



United States Copyright Office

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February 7, 2017

Michael J. McCue, Esq.
Lewis Roca Rothgerber
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Re: Second Request for Reconsideration for Refusal to Register Visa Flag Symbol Work and Visa Brand Mark; Correspondence ID 1-10K3R4X; SR#s 1-988599061 and 1-992931961

Dear Mr. McCue:

The Review Board of the United States Copyright Office (the “Board”) has considered Visa International Service Association’s (“Visa’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the works titled Visa Flag Symbol Work and Visa Brand Mark Design Work (the “Works”). After reviewing the applications, deposit copies, 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 WORKS

Both Works appear to be branding guidelines for use of specific Visa logos; the Office has previously found one of these logos ineligible for copyright registration. Visa Brand Design Work consists of two pages of text and eleven reproductions of a Visa trademark consisting of the word “VISA,” using a stylized “V” (“Visa Brand”). On the first page of this work, three Visa Brands are in a row at the left of the page and one Visa Brand is in the top right corner. On the left, the middle Visa Brand is surrounded by two dashed-line, rectangles, which are connected by solid lines. The lowercase letter “x” is near the middle of each solid line. Beneath that Visa Brand is another surrounded by a dashed-line rectangle with no top portion of the rectangle. The second page of this work has seven instances of Visa Brand, either in black, white, blue, or white or blue with gold on the tip of the letter “V” and either no visible background or a black or blue background.

Visa Flag Symbol Work consists of four pages of text, and two different versions of the Visa logo. Visa Flag Symbol Work contains twenty-three instances of the “three-band” Visa Flag Symbol (“Visa Flag”) in either color or black and white. That symbol consists of the word “Visa” on top of a gold rectangle and below a blue rectangle, while surrounded by a blue border. Visa previously applied to register this design, but the Copyright Office

denied registration in 2012. Letter from U.S. Copyright Office, to Michael J. McCue, Lewis and Roca LLP (June 19, 2012) ("2012 Board Letter"). On the first page, Visa Flag is below the title and above the main text. On the second page, Visa Flag is in the lower middle of the page. Short, descriptive phrases, such as "Outline and top band: Visa Blue," "Visa logotype: Visa Blue," "Rectangular background: White," and "Bottom band: Visa Gold" are attached to this Visa Flag by thin blue lines. The remainder of the page is comprised of text. On the third page, there are five instances of Visa Flag in two rows, either in black and white or in color, and with either no background, or a light blue, dark blue, or black background. On the last page are sixteen Visa Flags, arranged groups of three sizes.

The Works are depicted in Appendix A.

II. ADMINISTRATIVE RECORD

Visa filed applications for Visa Flag Symbol Work and Visa Brand Design Work on September 11 and 12, 2013, respectively. The applications for both Works claimed authorship in text and two-dimensional artwork. In a March 11, 2014 letter, a Copyright Office registration specialist refused registration of both Works. Letter from Kathryn Sukites, Registration Specialist, to Michael J. McCue, Lewis Roca Rothberger (Mar. 11, 2014). As that letter notes, the Office had offered to register a claim in the text alone, as a literary work, but that Visa refused to accept such a registration, as it was seeking to register the artwork and text together as a work of 2-D visual art. The registration specialist referred to a telephone conversation she had with Visa's counsel and noted that she was sending the letter "so that you will be able to appeal the rejection of the claim in 2-D artwork if you'd like. (The Copyright Office can register the particular text only but cannot register together with a claim in artwork and/or drawings.)" *Id.* at 1. Based on that understanding of Visa's claim, the registration specialist went on to find that the Works lack "the authorship necessary to support a copyright claim." *Id.*

In a letter dated June 10, 2014, Visa requested that the Office reconsider its initial refusal to register the Works. Letter from Michael J. McCue, Lewis Roca Rothberger, to U.S. Copyright Office (June 10, 2014) ("First Request"). In that letter, Visa stated that the Works "are comprised of, among other things, substantial original text, and featur[e] multiple images, layout, and arrangement of the artwork and text." *Id.* at 1. Visa also urged that "by acknowledging that the textual portions of the works at issue are protectable by copyright, the Copyright Office should have registered the works as a whole (regardless of how the work was categorized). Instead, the Copyright Office dissected the works, made a determination that some elements of the works were copyrightable and some were not copyrightable, and then refused to register the works as a whole." *Id.* at 2. Visa also disagreed that the non-textual portions of the Works were not protected by copyright. *Id.*

