



**United States Copyright Office**

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October 23, 2017

Jonathan Hyman, Esq.  
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20140 Main St.  
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**Re: Second Request for Reconsideration for Refusal to Register Blade Piercing Skin;  
Correspondence ID: 1-1X4WS29; SR #: 1-2745917311**

Dear Mr. Hyman:

The Review Board of the United States Copyright Office (“Board”) has considered Ulthera, Inc.’s (“Ulthera”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Blade Piercing Skin” (the “Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

**I. DESCRIPTION OF THE WORK**

The Work is a graphic work in black and white consisting of three design elements. Two of these elements appear as the letter “C” and are nested together. The third element, which fills some of the negative space created by the other two elements, consists of three arcs with a tapered line through the middle of the arcs. This second symbol could be described as three instances of the letter “T,” overlaid and rotated ninety degrees to the right.

The Work is depicted below.



## II. ADMINISTRATIVE RECORD

On September 28, 2015, Ulthera filed an application to register a two-dimensional artwork copyright claim in the Work. In a February 17, 2016 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Adrienne Brown, Registration Specialist, to Jonathan Hyman, Knobbe, Martens, Olson & Bear LLP (Feb. 17, 2016).

In a letter dated May 5, 2016, Ulthera requested that the Office reconsider its initial refusal to register the Work. Letter from Jonathan Hyman, Knobbe, Martens, Olson & Bear LLP, to U.S. Copyright Office (May 5, 2016) (“First Request”). Ulthera asserted that the Work contains at least the minimal amount of creativity and original material to be copyrightable; that the Work is not a familiar symbol or design, basic geometric shape, word or short phrase, or mere variation of typographic ornamentation, lettering, or coloring; and that public policy and the Constitution support the registration of the Work. In partial support of Ulthera’s first point, it argued that the Work was more creative than the design at issue in *Willard v. Estern*, 206 F. Supp. 2d 723 (D.V.I. 2002), a case involving a design partially comprised by a stylized font for the term “2000,” incorporating an ancient petroglyph.

After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and, citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), noted that while a “modicum of creativity is necessary to support a copyright registration . . . some works (such as the one in [*Feist*]) fail to meet the low standard.” Letter from Stephanie Mason, Attorney-Advisor, to Jonathan Hyman, Knobbe, Martens, Olson & Bear LLP 1 (Nov. 18, 2016). The Office again concluded that the Work “does not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” *Id.* The Office explained that *Feist* observed that “as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.” *Id.* at 2 (citing *Feist*, 499 U.S. at 363). The Office went on to explain that “[i]n implementing [the *Feist*] threshold for creativity, the Office and the courts consistently have found that standard designs, figures, and geometric shapes are not sufficiently creative to sustain a copyright claim” and that the Work consists of common and familiar shapes. *Id.* Finally, the Office offered that Ulthera’s reliance on *Willard* was misplaced:

Although it is not clear from the court’s opinion whether the court had the plaintiff’s deposit in the Office’s records before it, the work deposited with the Office for registration incorporated not only a glyph and the numerals ‘2’ and ‘0,’ but also other graphic elements drawn to represent fireworks in the background . . . [and that] [t]he application ultimately was amended to include the background artwork within the scope of the copyright claim, and a certificate was issued on this basis.

*Id.* at 3.

In a letter dated February 14, 2017, Ulthera 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 Jonathan Hyman, Knobbe, Martens, Olson & Bear LLP, to U.S. Copyright Office (Feb. 14, 2017) (“Second Request”). Ulthera stated that the Office’s determination was not in harmony with *Feist* and the Office “cannot point to any standard design, figure, and geometric shape which is the same as or similar to [the Work], or even any combination of any standard design, figure, and geometric shape which is the same or similar to [the Work].” *Id.* at 2. Ulthera also argued that, when rejecting its claim the Office focused on the portions of each design element, and suggested that “the Office’s position is nothing more than filtering the work to base elements without recognizing the uniqueness of the individual elements as depicted in the work and their combination as a whole.” *Id.* at 3. Ulthera then, focusing on portions of each design element, claimed that the Work was comprised of what it believed to be sixteen separate creative choices, which reflected both that the Work was not “standard” and has more than a “*de minimis* quantum of creativity.” *Id.* at 4.

Finally, Ulthera offered two additional arguments for registration of its Work. First, Ulthera stated that “the Office’s position on *Willard* is either misapplied and/or unfair,” in part, because the Office did not provide a copy of the Office’s correspondence with the applicant in *Willard*, which explained the scope of that applicant’s registration, to Ulthera. *Id.* at 9. Second, Ulthera states that the Copyright Clause of the Constitution supports the view that works should liberally be registered in order to create incentives for artists.” *Id.* at 9.

### III. DISCUSSION

#### 1. *The Legal Framework – Originality*

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, 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.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works (such as the alphabetized telephone directory at issue in *Feist*) fail to meet even this low 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 virtually nonexistent.” *Id.* at 359.

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act and described in the *Feist* decision. *See, e.g.*, 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”); *id.* § 202.10(a) (stating “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 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 test. *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”). A determination of copyrightability in the combination of standard design elements depends 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.C. Cir. 1989).

