



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

June 21, 2021

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Re: Second Request for Reconsideration for Refusal to Register Come and Drink It; Correspondence ID: 1-3VVNOUJ; SR # 1-7637637029

Dear Mr. Harper:

The Review Board of the United States Copyright Office (“Board”) has considered C&DI, LLC’s (“C&DI’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional claim in the work titled “Come and Drink It” (“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 two-dimensional logo that consists of a bottle on its side with a five-point star directly above it and the text “Come and Drink It” in all caps below the bottle. The Work is as follows:



II. ADMINISTRATIVE RECORD

On April 26, 2019, C&DI filed an application to register a copyright claim in the Work. In a June 17, 2019, letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Scott L. Harper (June 17, 2019).

In a letter dated September 10, 2019, C&DI requested that the Office reconsider its initial refusal to register the Work. Letter from Scott L. Harper to U.S. Copyright Office (Sept. 10, 2019) (“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 is not eligible for copyright protection, finding that the “selection, coordination, and arrangement of the five-point star, the sideways bottle, and the phrase “COME AND DRINK IT” to be insufficiently creative to support a claim in copyright.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Scott L. Harper (Jan. 17, 2020).

In a letter dated April 15, 2020, C&DI 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 Scott L. Harper to U.S. Copyright Office (Apr. 15, 2020) (“Second Request”). In that letter, C&DI argued that while the five-pointed star and the image of the bottle are familiar symbols/designs, the Work “as a whole, the selection, coordination, and arrangement of the elements are sufficiently creative to support a claim in copyright.” Second Request at 3. C&DI further argues that its reliance on an 1835 Texan flag design is evidence of “the inherent creativity of the Work” as “the Applicant intentionally used certain elements in a particular arrangement to establish a connection between the Work and the 1835 Texas flag, while simultaneously distinguishing the two and creating an original work of authorship.” Second Request at 5.

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. *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.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“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 authorship necessary to sustain a claim to copyright.

The Board finds that none of the Work's individual components are sufficiently creative to be eligible for copyright protection. As C&DI admits in its Second Request, the five-point star and bottle are familiar symbols/designs and as such are not copyrightable. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs”); 37 C.F.R. §201(a); COMPENDIUM (THIRD) § 906.1 (“the Copyright Act does not protect common geometric shapes, either in two-dimensional or three-dimensional form.”); *see also OddzOn Prod., Inc. v. Oman*, 924 F.2d 346, 349 (D.C. Cir. 1991) (no abuse of discretion in refusal to register Koosh ball for lack of creativity because it formed the “familiar shape” of a sphere). Further, the specific renderings of the five-point star and bottle are not protectable because they feature the bare minimum elements to form a star and a bottle, without added copyrightable stylization or other originality.

Additionally, the phrase “COME AND DRINK IT” is not copyrightable. Words, short phrases, and “mere variations of typographic ornamentation, lettering or coloring” are all ineligible for copyright protection. 37 C.F.R. §202.1(a), (e); *see also CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (citing the Office’s regulation and noting, “[i]t is axiomatic that copyright law denies protection to ‘fragmentary words and phrases’”); *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (concluding that the Office’s regulation barring the registration of short phrases is “a fair summary of the law”). C&DI argues that the phrase “COME AND DRINK IT” is a play on the phrase “COME AND TAKE IT,” a battle slogan used throughout history, “most notably in 1835 at the Battle of Gonzales during the Texas Revolutionary War.” Second Request at 3. Regardless, such mere wordplay is insufficient to warrant copyright protection. COMPENDIUM (THIRD) § 313.4(C) (“The U.S. Copyright Office cannot register individual words or brief combinations of words, even if the word or short phrase is novel or distinctive or lends itself to a play on words.”).

Additionally, viewed as a whole, the Board finds that the selection, coordination, and arrangement of the unprotectable elements that comprise the Work are insufficiently creative to render the work original for copyright protection. C&DI argues that “while the five-pointed star is a ‘familiar symbol,’ the bottle on its side is a ‘familiar design,’ and neither may likely be considered copyrightable works separate and apart from one another, the creative combination and particular arrangement . . . constitute a work of authorship evidencing a sufficient amount of creative expression.” Second Request at 3. While some combinations of familiar symbols/designs may contain sufficient creativity with respect to how they are arranged to support a copyright, not every combination or arrangement will be sufficient to meet this threshold. While “the standard of originality is low . . . it does exist.” *Feist*, 499 U.S. at 363. Here, C&DI merely combined familiar symbols/designs with a short phrase horizontally arranged in a stacked configuration. Placing unprotectable elements on top of one another with minor variations in spatial separation is a “garden-variety” logo configuration that is not entitled to copyright protection. *Feist*, 499 U.S. at 349.

C&DI further argues that the Work is sufficiently creative to warrant copyright protection, as it is “a creative play” on a famous 1835 Texas flag. C&DI asserts that it designed the Work to “call[] to mind the ‘COME AND TAKE IT’ flag.” Second Request at 4. Specifically, C&DI argues that “the inherent creativity of the Work stems from the fact that the Applicant intentionally used certain elements in a particular arrangement to establish a connection between the Work and the 1835 Texas flag, while simultaneously distinguishing the two and creating an original work of authorship.” Second Request at 5. The cited flag is as follows:

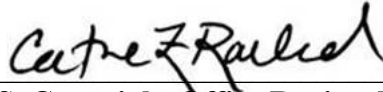


C&DI intentionally used designs identical to or reminiscent of the three different elements featured on the flag, and coordinated and arranged them in the exact same manner to mimic the placement of elements on the original flag. C&DI’s rote adherence to the design, coordination, and arrangement of the flag in creating the Work is further evidence that the Work lacks sufficient creativity and original authorship to warrant copyright protection.

In sum, the short phrase combined with two familiar symbols/designs that make up the Work, as a whole, lacks the requisite amount of creativity in their selection, combination, and arrangement to warrant copyright protection. *See Feist*, 499 U.S. at 359. Thus, the Board finds that the level of creative authorship involved in this combination of unprotectable elements is, at best, *de minimis*, and too trivial to merit copyright registration.

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



U.S. Copyright Office Review Board

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