



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

June 2, 2021

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**Re: Second Request for Reconsideration for Refusal to Register
Russell Wilson Logo (Correspondence ID: 1-2S2AVHG; SR 1-4441148842)**

Dear Ms. Cendali:

The Review Board of the United States Copyright Office (“Board”) has considered Nike, Inc.’s (“Nike’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Russell Wilson Logo” (“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 graphic artwork consisting of one thick black zig-zag line and one shorter horizontal line, which combine to create either a slanted “3” or sideways “W,” along with part of the letter “R.” The Work is depicted as follows:



II. ADMINISTRATIVE RECORD

On February 15, 2017, Nike filed an application to register a copyright claim in the Work. In November 2017, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter Refusing Registration from U.S. Copyright Office to Dinisa Folmar (Nov. 29, 2017).

Nike then requested that the Office reconsider its initial refusal to register the Work. Letter from Dale M. Cendali to U.S. Copyright Office (Feb. 28, 2018) (“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 creativity to warrant copyright registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Dale M. Cendali (July 3, 2018).

In response, Nike 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 Dale M. Cendali, to U.S. Copyright Office (Oct. 3, 2018) (“Second Request”). Nike asserted that the Work was not a variation of standard designs, common figures and shapes, and coloring, but rather an abstract and creative design. *Id.* Nike further pointed to the “numerous creative choices regarding the selection, arrangement, and visual presentation of the graphic elements comprising the design.” *Id.* Finally, Nike noted that the fact the Work is a logo, and thus a trademark, “in no way prevents it from being protected by copyright law.” *Id.*

III. DISCUSSION

A. *The Legal Framework*

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).

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.” 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.”). In addition, “a simple combination of a few familiar symbols or designs with minor linear or spatial variations, either in two-dimensional or three-dimensional form.” COMPENDIUM (THIRD) § 313.4(J). 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. *Id.* § 906.1.

B. Analysis of the Work

After careful examination and application of the legal standards discussed above, the Board finds that the Work does not contain the requisite separable authorship necessary to sustain a claim to copyright.

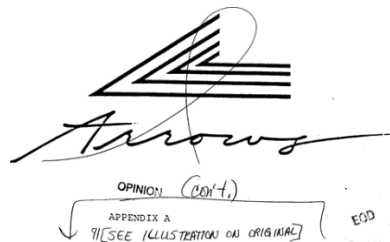
The Work is a simple combination of two black lines, one straight and one with a minimal three crooks or zigzags.¹ These elements are simple geometric shapes that are not protected by copyright law. COMPENDIUM (THIRD) § 906.1 (stating that copyright law does not protect geometric shapes, “including, without limitation, straight or curved lines, circles, ovals,

¹ A zigzag is a “series of short lines inclined at angles in alternate directions” or “a line or course having sharp turns of this kind.” “Zigzag,” OXFORD ENGLISH DICTIONARY (*available at* <https://www.oed.com/view/Entry/232845?rskey=5Mk1OX&result=1&isAdvanced=false#eid>).

spheres”); *see also* 37 C.F.R. § 202.1(a). The Board notes, alternatively, that the angled vertical line in the Work is similar to common graphic depictions of a lightning bolt.² While there are a variety of ways to depict a lightning bolt, the essential nature of the form is a vertical or angled zigzag that tapers to a point at the bottom of the shape. As with simple geometric shapes, familiar symbols and designs are not copyrightable and cannot be registered unless “the author used [this element] in a creative manner” COMPENDIUM (THIRD) § 906.2; *see also id.* § 313.4(J) (identifying as not copyrightable “common representational symbols [and] well-known and commonly used symbols that contain a *de minimis* amount of expression”). Here, the Work merely adds a horizontal bar to the top of the vertical zigzag, a modification that is a *de minimis* variation on the standard, often-used symbol.

While a combination of unprotected elements may be eligible for copyright protection, such protection is afforded “only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava*, 323 F.3d at 811; COMPENDIUM (THIRD) § 313.4(J) (“A work of authorship that incorporates [one or more familiar designs] into a larger design may be registered if the work as a whole contains a sufficient amount of creative expression.”). Here, the combination does not elevate the Work above the threshold for protection. The Work contains one horizontal line that abuts the zigzag form, with the edge of the horizontal line running parallel to the zigzag’s top edge.