After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that they "do not contain a sufficient amount of original and creative authorship to support copyright registrations based on 2-D

artwork.” Letter from Stephanie Mason, Attorney-Advisor, to Michael J. McCue, Lewis Roca Rothberger (Mar. 12, 2015). The Office reiterated, however, that “*we have offered a registration based on text for both claims. If the applicant wishes to pursue registrations on this basis, please contact me.*” *Id.* (emphasis in original).

In a letter dated July 10, 2015, Visa requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works as 2-D artwork. Letter from Michael J. McCue, to U.S. Copyright Office (July 10, 2015) (“Second Request”). In that letter, Visa claimed that the Works are registerable, because they are comprised of “substantial original text, multiple images, layout, and arrangement of the text and artwork.” *Id.* at 1. Visa further asserted that the Office did not consider the Works “as a whole” and if it had, it should have registered the Works, “regardless of whether the [Works] [are] categorized as . . . two-dimensional work[s] or textual work[s],” because the Office conceded that the text of the works are copyrightable as textual works. *Id.* Finally, Visa claimed that the Office applied a higher standard for originality, and that because other works of low creativity were deemed to be copyrightable, the Works should be registered. *Id.* at 2.

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 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).

B. Analysis of the Works

After careful examination, the Board finds that the Works fails to satisfy the requirement of creative authorship and thus are not copyrightable as two-dimensional artworks, even though they are registerable as literary works.

Here, the Works are comprised of text and versions of either the Visa Brand or Visa Flag designs. In 2010, Visa attempted to register a claim in a two-dimensional work identical to the Visa Flag design, which the Board denied in a final determination in 2012. See 2012 Board Letter. The Office reaffirms that decision. The Visa Brand design also is not individually subject to copyright protection. See 37 C.F.R. § 202.1(a), (e) (prohibiting registration of “[w]ords and short phrases such as names, titles, and slogans,” “mere variations of typographic ornamentation, lettering or coloring,” “mere variations of typographic ornamentation, lettering or coloring,” and “[t]ypeface as typeface”); see also Compendium (Third) § 313.4(C) (“Words and short phrases, such as names, titles, and slogans, are not copyrightable because they contain a *de minimis* amount of authorship.”),

§ 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”).

Significantly, Visa does not challenge the conclusion that the Visa Brand and Visa Flag designs, standing alone, are not copyrightable. Instead, Visa claims that the Office did not consider the Works as a whole when considering their claim for 2-D artwork. Second Request at 1. The Office disagrees. The registration specialist engaged in a proper review of the Works. As noted in the *Compendium of U.S. Copyright Office Practices* (“*Compendium*”), “[w]hen examining a claim to copyright, the registration specialist will use objective criteria to determine whether the work satisfies these requirements by reviewing the information provided in the application and by examining the deposit copy(ies), including its individual elements as well as the work as a whole.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 309 (3d ed. 2014) (“COMPENDIUM (THIRD)”).¹

Under that standard, the question is whether the combination of elements in the work is protectable under the legal standards described above. Although the Board recognizes that a work composed of uncopyrightable individual elements may itself be protectable as a whole, the Works at issue here do not rise to that level. COMPENDIUM (THIRD) § 905 (“original authorship may be present in the selection, coordination, and/or arrangement of images, words, or other elements, provided that there is a sufficient amount of creative expression in the work as a whole”); § 906 (“The U.S. Copyright Office will register a visual art work that includes uncopyrightable material if the work as a whole is sufficiently creative and original.”). Here, the two-dimensional artwork is composed of graphics that are included to function as an illustration of what the Works’ text describes—how to appropriately display or use the two different Visa trademarks—and not due to a creative choice in selection, coordination, or arrangement. Moreover, to the extent that Visa is claiming authorship in layout, “[t]he general layout of format of a book, a page, a website, a webpage, a poster, a form, etc., is not copyrightable, because it is merely a template for expression and does not constitute original expression in and of itself.” COMPENDIUM (THIRD), § 906.5.²

