



**United States Copyright Office**

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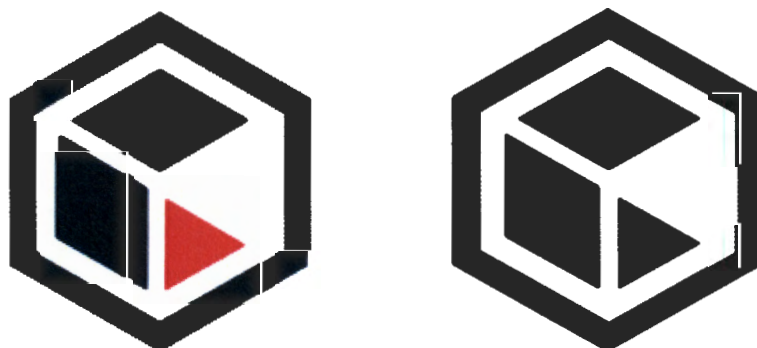
**Re: Second Request for Reconsideration for Refusal to Register COMMVAULT HEXAGON GRAPHIC ARTWORK (COLOR), Correspondence ID: 1-28HHG8A, SR# 1-3412938201; COMMVAULT HEXAGON GRAPHIC ARTWORK (BLACK & WHITE), Correspondence ID: 1-28HOIXH, SR# 1-3567579607**

Dear Ms. Graybeal:

The Review Board of the United States Copyright Office (“Board”) has considered CommVault Systems, LLC’s (“CommVault”) second requests for reconsideration of the Registration Program’s refusal to register two-dimensional artwork claims in the works titled “CommVault Hexagon Graphic Artwork (Color)” and “CommVault Hexagon Graphic Artwork (Black & White)” (“Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denial of registration for both Works.

**I. DESCRIPTION OF THE WORKS**

The Works are two versions of the same design, but one is in color and the other in black and white. The design consists of two parallelograms and a triangle, arranged to appear to be an incomplete cube, surrounded by a hexagonal-shaped outline. In the color version, all portions of the design are black except for the triangle, which is red.



## II. ADMINISTRATIVE RECORD

On June 7, 2016, CommVault filed two applications to register copyright claims in the Works as two-dimensional artworks. In two letters sent on November 2, 2016 and November 3, 2016, a Copyright Office registration specialist refused to register the claims, finding that the Works “will not support a claim to copyright” because “a work of the visual arts must contain a minimum amount of creative pictorial, graphic or sculptural authorship,” and the Works do not. Letter from Examiner Jones, Registration Specialist, to Seth Reagan, Perkins Coie LLP (Nov. 2, 2016); Letter from Examiner Jones, Registration Specialist, to Seth Reagan, Perkins Coie LLP (Nov. 3, 2016).

In two substantively identical letters dated December 13, 2016, CommVault requested that the Office reconsider its initial refusal to register the Works. Letters from Seth Reagan, Perkins Coie LLP to U.S. Copyright Office (Dec. 13, 2016) (“First Requests”). CommVault argued that “works incorporating geometric shapes and original design elements can be copyrightable,” and “[o]nly a modicum of creativity is necessary to warrant copyright protection.” *Id.* at 1. CommVault stated that “far more than a ‘modicum’ of creativity” is demonstrated in the Works, since CommVault “has arranged at least four geometric shapes . . . in a non-standard and non-symmetrical manner.” *Id.* Additionally, CommVault noted that the Works “communicate[] a message from [CommVault] to the viewer.” *Id.*

After reviewing the Works in light of the points raised in the First Requests, the Office re-evaluated the claims and again concluded that the Works “do[] not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration.” Letters from U.S. Copyright Office to Seth Reagan, Perkins Coie LLP (Apr. 12, 2017). The Office stated that “standard designs, common figures and shapes, and coloring are not sufficiently creative to sustain a copyright claim,” and the “hexagons, parallelograms, and triangle that make up [the Works] are common and familiar shapes,” and as such, “the individual elements . . . do not reflect a sufficient amount of original and creative authorship to support a copyright registration.” *Id.* at 2. The Office noted that it also “examines every work submitted for registration in its entirety, with individual elements assessed . . . in their overall inter-relatedness within the work as a whole.” *Id.* at 3. The Office pointed out that, for both Works, the “work as a whole consists of four common shapes arranged inside of a large common shape in a simple . . . color scheme.” *Id.* The Office stated that this combination “is a basic, garden-variety logo configuration that demonstrates insufficient creativity to support a claim of copyright.” *Id.*