Similar to *John Muller & Co., Inc. v. N.Y. Arrows Soccer Team, Inc.*, the current case concerns an arrangement of basic geometric shapes. 802 F.2d 989, 990 (8th Cir. 1986). The design at issue in *John Muller* consisted of “four angled lines which form an arrow and the word ‘Arrows’ in cursive script.” *Id.* The four lines varied in size and were stacked from largest to smallest. While there was some creative decision-making in the selection of shapes, the Eighth Circuit upheld the Copyright Office’s refusal to register the work and affirmed the district court’s opinion that the “logo lacked the level of creativity needed for copyrightability.” *Id.*



The work at issue in this holding is quite analogous to the Work and its few geometric expressions. Both the “Arrow” logo and the wing shape at issue juxtapose lines to evoke common shapes or familiar designs.

And although Nike argues that the Work is a “wholly fanciful design, which combines abstract lines with negative space to create a striking image,” Second Request at 6, the Office

² *See, e.g.*, “High Voltage,” EMOJIPEDIA (available at <https://emojipedia.org/high-voltage/>); “Danger High Voltage Keep Out Sign,” SAFETYSIGN.COM (available at <https://www.safetysign.com/products/2498/danger-high-voltage-sign?s=st1ztf6nzskm9fzgp40zbp13b>); “The Flash,” D.C. Comics (available at <https://www.dccomics.com/characters/the-flash>); “Hydration,” GATORADE (available at <https://www.gatorade.com/hydration>); “PWRUP,” AC/DC (available at <https://pwrap.acdc.com/>).

does not evaluate based on the aesthetic quality of the Work. COMPENDIUM (THIRD) § 310.2. It would be dangerous for the Copyright Office to make aesthetic judgments in evaluating the copyrightability of particular works. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.”).

Additionally, to the extent that the Work is a depiction of the number “3,” or the letters “R” (when the straight line is at the bottom) or “W” (when viewed on its side with the straight line to the left), that does not bring the Work over the line into copyrightability but rather militates against registration. Font and typographic ornamentation alone are not protected by copyright law. *See* 37 C.F.R. § 202.1(e) (prohibiting registration of “familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring” and “[t]ypeface as typeface”). Here, the standard bottom lobe of the number “3” is broken into a separate line and the number’s usual curves are angular. Though meant to produce a combination of a “3,” “W,” and “R,” the resulting design is a mere variation of typographic ornamentation and does not constitute separate pictorial authorship. Further, the number “3” and the letters “R” and “W” are common alphanumeric symbols, and as such are not generally copyrightable, even if stylized. COMPENDIUM (THIRD) § 313.4(J); *see also Yu Zhang v. Heineken N.V.*, 2010 WL 11596643 (C.D. Cal. Sept. 29, 2010) (declining to find copyright protection in a stylized rendering of Kanji characters in the Chinese language).

These alphanumeric symbols, further, are not randomly chosen, but are strongly identified with Wilson’s name and jersey number.³ Nike claims that the work has no relationship to common symbols, designs, or letters, even though its own advertising copy states that the work is an “RW logo.”⁴ The selection of alphanumeric symbols derive not from creative choice but from Wilson’s own initials and the number that identifies him. As a result, the selection and combination of these elements are not sufficiently original. *See PrimeSource, Inc. v. Personal Resource, Inc.*, No. 97-CV-0400, 1998 WL 543366, at *4 (W.D.N.Y. Aug. 21, 1998) (choice of letters in design not original because they “were taken from the name of the HRP division [related to the work]”). And, as mentioned above, the Work fails to meet the threshold for copyright protection even when not viewed as a combination of alphanumeric symbols.

The Board agrees with Nike that a Work’s status under trademark law bears no relationship to whether a work can be registered with the Copyright Office. COMPENDIUM (THIRD) § 602 (stating the Copyright Office will register a claim when it “determines that the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of U.S. Copyright law have been met”). The legal standards between copyright and trademark law are distinct and protection under one does not negate or necessitate protection under the other. The Office reviews all works purely on the basis of the legal standard for copyright protection, without consideration of possible protection under forms of intellectual property

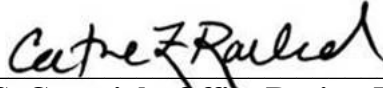
³ Wilson wears the number 3 as quarterback for the Seattle Seahawks. Seattle Seahawks, “Seahawks Roster,” <https://www.seahawks.com/team/players-roster> (last visited Aug. 30, 2019).

⁴ Nike, “Nike Tech Trainer Russell Wilson,” <https://news.nike.com/footwear/nike-tech-trainer-russell-wilson>, (Dec. 03, 2018) (referring to the logo that appears on the tongue and sockliner).

The Board thus finds that the Work consists of creative authorship that is, at best, *de minimis*, and too trivial to support copyright registration. See COMPENDIUM (THIRD) § 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 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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