



United States Copyright Office

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September 23, 2016

Brett Klein
Winthrop & Weinstine, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402

Re: Second Request for Reconsideration for Refusal to Register 2013 Basketball Ring Chassis; Correspondence ID: 1-1439Z1E

Dear Mr. Klein:

The Review Board of the United States Copyright Office (the “Board”) has considered Jostens’ second request for reconsideration of the Registration Program’s refusal to register a jewelry design claim in the work titled “2013 Basketball Ring Chassis” (“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 jewelry design for the base frame of a ring, also known as a chassis. The body starts as a circular metal band, and the band expands along the sides of the circumference into a square-shaped, bezel-edged top. The ring’s body appears to be recessed, and it bows outwardly. The transition from the top of the ring to the sides is accented by a rectangular-shaped indentation on two sides of the ring. At the top of the ring, there is a square-shaped recess. To the left and right of the recessed top, there are cut-outs that represent portions of the word “HEAT” from the Miami Heat basketball team’s logo. The cut-outs form half of an “H” and half of the stylized “T” from the logo.

A reproduction of the Work is included as Appendix A.

II. ADMINISTRATIVE RECORD

On January 21, 2014, Jostens filed an application to register a copyright claim in the Work. In a May 7, 2014 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Sandra Ware, Registration Specialist, to Brett Klein, Winthrop & Weinstine, P.A. (May 7, 2014).

In a letter dated August 6, 2014, Jostens requested that the Office reconsider its initial refusal to register the Work. Letter from Brett Klein, Winthrop & Weinstine, P.A., to U.S. Copyright Office (Aug. 6, 2014) (“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 “does not contain a sufficient amount of original and creative authorship to support a copyright registration.” Letter from Stephanie Mason, Attorney-Advisor, to Brett Klein, Winthrop & Weinstine, P.A. (May 28, 2015).

In a letter dated August 27, 2015, Jostens 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 Brett Klein, Winthrop & Weinstine, P.A., to U.S. Copyright Office (Aug. 27, 2015) (“Second Request”). In that letter, Jostens claimed that careful examination of the Work’s design features as a whole supports a claim to copyright. *Id.* at 3. Specifically, Jostens asserted that the Copyright Office failed to “review and appreciate the more intricate aspects” of the Work. *Id.*

III. DECISION

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 Ninth Circuit rejected a claim of copyright in a piece of jewelry where the manner in which the parties selected and arranged the work’s component parts was more inevitable than creative and original. *See Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971). 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).

Finally, 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 OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2014) (“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.

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 creative authorship necessary to sustain a claim to copyright.

The Board finds that, viewed as a whole, the Work’s design elements are not sufficient to render the Work original. When evaluating a jewelry design’s copyrightability, the Board may take into account the shapes of various elements; decoration on the jewelry’s surface, such as engravings; as well as the selection and arrangement of the various elements. *See* COMPENDIUM (THIRD) § 908.3. The overall design of the Work is little more than a circular metal band that graduates into a square-shaped top. Although close examination shows a slight bezel design and recessing on the top and sides of the chassis, this detail does not rise to the level of creativity sufficient to merit copyrightability. Instead, the bezeling and recessing merely accent the common rectangular and square shapes that comprise the Work’s design.

Jostens argues that the top of the ring is copyrightable, even if the remaining features are not. *See* Second Request at 4. Specifically, Jostens asserts that the cut-out silhouettes of the partial “H” and “T” from the Miami Heat logo are analogous to an example the Office describes in the Compendium of U.S. Copyright Practices, Third Edition. The example states: “Samantha Stone drew an original silhouette of Marie Antoinette with a backdrop featuring multiple fleur de lys designs. The registration specialist may register this work because it incorporates an original, artistic drawing in addition to the standard fleur de lys designs.” COMPENDIUM (THIRD) § 906.2. The Compendium uses this example to illustrate the point that a work including familiar symbols or designs, such as fleur de lys, may be registered if the author used the familiar elements in a creative manner, combined with other copyrightable elements. Jostens uses this example to argue that even if the Work’s standard ring design elements are not copyrightable—akin to the fleur de lys—then the top of the chassis is copyrightable due to the partial silhouettes of the “H” and “T”—akin to the Marie Antoinette silhouette. We disagree. A cut-out of a partial “H” and “T,” even if the letters have been stylized, cannot be compared to an original drawing of an individual’s silhouette. The


“H” and “T” cut-outs are, instead, mere variations of uncopyrightable letters or words and, as a general rule, typeface, lettering, and typographic ornamentation are not registrable. 37 C.F.R. § 202.1(a), (e). Thus, like the other elements of the Work, the partial “H” and “T” cut-outs are not copyrightable.

Viewed as a whole, the Work lacks the requisite creativity to warrant copyright protection. The Board finds that the level of creative authorship involved in this configuration of unprotectable elements is, at best, *de minimis*, and too trivial to enable copyright registration. *See id* at § 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 claims in the Work. 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

Appendix A