A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. For example, the United States District Court for the Southern District of New York upheld the Copyright Office’s refusal to register simple designs consisting of two linked letter “C” shapes “facing each other in a mirrored relationship” and two unlinked letter “C” shapes “in a mirrored relationship and positioned perpendicular to the linked elements.” *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005). Likewise, the Ninth Circuit has held that a glass sculpture of a jellyfish consisting of clear glass, an oblong shroud, bright colors, 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 language in *Satava* is particularly instructive:

It 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).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result in a work that, as a whole, is sufficiently creative.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2014) (“COMPENDIUM (THIRD)”); *see also Atari Games Corp.*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See COMPENDIUM (THIRD)* § 310.2. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or its symbolism, the time and effort it took to create, or the design’s commercial success

in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

## 2. *Analysis of the Work*

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright. The Board's finding is based on the "minimal degree of creativity" required by the Supreme Court in *Feist*, and by a review of the Work as a whole.

Initially, the Board finds that none of the Work's constituent elements (the nested "C" element and rotated and overlaid, rotated triple "T" element) are subject to copyright protection. *See* 37 C.F.R. § 202.1 (a), (e) (prohibiting registration of "mere variations of typographic ornamentation, lettering or coloring"); COMPENDIUM (THIRD) § 913.1 ("Copyright Office cannot register a claim to copyright in typeface or mere variations of typographic ornamentation or lettering, regardless of whether the typeface is commonly used or truly unique."). The fact that these designs have sharp (90°) edges at the end (in the "C" elements) or slight tapering and rounded edges at the end (in the "T" element) is insignificant—these are the type of inconsequential differences not protected by copyright (as typography or otherwise). Additionally, the Work's elements are similar to several common symbols and designs, including the letters "C" and "T," the "standby symbol" (IEC 60417-5009), a papal (triple) cross, arcs, circles, bands, a bullseye, and the connectivity symbol commonly used in wi-fi or radio graphics. The Office cannot register familiar symbols or designs. 37 C.F.R. § 202.1 (a); *see also* COMPENDIUM (THIRD) § 313.4(J) (noting that familiar symbols and designs such as "letters," "[c]ommon representational symbols," "[w]ell-known and commonly used symbols that contain a *de minimis* amount of expression," and "[f]amiliar religious symbols such as crosses" cannot be registered), *id.* § 906.1 (common geometric shapes are not eligible for copyright protection). Thus, the elements that comprise the overall Work are not themselves copyrightable.

But the Board also recognizes (as mentioned above) that works composed entirely of uncopyrightable designs may, in some instances, be copyrightable as a whole. Thus, the Board reviewed the Work as a whole, with the combination of the "C" and "T" elements together, to determine if the overall design warrants copyright protection. Examining the Work in its entirety reveals that it is not sufficiently creative overall. Nesting the letter "C" is a common design feature in logos, found in the Chicago Cubs, Comedy Central, CNN, and Federal Communications Commission logos, among others. Further, and as noted above, designs consisting of two linked letters "facing each other in a mirrored relationship" and two unlinked letters "in a mirrored relationship and positioned perpendicular to the linked elements" have been found to not merit copyright protection. *Coach*, 386 F. Supp. 2d at 496; *see also, John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (8th Cir. 1986) (upholding the Copyright Office's refusal to register a simple logo consisting of four nested, angled lines which

formed an arrow and the word “Arrows” in a cursive script beneath the arrow); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, No. 82-5438, 1983 U.S. Dist. LEXIS 14631, at \*4 (E.D. Pa. Aug. 15, 1983) (“Variations of . . . circles and ellipses” are not protectable, as “[s]uch basic geometric shapes have long been in the public domain and therefore cannot be regulated by copyright.”).<sup>1</sup>

Finally, Ulthera suggested that because the Constitution contemplates incentivizing authors to create new works by granting them exclusive rights in their works, the Board’s standard of review should be liberal in favor of registration. *Id.* at 10. The Board wholeheartedly agrees that the Constitution’s Copyright Clause aims to promote the progress of science, and is invaluable to encouraging creativity in the United States. U.S. Const. art. I, § 8, cl. 8. Indeed, copyright has been deemed the “engine of free expression” by the Supreme Court. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). This fundamental mission, however, does not extend to every effort at creation. Instead, as set forth in the Copyright Act itself and explained repeatedly by the courts, copyright protection extends only to *original* works of authorship. 17 U.S.C. § 102(a); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 489-90 (2d Cir. 1976) (“[T]he one pervading element prerequisite to copyright protection regardless of the form of the work is the requirement of originality—that the work be the original product of the claimant. . . . This derives from the fact that, constitutionally, copyright protection may be claimed only by ‘authors.’” (internal quotations and citations omitted)). *Feist* held that “[o]riginality is a constitutional requirement” and explicitly rejected copyright protecting effort alone. *Id.* at 346, 364 (“This decision should not be construed as demeaning [the Respondent’s] efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort.”); *see also Bleistein*, 188 U.S. 239. The Board bases its decision on the Work’s originality as a whole, not the Work’s attractiveness or the effort it took to create. And, contrary to Ulthera’s suggestion, faithful enforcement of these limits furthers the overall goals of the copyright system.

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<sup>1</sup> Ulthera urges that the Office’s position on *Willard* is “misapplied and/or unfair,” suggesting that the Office should have registered a work consisting of *only* the term “2000,” which incorporated an ancient design for the middle portion of that term (“00”). Second Request at 9. Ulthera further states and that the Office should have made it aware of what the copyright registration covered for the work at issue in *Willard*. *Id.* Neither position is persuasive. The Office made clear what was being registered (and what would not be registered) regarding the *Willard* work in its registration records and that documentation is publicly available.

**IV. CONCLUSION**

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY:   
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Copyright Office Review Board