



Copyright Review Board

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

June 16, 2021

Eric Haugen, Esq.
121 South Eighth Street
Suite 1130
Minneapolis, MN 55402

Re: Second Request for Reconsideration for Refusal to Register Wood U Face It Jesus Loves U (Correspondence ID:1-3UCAEYB; SR # 1-7443893941)

Dear Mr. Haugen:

The Review Board of the United States Copyright Office (“Board”) has considered Judy Thornton’s second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work titled “Wood U Face It Jesus Loves U” (“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 design with the words “Wood U Face It” written above a mirrored circle and the words “Jesus” and “Loves” on the left and right of the circle, respectively. A “U” encompasses the circle. A red curved line connects the top of the “U,” and two red colons are on either side of “Face It.” The design is applied to a wooden surface. The Work is as follows:



II. ADMINISTRATIVE RECORD

On February 2, 2019, Thornton filed an application to register a copyright claim in the “Work.” In an August 5, 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 Eric Haugen, Esq. (Aug. 5, 2019).

In a letter dated November 5, 2019, Thornton requested that the Office reconsider its initial refusal to register the Work. Letter from Eric Haugen, Esq., to U.S. Copyright Office (Nov. 5, 2019) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claim and again concluded that the Work does not contain enough creativity to warrant registration. Refusal of First Request for Reconsideration from U.S. Copyright Office, to Eric Haugen, Esq. (Dec. 18, 2019). Specifically, the Office explained that none of the common shapes, letters, or words comprising the Work are copyrightable alone, and found that the arrangement is a simple, basic configuration that lacks the necessary creativity required to support a claim in copyright. *Id.* at 3-4.

In a letter dated March 18, 2020, Thornton 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 Eric Haugen, Esq., to U.S. Copyright Office (Mar 18, 2020) (“Second Request”). In that letter, Thornton argues that the Work is sufficiently creative for registration because of the positioning of the words “Wood U Face It Jesus Loves U” around the circular mirror. *Id.* at 1. Specifically, Thornton contends:

The words FACE IT are placed above a mirror, and the letter U, meaning “you”, surrounds approximately $\frac{3}{4}$ of the mirror. The “WOOD U” portion of the work is crafted so that the two “O” Letters and the letter “U” resemble a smiling face. . . The work cleverly places the word “FACE IT” above the mirror that is surrounded by the large U. The person looking into the mirror will be experiencing these aspects of [the] work as they look into the mirror and see a reflection of their face. *Id.*

Accordingly, Thornton asserts that the Work has the requisite creativity to support registration.

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 stereotypical elements in a glass sculpture of a jellyfish including clear glass, an oblong shroud, bright colors, vertical orientation, and the 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. 2017) (“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.

Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* COMPENDIUM (THIRD) § 310.2. The attractiveness of a design, the espoused intentions of the author, the design’s visual effect or its symbolism, the time and effort it took to create, or the design’s commercial success in the marketplace are not factors in determining whether a design is copyrightable. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

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 authorship necessary to sustain a claim to copyright.

The Work consists of geometric shapes (a circle and a square), lettering, and words or a short phrase (“wood u face it Jesus loves u”). None of these elements, however, are copyrightable individually. *See* 37 C.F.R. § 202.1(a) (“words and short phrases, such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation; [and] lettering or coloring” are ineligible for copyright protection); *see also CMM Cable Rep, Inc. v. Ocean Coast Props., 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’”); COMPENDIUM (THIRD) § 906.1 (“the Copyright Act does not protect common geometric shapes, either in two-dimensional or three-dimensional form . . . including . . . straight or curved lines, circles . . . [and] squares . . .”).

The Work as a whole is likewise insufficiently creative. It combines only a few unprotectable elements in a standard arrangement, with words on the top and sides of a central circle all positioned on a square background. The simplistic arrangement of the shapes and words falls within a standard template that lacks the low amount of creativity necessary for copyright protection. Thornton argues that the work is creative because “the ‘WOOD U’ portion of the [W]ork is crafted so that the two ‘O’ letters and the letter ‘U’ resemble a smiling face” and “‘FACE IT’ is positioned above the mirror surrounded by the letter ‘U,’ which is intended to represent the word ‘you.’” Second Request at 1. Using the letter “u” to represent the word “you,” however, is an “age old practice,” which does not inject a sufficient amount of creativity into an otherwise typical design. *See Feist*, 499 U.S. at 363; *see also I O U, n.*, OXFORD ENGLISH DICTIONARY ONLINE, <https://www.oed.com/view/Entry/99353?redirectedFrom=iou&> (last visited June 4, 2021). Similarly, combining two circles and a “u” shape to form a smiling face is an expected combination that does not represent sufficient creative authorship.¹ At best, this

¹ *See, e.g.* “Collection of Smiley Face Transparent,” CLIPART LIBRARY (available at <http://clipart-library.com/free/smiley-face-transparent.html>); “Transparent Smiley Face Png Clipart,” PIKPNG (available at https://www.pikpng.com/pngvi/whmJbT_smiley-face-transparent-smiley-face-png-clipart/); “Smiley happy icon on

positioning merely amounts to a common play on words and a garden-variety smiling face, neither of which are not copyrightable. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.2. And to the extent that this positioning may be clever, uniqueness or novelty is not a consideration when assessing whether a work is copyrightable. Nor is the symbolic meaning or impression that a work is intended to evoke or impart on its viewer. COMPENDIUM (THIRD) at §§ 310.1, 310.3. Finally, the Office, in considering prior combinations of simple faces and words determined that such designs lacked a sufficient amount of creativity to support registration. *See* Statement of Interest ex rel. U.S. Copyright Off. at 2, *I.C. v. Delta Galil USA*, No. 1:14-cv-07289-GHW (S.D.N.Y. July 5, 2016).

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

Regan A. Smith, General Counsel and

Associate Register of Copyrights

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transparent background vector image,” VECTORSTOCK (available at <https://www.vectorstock.com/royalty-free-vector/smiley-happy-icon-on-transparent-background-vector-35649033>).