Visa’s arguments that other works of low creativity have been registered, and thus these Works should be registered, are unpersuasive. The Office makes determinations of

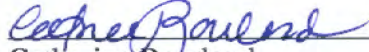
¹ One reason Registration Specialists must consider individual elements of a work is that works that have been previously published or previously registered or are comprised of certain unclaimable material must be disclaimed for the work to qualify for registration. See COMPENDIUM (THIRD) §§ 621.1, 621.4, 621.5.

² The Compendium includes an apt example: “Fred Foster publishes a one-page newsletter titled Condo Living that provides information for residents of his condominium complex. Each issue contains the name of the newsletter, a drawing of the sun rising over the complex, two columns reserved for text, and a box underneath the columns reserved for photographs. Fred attempts to register the layout for his newsletter. The registration specialist will reject the claim in layout, but may register the illustration if it is sufficiently creative.” *Id.* § 906.5.

copyrightability on a case-by-case basis and decisions to register other works are not binding on the Office when examining other applications. *Id.* § 309.3. Additionally, Visa's claims that the Office applied a higher standard for originality to the Works, and "summarily concluded" the Works are not original also are not persuasive. Second Request at 2. While Visa points out that *Feist* recognized the level of creativity required for protection is low, Visa fails to recognize that that some works, such as the works at issue here, fail to meet even this low threshold. *Feist*, 499 U.S. at 345.

IV. CONCLUSION

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

BY: 
Catherine Rowland
Copyright Office Review Board

Appendix A

Appendix A



Marketing Use of the Visa Brand Mark

The Visa Brand Mark is the visual representation of the Visa brand, and may be used in communications and materials that promote usage or indicate acceptance of payment products bearing the Visa Brand Mark.

The following section outlines requirements for use of the Visa Brand Mark in non-Card applications.

Visa Brand Mark



Minimum Clear Space



Minimum Size



0.5"
12.7mm
36 pixels

VISA BRAND MARK IN PRINT COMMUNICATIONS

The Visa Brand Mark as shown to the left is intended for use in marketing and promotional materials.

Requirements

When using the Visa Brand Mark in any print communications such as advertising, marketing or promotional applications, the following requirements must be met:

- Be sure the Visa Brand Mark is fully and clearly visible.
- Maintain a clear space, free of any text or graphics around the Visa Brand Mark. The minimum clear space must be equal to the cap height of the Visa Brand Mark, applied on all sides as shown here.
- Use only the Visa-provided artwork for the Visa Brand Mark.
 - Scale the Visa Brand Mark as needed but do not alter the proportions or elements of the Visa Brand Mark in any way.
- In print communications and advertising applications, present the Visa Brand Mark in full color whenever possible.
 - When producing black and white advertising materials, present the Visa Brand Mark as either the black halftone or one-color black alternative.
 - When producing one-color print communications, present the Visa Brand Mark as either the black halftone or one-color Visa Blue or black alternative (depending on the single color being used). If presenting the black halftone brand mark alternative, make sure that the reproduction process used is capable of successfully producing the halftone screened wing of the brand mark.
- Do not use trademark registration symbols in association with the Visa Brand Mark until Visa International has certified that registration is complete in your country. Please note that not all the brand mark color alternatives may be granted trademark registration at the same time.
- The Visa brand Mark was designed to easily scale to larger and smaller sizes as needed.
 - The minimum size of the Visa Brand Mark is 0.5"/12.7mm/36px. Depending on the reproduction method used, this minimum size may need to be increased to maintain legibility of the brand mark (e.g., embroidery, silk screening, etc.)

