

American Airlines Flying High After Copyright Office Reversal

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American Airlines recently scored a major win by convincing the Copyright Office to reverse its refusal of an application to register the “American Airlines Flight Symbol.”

American Airlines reached its final destination after overcoming myriad delays. The Copyright Office rejected American Airlines' copyright application three times on the ground it did not contain a sufficient amount of original and creative artistic or graphic authorship to support a copyright registration. According to the Copyright Office, it receives half a million applications annually, but only declines to register less than 20,000 on this basis. First, a Copyright Office Registration Specialist refused registration; second, an Attorney-Advisor for the Copyright Office denied American Airlines' First Request for Reconsideration; and third, the Copyright Office Review Board denied American Airlines' Second Request for Reconsideration. In fact, the Review Board noted that "the Work falls just below the threshold for creativity required by the Copyright Act." With no other options left, American Airlines filed a lawsuit seeking judicial review of the decision under the Administrative Procedures Act ("APA"). The complaint referenced widespread disapproval of the decision amongst copyright practitioners, including an informal poll during a June 2018 meeting of the Copyright Society of the USA. In a presentation by Karyn Temple, the Acting Register of Copyrights, she asked an audience whether anyone agreed with the refusal. Apparently, no one raised their hand and then, according to the complaint, Ms. Temple conceded, "I think the main drafter of that one actually even kind of regrets that decision." Only one month after it filed the complaint, American Airlines dismissed the suit, reporting that the Copyright Office had agreed to again review its refusal of the work.

After conducting an additional review of the design, the Copyright Office has now reversed its three prior refusals of the application finding that the work does indeed contain the requisite level of creativity. So, why the change? The decision purportedly hinges on American Airlines' submission of a higher-quality image of the work showing "additional detail that had not been clear from the original deposits." With this new version of the design, the Copyright Office Review Board found a number of elements showing sufficient creativity, including an "aircraft tail element [that] is oriented on an angle," a "bird-head element [that] hovers just below the center of the aircraft tail element" with a "three-dimensional appearance that causes the bird-head element to appear to be above and separated from the aircraft tail," and multiple colors with different gradients and shading "further heightening the illusion of depth." Notably, the Board limited American Airlines' level of protection by stating that "the resulting protection is thin, protecting only the Work's original and creative elements 'against only virtually identical copying.'" Interestingly, at least to our eyes, the original deposit copy of the work is not all that different than the higher-quality version that apparently swayed the Copyright Office. The shading, gradients, and bird-head elements are all visible.

The Board also took pains to indicate that "there are no third requests for reconsideration," despite the upgrade it afforded American Airlines. It also stressed that all decisions by the Copyright Office are made on a case-by-case basis and other applicants should not expect the Board to conduct such additional screening when applications are rejected.

So what can your brand learn from this victory in the sky?

1. Submit the highest quality images you have when applying to register logos with the Copyright Office.
2. When you have a two-dimensional logo that contains shading and features that give the work depth, make sure to point that out on a First Request for Reconsideration.
3. If your logo consists of a combination of geometric shapes and suggestive elements that may not be readily discernable, explain those elements to the Copyright Office in a First Request for Reconsideration. While the Copyright Office claims, that “the symbolic meaning or impression that a work conveys is irrelevant to whether a Work contains a sufficient amount of creativity,” this decision suggests otherwise.
4. The Copyright Office is not interested in a work’s public reception or the author’s intent, so don’t expend resources providing evidence of these points to the Office. In the decision, the Copyright Office also included a reminder that “the Office does not consider the time and effort used in creating a design, its novelty, aesthetic appeal, or commercial value.”

It remains to be seen if others will try to leverage similar outcomes by seeking review under the APA, especially in light of what appears to be a recent trend of the Copyright Office refusing company logos on the ground they lack creativity. In the meantime, American Airlines will be sipping champagne in first class by itself.