



United States Copyright Office

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January 13, 2017

Wm. Tucker Griffith, Esq.
McCormick, Paulding & Huber LLP
Cityplace II
185 Asylum St.
Hartford, CT 06103-3410

**Re: Second Request for Reconsideration for Refusal to Register Deltafone Mobile App
- Design 1; Correspondence ID: SR# 1-1882367461**

Dear Mr. Griffith:

The Review Board of the United States Copyright Office (the “Board”) considered Deltafone LLC’s (“Deltafone’s”) second request for reconsideration of the Registration Program’s refusal to register a compilation and text claim in the work titled “Deltafone Mobile App - Design 1”¹ (the “Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board finds that the Work exhibits copyrightable authorship in graphic compilation and thus may be registered. As the Office recognized that the text of the Work was copyrightable in response to Deltafone’s first appeal, the remainder of this letter will discuss the Work’s copyright in graphic compilation.

The Work consists of fourteen pages that display the first or “main” page and sub-pages for a dental industry-themed phone app. The main page of the app consists of icons and pictures (collectively “graphics”), words, and simple shapes and colors, displayed in twenty-one squares or rectangles, set in a table. The other pages in the deposit consist of a combination of text and graphics that correspond (in subject matter) to thirteen of the twenty-one graphics on the main page. The graphics on the main page and sub-pages are not owned by Deltafone and have been disclaimed in the copyright application. In one place on the main page and in several sub-pages, text indicates that information is missing, *e.g.*, “pictures/slides and graphics go here.” The main page contains graphics and text that are typical for many apps, for example the word “call” paired with a picture of a phone. It also contains graphics and text that are specific to the dental subject matter, such as an x-ray of teeth paired with the words “cone beam.”

¹ The Office believes the title of the work was entered incorrectly as Deltafone Mobile App - Design 1. The record will list the work as “Deltafone Mobile App - Design 1.” See COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 603.1 (3d ed. 2014) (As a general rule, immaterial variances, such as a misspelling or typographical error will be disregarded and the Office will register the claim without annotating or communicating with the applicant; though the Office may note the variance in the online public record.).

Though the Board is granting a copyright registration, due to Dentalfone's arguments in the requests for reconsideration, the Board is compelled to clarify what subject matter the registration covers. In the First and Second Requests for Reconsideration, Dentalfone suggests that the claim is in "arrangement and layout expressed in a compilation." Letter from Wm. Tucker Griffith, McCormick, Paulding & Huber LLP, to U.S. Copyright Office 1 (Jan. 13, 2016) ("Second Request"). As identified by Dentalfone, some courts have used identifying "layout" as a consideration in whether a work is copyrightable. Second Request at 1, 4-5 (citing *Schiller & Schmitdt v. Nordisco Corp.*, 969 F.2d 410, 414 (7th Cir. 1992) ("layouts of . . . product photographs" were copyrightable as a compilation); *Real View, LLC v. 20-20 Tech. Inc.*, 683 F. Supp. 2d 147, 157 (D. Mass. 2010) (layouts of windows on a screen was a component of a protectable compilation); *Reader's Digest Association, Inc. v. Conservative Digest Association, Inc.*, 821 F.2d 800, 806 (D.C. Cir. 1987) (noting "the distinctive arrangement and layout of [ordinary lines, typefaces, and colors] is entitled to protection as a graphic work"))).

General claims of layout or formatting are not accepted by the Copyright Office because it is a "template of expression." COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.3(E) (3d ed. 2014) ("COMPENDIUM (THIRD)"); see also 37 C.F.R. § 202.1(c) (noting that blank forms "which are designed for recording information and do not in themselves convey information" are not copyrightable). Instead, copyright protection "may be available for the selection, coordination, and/or arrangement of *specific content*, such as a compilation of artwork . . . provided that the content is arranged in a sufficiently creative manner." COMPENDIUM (THIRD) § 313.3(E) (emphasis added).

The Board believes that the Work contains a sufficient, although minimal, amount of original and creative authorship in the selection, coordination, and arrangement of its constituent graphic elements upon which to support a copyright registration. Our decision to register this work is based on the low standard for copyrightability articulated in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). Just as *Feist* recognized that only a "modicum of creativity [is] necessary to transform mere selection into copyrightable expression," it also recognized that the copyright in some compilations is "thin." *Id.* at 349. In the context discussing of a factual compilation, *Feist* explained that for works having a "thin" copyright, "a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement." *Id.* This logic would also apply to those authors who did not simply use facts in a compilation, but like Dentalfone, used uncopyrightable images or others' authorized clip art in their work.

The copyright of the graphic compilation in the Work is one of those that could be called "thin," and thus the Office is compelled to caution Dentalfone that it may only prevent others from copying only the original and creative features it contributed to the Work. See *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003), *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003), *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994). Later authors would potentially be able to reshuffle the pictures used in the Work as well as change the Work's format or layout without infringing this particular compilation.

It is the Work's arrangement of its specific content that contains the modicum of creativity required for copyright registration. If different content was selected for placement in a similar layout, Dentafone would have no copyright claims against this later author. To be clear, the Board is granting registration for a claim in graphic compilation and any implication that layout or format is protected by this copyright registration is incorrect.

No response to this letter is necessary.

BY:



Chris Weston
Copyright Office Review Board