Marketing Use of the Visa Brand Mark

Visa Brand Mark on white background



Visa Brand Mark in Visa Blue on light background



Visa Brand Mark reversed on black background



Visa Brand Mark, halftone



Visa Brand Mark on dark background



Visa Brand Mark in black on light background



Visa Brand Mark reversed on Visa Blue background



COLOR REQUIREMENTS FOR THE VISA BRAND MARK

Accurate color reproduction is crucial to ensuring a consistent representation of the Visa Brand Mark. The examples to the left show the correct alternative color applications of the Visa Brand Mark.

When reproducing the Visa Brand Mark the following color requirements must be met:

For print applications:

Visually match Visa Blue and Visa Gold to the appropriate Pantone® colors when printing in spot color. Unless media demands 4-color process, always print in spot color.

Visa Blue (coated and uncoated): Pantone 286

Visa Gold (coated): Pantone 1375, Visa Gold (uncoated): Pantone 137

Visually match Visa Blue and Visa Gold to appropriate CMYK formulas when printing in a 4-color process.

Visa Blue: CMYK C100M65 Y0 K10

Visa Gold: CMYK C0 M40 Y100 K0

For online applications:

Use the Visa Blue and Visa Gold RGB colors.

Visa Blue: R0 G35 B160

Visa Gold: R255 G160 B0

Note that converting to RGB from Pantone spot colors or CMYK will not automatically produce the Visa-specific RGB colors in the final web graphic.

Save the artwork as a GIF with all necessary colors. This will maintain the correct RGB values in non-anti-aliased areas.

When copying artwork from one application to another, convert the new document to RGB before pasting the artwork into the file.



Visa Flag Symbol

VISA INTERNATIONAL GUIDELINES
AND REPRODUCTION SPECIFICATIONS



The familiar three-band Visa Flag symbol is the primary global acceptance mark owned by Visa International. It may be used by Member financial institutions in connection with Visa programs for products bearing the Visa Flag.

These Visa International guidelines outline the appropriate use of the Visa Flag. Color specifications and reproduction art are also provided.

It is essential that these guidelines be followed exactly to maintain consistency across a wide range of applications, to support the brand identity, and to protect the integrity of the Visa Flag.

For complete Visa Flag symbol specifications, please refer to the *Visa International Operating Regulations*.

General Rules

The Visa Flag symbol is an acceptance mark used for materials designed to communicate merchant acceptance of cards bearing the Visa Flag, and for advertising or collateral materials relating to products bearing the Visa Flag.

The Visa Flag may never be used in a way that implies endorsement of any other product or service, except with prior written permission from Visa International.

For more information, please contact your Visa regional representative.

Applications

Card Applications

The Visa Flag symbol must appear on the front of Visa cards that are accepted by merchants and ATMs displaying the Visa Flag. Please refer to the *Visa International Operating Regulations* for specifications.

The Visa Flag symbol must not appear on any card with marks belonging to, owned by, or affiliated with American Express, Europay International, MasterCard International, Morgan Stanley, Dean Witter, Discover & Company, or any entity deemed competitive by the Visa International Board.

For information about card design approvals, contact your Visa regional representative.

Point-of-Sale (POS) Applications

The Visa Flag symbol is used to indicate acceptance of products bearing the Visa Flag at the point of sale (POS) of qualifying merchants. It must be prominently displayed on signs or decals at or near POS terminals where cards bearing the Visa Flag are accepted.

On point-of-sale signage, the Visa Flag must be in full color, and must be at least as large as all other mark(s) of other shared regional or national POS network services (or any other acceptance mark) displayed on that signage.

The Visa Flag symbol must be at least 54 mm high and proportionately scaled as shown in the enclosed reproduction artwork. The Visa Flag may not have a smaller total area than any other acceptance mark displayed.

Use on ATMs

All ATMs that accept Visa cards must display the Visa Flag in accordance with the rules outlined in this guide. If the ATM is inside the bank branch or other facility, the Visa Flag should be displayed at or near the main entrance. The mark must also be displayed at the ATM.

When displayed at the ATM, the Visa Flag must be at least 54 mm high and proportionately scaled. It must also be at least as large as all other shared network marks displayed on the ATM, with the exception of the Member's own proprietary network mark and the mark of a single primary regional network which is also displayed on the ATM.