In two substantively identical letters dated July 12, 2017, CommVault requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letters from Lynne E. Graybeal, Perkins Coie LLP to U.S. Copyright Office (July 12, 2017) (“Second Requests”). In these letters, CommVault claimed that “the Office’s analysis and ultimate conclusion are in error,” and the Works “satisf[y] Feist’s ‘modicum of creativity’ standard and should be granted . . . copyright registration.” *Id.* at 2. CommVault argued that the Office “inappropriately focuses on ‘individual elements’ rather than the Work as a whole, and applies a heightened creativity standard.” *Id.* It stated that “the combination and arrangement of the underlying geometric shapes in the Work[s] do evidence the modicum of creativity required

by *Feist*,” because the shapes “are brought together to create, *inter alia*, a *tromp-l’oeil* effect, which gives the two-dimensional design a three-dimensional look.” *Id.* at 2–3. CommVault argued that the Works are “a new combination of various shapes, which required determinations regarding arrangement of spacing, sizing, color . . . and angles vis-à-vis the other elements.” *Id.* at 3. CommVault compared the Works to the wrapping paper example included in the Office’s Compendium. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, § 906.1 (3d ed. 2017) (“COMPENDIUM (THIRD)”). The wrapping paper “is comprised of standard shapes,” yet it “satisfies the modicum of creativity standard.” *Id.* at 4. CommVault argued that the Works, like the wrapping paper, “must be found registrable because [they] show a selection, arrangement and coordination of elements in a non-uniform way.” *Id.* CommVault also argued that each of the cases the Office cited does not oppose registration of the Works. *Id.* at 5–7.

### III. DISCUSSION

#### A. The Legal Framework

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 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." COMPENDIUM (THIRD) § 906.1; *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 market places are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

## **B. Analysis of the Works**

After carefully examining the Works and applying the legal standards discussed above, the Board finds that they do not contain the requisite originality necessary to sustain a claim to copyright.

The Board accepts that the Works satisfy the first prong of the originality requirement, independent creation. The Works, however, lack sufficient creativity to satisfy the second prong. Considering the elements of the Works individually or as a whole, the Works are simple, minor variations on common shapes or symbols consisting of a few geometric shapes arranged in an

obvious manner. *See, e.g., Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540 (D.D.C. 1991) (upholding refusal to register chinaware design pattern composed of simple variations of geometric designs due to insufficient creative authorship to support copyright registration).

The Works' constituent elements—the two parallelograms, the hexagon, and the triangle—are not individually subject to copyright protection. 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs; . . . lettering or coloring”); *see also* COMPENDIUM (THIRD) § 313.4(J) (“Well-known and commonly used symbols that contain a *de minimis* amount of expression” are not copyrightable.), § 906.1 (noting that simple shapes, such as “ovals” and “squares,” are not copyrightable).

The question then is whether the combination of elements is protectable when viewed as a whole. The Board finds that, viewed as a whole, the Works simply are not sufficiently creative from a copyright perspective. *See Feist*, 499 U.S. at 359. Here, the combination of two parallelograms and a triangle, with a hexagon surrounding them, does not rise to the level of creativity necessary for copyright protection. There is simply not enough creative authorship in the design of the Works to warrant copyright protection. Indeed, the Works contain far fewer elements than are included in the wrapping paper example included in the Compendium. COMPENDIUM (THIRD) § 906.1 and reproduced below:



There, the design is made up of many stars, many circles, and many triangles, all in different colors, sizes, and orientations. In total, there are eight different colors used in that design. By contrast, the Works have far fewer elements: only four different shapes in total. And the Works' color schemes are simple: one is just black and white; the other is black, white, and red. The Office finds that the Works thus do not evince enough creativity for protection under the Copyright Act and that the selection and placement of the Works' elements are the product of only *de minimis* creative choices. *Cf.* COMPENDIUM (THIRD) § 313.4(J) (“a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations” is not copyrightable).

