



**United States Copyright Office**

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June 23, 2020

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**Re: Second Request for Reconsideration for Refusal to Register  
BlueMichiganMitten2, Correspondence ID: 1-3PQLK5P; SR # 1-6596712093**

Dear Mr. McGlynn:

The Review Board of the United States Copyright Office (“Board”) has considered the second request of Kathryn Ann Ambrose (“Ambrose”) to reconsider the Registration Program’s refusal to register a claim for a two-dimensional art design titled *BlueMichiganMitten2* (“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 claim in a two-dimensional visual work. The Work consists of a dark blue rectangle containing a block letter “M” in gold, *i.e.*, maize, coloring. The center of the letter has been cut out in the shape of the lower peninsula of the state of Michigan. The Work is as follows:



## II. ADMINISTRATIVE RECORD

On May 18, 2018, Ambrose filed an application to register a copyright claim in the Work. In a March 18, 2019, letter, a Copyright Office registration specialist refused to register the claim, finding that it did not contain any copyrightable authorship. Initial Letter Refusing Registration from U.S. Copyright Office, to Gerald McGlynn, III (Mar. 18, 2019).

In a letter dated June 14, 2019, Ambrose requested that the Office reconsider its initial refusal to register the Work. Letter from Gerald McGlynn, III to U.S. Copyright Office (June 14, 2019) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work lacked copyrightable authorship because it contained only the “common and familiar shapes” of a rectangle and outline of the state of Michigan, as well as a “single letter.” Refusal of First Request for Reconsideration from U.S. Copyright Office, to Gerald McGlynn, III at 2 (Sept. 20, 2019). The Office also determined that, looking at all of the unprotectable elements as a whole, the Work lacked sufficient creative arrangement and combination of those elements to sustain a copyright claim. *Id.* at 2–3.

In a letter dated December 17, 2019, Ambrose 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 Gerald McGlynn, III to U.S. Copyright Office (Dec. 17, 2019) (“Second Request”). In that letter, Ambrose argued that the Work did not use common shapes, but rather it creatively used “positive and negative space to present an evocative image which, in and of itself, constitutes no known shape or letter.” Second Request at 2 (additionally arguing “the work does not contain any letter at all”). Ambrose further states that the Work’s use of “positive and negative spaces” “at most partially evoke an outline of the State of Michigan” and describes the sides of the capital “M” as “arbitrary positive shapes” whose appearance as the letter “M” “speaks to the creative nature of Ms. Ambrose’s work.” Second Request at 4. Finally, Ambrose emphasizes the low threshold for creative and that the Work was created independently, such that even if the outline of Michigan and the letter M are part of the work, they are “presented originally, creatively and without slavish copying of any map or lettering.” Second Request at 3.

## III. DISCUSSION

### A. *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 Publ’ns, Inc. v. Rural Tel. Serv. 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. *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 claim to 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. 2017) (“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*, 188 U.S. 239.

### ***B. 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 separable authorship necessary to sustain a claim to copyright.

The constituent elements of the Work are the dark blue rectangle, the maize-colored block letter “M,” and the outline of lower Michigan, overlaid on top of the “M.” None of these individual elements alone are sufficiently creative to support copyright protection. The rectangle is a “common geometric shape” that in and of itself is ineligible for protection. COMPENDIUM (THIRD) § 906.1. The capital “M” is likewise unprotectable “lettering” not subject to copyright. 37 C.F.R. § 202.1(a) *see also* COMPENDIUM (THIRD) § 906.4 (typeface is not registrable). Finally, the outline of lower Michigan is not protectable because “fundamental map outlines” such as “the general outline of the United States and state boundary lines” are in the public domain and not subject to copyright. *Christianson v. W. Publ’g. Co.*, 53 F. Supp. 454, 455 (N.D. Cal. 1944), *aff’d*, 149 F.2d 202 (9th Cir. 1945); *see also Carter v. Haw. Transp. Co.*, 201 F. Supp. 301, 303 (D. Haw. 1961) (noting that the outline of the island of Hawaii is in the public domain and is not copyrightable).

The Work could still be eligible for protection if its unprotectable elements were combined and arranged in a sufficiently creative way. Sufficient creativity in arrangement and composition can be the bridge between a work comprised of only unprotectable elements and copyright protection. Viewed as a whole, however, the Board finds that the collection and arrangement of unprotectable elements is insufficient to support a copyright claim.

First, the unprotectable elements are not numerous enough, and their arrangement not original enough, to constitute an original work of authorship. *See Satava*, 323 F.3d at 811. Second, the Work is a mere garden-variety arrangement of elements. The Work employs the University of Michigan official colors of dark blue and a maize yellow,<sup>1</sup> with a partial outline of the state of Michigan overlaid on top of the capital letter “M,” which is centered in a rectangle.

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<sup>1</sup> *See Branding Guidelines: Color*, UNIVERSITY OF MICHIGAN MEDICINE, <https://med.umich.edu/branding/color.html> (“Blue and maize are University of Michigan’s main colors[.]”).

Further, the capital letter “M” is extremely similar in both proportion and font to the University’s “Block M” trademark.<sup>2</sup> Taken together as a whole, the Work’s arrangement of “familiar pairs of colors,” COMPENDIUM (THIRD) § 906.3; typeface, *id.* § 906.4; and public domain state boundaries is *de minimis* authorship. *Id.* § 313.4(B) (providing example of uncopyrightable *de minimis* authorship of “an outline map of South Carolina with a blue heart in the center of the design featuring the white crescent moon and white palmetto tree from the state flag”). The Copyright Act requires something more. *See Feist*, 499 U.S. at 363 (“copyright protects only those constituent elements of a work that possess *more than a de minimis* quantum of creativity”) (emphasis added).

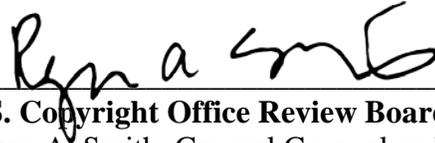
The Board has considered Ambrose’s other arguments and finds them unpersuasive. Ambrose argues that the constituent elements of the Work are not familiar figures because they “constitute[] no known shape or letter,” and thus neither the shape of the state of Michigan or the capital “M” appear in the work. Second Request at 2. Ambrose previously conceded that the Work depicts an “outline of the state map of Michigan” but argued that the creative expression in the Work consisted of the “selection, arrangement, and presentation of elements.” First Request at 1. This is a correct statement of the appropriate test: common shapes are “not subject to copyright,” 37 C.F.R. § 202.1, and thus any copyright claim must lie in the creative arrangement of those shapes taken as a whole, which the Board has considered and found lacking in the Work. Ambrose additionally argues that the existence of geometric shapes in a work is not fatal to a copyright claim. Second Request at 4–5 (quoting *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1035 (9th Cir. 1992)). The Office agrees with Ambrose: the sufficiently creative arrangement and employment of common geometric shapes can be the basis for copyright protection. The Work simply fails to meet that threshold.

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<sup>2</sup> *Brand & Visual Identity: Logos*, UNIVERSITY OF MICHIGAN, <https://brand.umich.edu/logos/>. The Board further notes that the preexisting University of Michigan logo, over which Ambrose overlaid an outline of the lower portion of the state of Michigan, cannot form any basis for a claim for copyrightability in the Work by Ambrose. This is because, with respect to derivative works, only “new authorship that the author contributed to the derivative work may be registered” to the extent that it constitutes original expression beyond that contained in the underlying material. COMPENDIUM (THIRD) § 311.2 (citing *Waldman Publ’g Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994)).

#### 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.



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**U.S. Copyright Office Review Board**

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