If any other shared network marks are displayed in full color, the Visa Flag symbol must also be in full color. If all other national or international ATM acceptance marks are displayed in a single color, the Visa Flag may appear in that single color, with the top band, Visa logotype, and outline box printed at 100% and the bottom band at a 30% screen tint.

Advertising and Promotion Applications

When used in advertising and promotional materials, the Visa Flag symbol must be fully and clearly visible—not distorted or partially concealed.

If a card displaying the Member's name or logo and the Visa Flag appears in merchant advertisements to indicate the acceptance of Visa cards bearing the Visa Flag for payment, the Visa Flag must also appear in the same advertisement at least as large as the Visa card reproduction. This is to avoid the impression that only that Member's Visa cards are accepted.

Visa Flag in Text

Always use an initial capital letter "V" and "F" when using the words Visa Flag in text.

Trademark Denotation

Reproduction of the Visa Flag symbol may require the use of a registration symbol (for example, ®) denoting registered trademark status. Each country has laws pertaining to trademark denotation symbols; trademark laws — as well as the registration status of a mark — may change from time to time. Consult your Visa legal representative on an annual basis to ascertain current trademark denotation requirements.

Design Specifications

Visa Flag Symbol Elements

The Visa Flag symbol consists of:

- Visa Blue, white and Visa Gold Bands design mark
- the Visa logotype
- a white background
- an outline box

These elements must always be used in their combined form as the Visa Flag.

Visa Flag Symbol



The Visa Flag symbol must always appear exactly as shown in the artwork provided here. The letters and spacing are shown in the correct design and proportions. For example, the Visa Flag may not appear with rounded corners. No text or graphic may appear within the Flag or touch the edges of the Flag. Also, the Flag should never be reproduced as a "negative" image (for example, with a black central band and a white Visa logotype).

Outline and top band: Visa Blue

Visa logotype: Visa Blue

Rectangular background: White

Bottom band: Visa Gold

Color Specifications

Full-Color Reproduction

When reproduced in full color, the Visa Flag symbol appears with the top band, the Visa logotype, and outline in Visa Blue. The rectangular background behind the Visa Flag appears in white and the bottom band appears in Visa Gold.



Two-color Visa Flag symbol

When the Visa Flag appears in full color on a dark background, the outline serves as a keyline (and does not print), and the background runs up to the edge of the white background.



Two-color Visa Flag symbol on a light background

When using a full-color application on a white or light-colored background, the outline must print in Visa Blue.



Two-color Visa Flag symbol on a Visa Blue or dark color background

Note that the Visa Blue and Visa Gold used on the Visa Flag are specific colors. Use the enclosed color swatches to visually match the colors. Pantone, Inc. has developed ink formulas to assist printers in reproducing these colors; formulas are provided on the back of the color swatches.



Single-color Visa Flag symbol in black with a 30% screen tint in bottom band

For electronic on-screen applications, the RGB equivalent to Visa Blue is Red 0, Green 51 and Blue 102; and the RGB equivalent to Visa Gold is Red 255, Green 153 and Blue 0.



Black Visa Flag symbol on a black background

Single-Color Reproduction

For single-color reproduction, it is required that the Visa Flag symbol appear in black and white. But when the Visa Flag appears with marks of other payment systems in a single color other than black, the Visa Flag may appear in that color. The top band, Visa logotype and outline box must be printed at 100% and the bottom band at a 30% screen tint.

In cases where printing limitations prohibit quality reproduction of the 30% screen tint, the Visa Flag should be reproduced in a single solid color.

The Visa Flag must appear as a "positive" image. Never reverse the Visa Flag to white bands and letters in a dark box.

The full-color and single-color Visa Flag symbols shown here are examples only, and must not be used for reproduction.

For reproduction, use the "Reproduction Artwork for Printer" provided on the following page. Electronic art is available from your Visa regional representative.

*Reproduction Artwork
for Printer*

The artwork shown here provides the printer with all the elements needed for full-color and single-color reproduction of the Visa Flag.

For best reproduction, reduce larger-size artwork to the size needed wherever possible, rather than enlarging smaller-size artwork.

Electronic art is available from your Visa regional representative.

