qualify for copyright protection. But it is not true that any combination of unprotectible elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectible 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.") (citations omitted) (emphasis in original).

Copyright Office Registration Specialists (and the Board, as well) do not make aesthetic judgments in evaluating the copyrightability of particular works. Likewise, 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. 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 works*

Before considering whether "IATAN ID Card," "IATAN Accreditation Card," and "IATAN Certificate of Accreditation" are copyrightable, it is necessary to determine the identity and scope of the registration claims. The Board determines that you have misidentified the three works as being derivative, and have not accurately described the preexisting material contained within each work.

Section 101 of the Copyright Act, 17 U.S.C. defines a "derivative work" as:

> a work *based upon* one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'

(emphasis added). You state in your second requests for reconsideration for each work that they are derivative because they bear the preexisting IATA logo. However, neither "IATAN

ID Card," "IATAN Accreditation Card," nor "IATAN Certificate of Accreditation" is based upon the IATA logo. The IATA logo is simply reproduced in its entirety and placed upon works which do not recast, transform or adapt the logo, and instead are designed to serve purposes wholly separate and apart from the logo itself.[3] The three works, therefore, are not derivative works and the legal analysis for copyrightability for derivative works does not apply.

With respect to the scope of the copyright claims to the three works, you state that the IATA logo is preexisting and should be excluded from the claims, but the IATAN logo is original and should be included in the Board's analysis of the works. The Board, however, determines that the IATAN logo is preexisting, and must be excluded as well. The IATAN logo was registered with the United States Trademark Office on January 20, 2009 (registration # 3564660), well before copyright registrations were sought for the present works. The Board, therefore, examines the works without consideration of either the IATA or IATAN logo.

1. IATAN ID Card

The Board has determined that none of "IATAN ID Card'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 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." Here, the work contains basic identifiers for information appearing on an identification card (name of person, travel agency, and verification numbers), two groups of bar codes, a space for a photograph (no copyright is claimed for photograph appearing on the deposit material), the words "Accredited Travel Agent," and the outline of the letters "I" and "D." This simple lettering, numbering and short phrases, along with the color scheme, are not eligible for copyright protection. *See Id.* (prohibiting registration of basic symbols or designs); *see, also Racenstein & Co., Inc. v. Wallace d/b/a 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 (stating that mere variations in typographic ornamentation or letter 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). The Review Board has also examined the Watermark Logo, which you identify as "a series of four bars of varying horizontal length

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[3] The only possible presence of a derivative work is contained in "IATAN ID Card," and what you have identified as the Watermark Logo. The Watermark Logo appears to be a reproduction of the lower right portion of the IATA logo, with some extension and embellishment. Your second request for reconsideration, however, refers to this design as a separate logo, so the Board is unable to reach the conclusion that it is derivative of the IATA logo.

created by employing different shades of blue anchored by a quarter circle in comparable shades of blue." *Letter from Lisa A. Garano to Copyright RAC Division* of 9/04/2012 at 2. The only possible presence of a derivative work is contained in "IATAN ID Card," and what you have identified as the Watermark Logo. The Watermark Logo appears to be a reproduction of the lower right portion of the IATA logo, with some extension and embellishment. Your second request for reconsideration, however, refers to this design as a separate logo, so the Board is unable to reach the conclusion that it is derivative of the IATA logo. For the reasons stated above, the Board finds this design to contain basic geometric shapes and coloration that are not, by themselves, copyrightable.

The Board has also examined "IATAN ID Card" as a whole and determines that it 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 that 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, "IATAN ID Card" is a basic photograph identification card providing for inclusion of essential information necessary to identify the cardholder during a set period of time. The overall work, therefore, contains *de minimus* authorship that fails to meet the copyright threshold. Accordingly, we conclude that the work, as a whole, lacks the requisite "creative spark" necessary for registration. *Feist*, 499 U.S. at 359.

2. IATAN Accreditation Card

"IATAN Accreditation Card" is even more simplistic in its design that "IATAN ID Card" and does not contain any elements that are, individually, sufficiently creative to warrant copyright protection. As with "IATAN ID Card," the IATA and IATAN logos are preexisting works that are excluded from the claim, leaving the black, blue and white bands of color (the Horizon Logo) at the top of the card, the phrase "Accredited by The International Airlines Travel Agent Network" in the center of the card in two different type point sizes, and the phrase "Global Recognition for Professional Travel Agencies" at the bottom of the card. The colored bands comprise basic geometric shapes in three colors and are not registrable under 37 C.F.R. §202.1(a). The two short phrases in the center and bottom of the card comprise *de minimus* authorship and are likewise not protectable under that section.

The Board has also considered "IATAN Accreditation Card" as a whole and does not find there to be sufficient creativity in the selection, coordination, or arrangement of the constituent elements as required by *Feist*. The location of the colored bands in rows at the top of the card, and the "Global Recognition" phrase at the bottom is commonplace and lacks creativity. The location of the "Accredited" phrase is the central feature of the card and is virtually dictated by its function. None of these choices represent creative authorship in their selection, coordination or arrangement. *Feist*, 499 U.S. at 359. The Board concludes that, as a whole, "IATAN Accreditation Card" does not meet the standards for copyright registration.

3. IATAN Certificate of Accreditation

The Board has considered both the constituent elements of "IATAN Certificate of Accreditation" and the work as a whole and, for the same reasons applicable to "IATAN Accreditation Card," finds the work to be not copyrightable. The colored bands at the top of the certificate (the Extended Horizon Logo) once again are basic geometric shapes in three colors and do not contain sufficient creative authorship. The "Certificate of Accreditation" language located in the center of the certificate, and the signature lines and information at the bottom sides, are located and arranged in a fashion that is *de rigueur* to most certificates of recognition or merit, and do not represent creative choices. Likewise, the "This is to certify..." language in the center of the certificate is standard and utilitarian, and does not contain sufficient authorship. Viewing the work as a whole, one is presented with a standard accreditation certificate that lacks the requisite "creative spark" necessary for registration. *Feist*, 499 U.S. at 359.

Finally, for "IATAN Accreditation Card" and "IATAN Certificate of Accreditation," you have attached to your second requests for reconsideration copies of graphic works (mostly containing bands of colors) created by famous artists that you assert are supportive of registration of these two works. The Copyright Office does not compare works submitted for registration with other works (registered or not) for purposes of making determinations, nor is it required to do so. *See, Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074, 1076 (D.D.C. 1991)(where the court stated that it was not aware of "any authority which provides that the Register must compare works when determining whether a submission is copyrightable."); *accord, Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 499 (S.D.N.Y. 2005) (stating the Office "does not compare works that have gone through the process."). Each work is evaluated on its own merits, with the Office applying the relevant statutory and regulatory guidelines.

IV. CONCLUSION

For the reasons stated above, the Copyright Office Review Board affirms the refusal to register the works entitled "IATAN ID Card," "IATAN Accreditation Card," and "IATAN Certificate of Registration." This decision constitutes final agency action in this matter. 37 C.F.R. § 202.5(g).

Maria A. Pallante
Register of Copyrights

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