In support of its arguments, CommVault cited four cases. While, as discussed below, the outcomes of those cases are factually distinguishable from the instant case, the Board notes that each work submitted for copyright registration must be evaluated for copyrightability on its own merits in accordance with the statute and relevant legal principles as cited above. As a threshold matter, the Board does not directly compare the Works to works that were granted registration or deemed copyrightable in the past; the Board examines works individually, applying uniform

standards of copyrightability throughout the examination process. Differences between any two works thus can lead to different results. *See* Compendium (Third) 602.4(C) (“When examining a claim to copyright, the U.S. Copyright Office generally does not compare deposit[s] to determine whether the work for which registration is sought is substantially similar to another work.”); *see also Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540, at \*2 (D.D.C. July 30, 1991) (stating that court 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 (indicating the Office “does not compare works that have gone through the registration process”). And, as discussed above, the Board applies the copyrightability standard articulated in *Feist*—not a standard articulated in other district court cases—through its expert administration of the nation’s copyright registration system.

Nevertheless, each of the works at issue in the cases cited by CommVault is distinguishable from the works at issue here. In *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841 (9th Cir. 2012), the work at issue was a stylized repeating floral pattern on fabric. The court indeed found that the arrangement of otherwise uncopyrightable elements was protectable, but those elements consisted of “the green color of stems and leaves” and “the combination of open flowers and closed buds in a single bouquet.” *Id.* at 850. In other words, the owner of the work stylized many of those elements to create the fabric design. *Id.* at 851. There are far fewer elements in CommVault’s Works, and CommVault took far less liberty in stylizing or combining the elements in any expressive manner.

Similarly, in *Prince Grp., Inc. v. MTS Prod.*, 967 F. Supp. 121 (S.D.N.Y. 1997), the arrangement of unprotectable elements was far more original and creative than that the arrangement in the Works. The work at issue there was a polka dot design, but the dots in the design were “irregularly shaped, and not the perfect circles of a standard polka dot,” “shaded,” that is, there is a crescent of white around half of the perimeter of each of the dots which is different from the standard uniformly colored polka dot, and they consist of several different colors,” and placed in “imperfect and conflicting diagonal lines at varying distances from each other giving the appearance of randomness.” *Id.* at 125. The presence of the shading and colors, and irregular placement of the dots rendered the pattern sufficiently original so as to be protectable, even though the individual elements were not in themselves copyrightable.

The work at issue in *Runstadler Studios, Inc. v. MCM Ltd. P’ship*, 768 F. Supp. 1292 (N.D. Ill. 1991), was a three-dimensional sculpture. The sculpture there was composed of 39 clear glass rectangles, overlying each other to form a spiral with approximately 405 degrees of arc. *Id.* at 1295. The court held that the sculpture possessed sufficient creativity due to the “location, orientation and dimensions of the glass panes, and the degree of arc of the spiral,” which were evidence of “intellectual labor and artistic expression.” *Id.* at 1295-96. In other words, the arrangement of the significantly greater number of geometric elements in *Runstadler Studios* was original and creative based on elements, such as three-dimensional arrangement and degree of arc, not present in the Works.

Finally, in *Titlecraft, Inc. v. Nat'l Football League*, No. 10 Civ. 758, 2010 WL 5209293 (D. Minn. Dec. 20, 2010), the work at issue was a sterling silver football trophy made up of a replica football sitting, at a downward angle, atop a three-sided base with concave, tapering sides. CommVault argues that, since the combination of the two unprotectable shapes in that case was protectable by copyright, the Works are also protectable. Second Request at 4. Although it presents a close case, ultimately the trophy at issue in *Titlecraft*—the Vince Lombardi Trophy—encompassed shapes that are notably more complex and less ordinary than those in the Works at issue here (including the convex and tapered three-sided base). Moreover, the court in *Titlecraft* determined that the combination of the elements of the trophy was done “in an original way.” 2010 WL 5209293, at \*4. The Office cannot reach the same conclusion here: the elements in the Works here simply are not arranged in an original way.

Overall, the Board finds that the Works are not copyrightable. The level of creative authorship involved in their configuration of elements is, at best, *de minimis*, and too trivial to support copyright registration. *See* COMPENDIUM (THIRD) § 313.4(B).

#### 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 Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY:



Chris Weston  
Copyright Office Review Board