



United States Copyright Office

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RE: Second Requests for Reconsideration for Refusal to Register Derrick Logo, Derrick Corp Dual Pool Artwork, Derrick Corp Hyperpool Artwork, FLC 500; Correspondence IDs: SR#s 1-1832471301, 1-1832697908, 1-1832698251, and 1-1806478999

Dear Mr. Mueller:

The Review Board of the United States Copyright Office (the "Board") has examined Derrick Corporation's ("Derrick's") second requests for reconsideration of the Registration Program's refusals to register two-dimensional artwork copyright claims in the works "Derrick Logo," "Derrick Corp Dual Pool Artwork," "Derrick Corp Hyperpool Artwork," and "FLC 500" (collectively, the "Works"). After reviewing the applications, deposit copies, and relevant correspondence in these cases, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program's denials of registration.

I. DESCRIPTION OF THE WORKS

The Works are two-dimensional, graphic logo designs. First, the Derrick Logo consists of a red oval positioned at the left of the work, which fades to a smaller, white oval positioned at the right of that oval. The name "Derrick" partially overlaps the oval graphic. Underneath and to the right of "Derrick" are the words "Equipment Company." All words are colored in black.



The three other works at issue in this letter, Derrick Corp Dual Pool Artwork, Derrick Corp Hyperpool Artwork, and FLC 500, are graphic works that also function as product packaging. Each work is divided into three quadrilaterals. The lower left quadrilateral of each work consists of a rectangle containing the company's contact information as well as the Derrick Logo, but with the Derrick Logo's oval colored in green, instead of red. The lower right quadrilateral of each work consists of a square containing a logo consisting of a pyramid with the left edge made up of a black background and curved white lines and the right edge made up of a green background and curved white lines ("pyramid screen logo"). Underneath each pyramid are the words "pyramidTM" in black and "screen" in green.

In Derrick Corp Dual Pool Artwork, the top quadrilateral has a green background and the words "Dual Pool" and "Derrick DP 600 Shaker" in white set in a rhombus with a black background, a white and black boarder, and curved edges. A curved line runs through the words "Dual Pool." Underneath the rhombus are the words "API RP 13C (ISO 13501) Compliant Screen" in white. The words "genuine Derrick screen surface technology" are in white at the top of the quadrilateral. The sides of the work contain a green rectangle that repeat the ASO compliance language and a Derrick Logo in white only. The words "caution: sharp edges" and "fragile: do not puncture" are in green in the corner of each side of the product packaging.

DERRICK CORP DUAL POOL ARTWORK:



In Derrick Corp Hyperpool Artwork, the top quadrilateral has a green background and the word "Hyperpool" set within a black "H" with a curved top portion of the letter. Underneath that "H" are the words "API RP 13C (ISO 13501) Compliant Screen" in white. The words "genuine Derrick screen surface technology" are in white at the top of the rectangle. The sides of the work contain a green rectangle that repeat the ASO compliance language and a Derrick Logo in white only. The words "caution: sharp edges" and "fragile: do not puncture" are in green in the corner of each side of the product packaging.

DERRICK CORP HYPERPOOL ARTWORK:



In FLC 500, the top quadrilateral has a green background and the words "FLC 500™" and "For Derrick FLC 500 Series Shakers" in black. The words "genuine Derrick screen surface technology" are in white at the top of the quadrilateral. The words "fragile: do not puncture" are in green in the corner of each side of the product packaging.

FLC 500:



II. ADMINISTRATIVE RECORD

Derrick filed an application to register a copyright claim in FLC 500 on October 7, 2014, and filed applications to register the remainder of the Works on October 17, 2014. In November 2014 letters, Copyright Office registration specialists refused to register the Works, finding that each “lacks the authorship necessary to support a copyright claim.” Letter from Paula Gillaspie, Registration Specialist, to Jason Mueller, Adams and Reese LLP (Nov. 10, 2014) (regarding FLC 500); Letters from Shawn Thompson, Registration Specialist, to Jason Mueller, Adams and Reese LLP (Nov. 19, 2014) (regarding Derrick Logo, Derrick Corp Hyperpool Artwork, and Derrick Corp Dual Pool Artwork).

In December 2014 and February 2015 letters, Derrick requested that the Office reconsider its initial refusal to register the Works. Letter from Jason Mueller, Adams and Reese LLP, to U.S. Copyright Office (Dec. 10, 2014) (regarding FLC 500); Letters from Jason Mueller, Adams and Reese LLP, to U.S. Copyright Office (Feb. 2, 2014) (regarding Derrick Logo, Derrick Corp Hyperpool Artwork, and Derrick Corp Dual Pool Artwork) (collectively, the “First Requests”). After reviewing the Works in light of the points raised in the First Requests, the Office reevaluated the claims and again concluded that the Works do not contain a sufficient amount of original and creative artistic authorship to support copyright registration. Letters from Stephanie Mason, Attorney-Advisor, to Jason Mueller, Adams and Reese LLP (Nov. 19, 2014) (separate letters were sent for each of the four works at issue).

In August 27, 2015 letters, Derrick requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letters from Jason Mueller, Adams and Reese LLP, to U.S. Copyright Office (Aug. 27, 2015) (“Second Requests”). In those letters, Derrick disagreed with the Office’s conclusion that the Works, as a whole, do not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, Derrick claimed that the Works were compilations that met the “minimum degree of creativity necessary” for registration. *Id.* at 2-3. In each of its requests, Derrick compared the Works to a Hot Wheels logo that the Ninth Circuit found “protectable for the purposes of a copyright infringement action.” *Id.* at 2 (citing *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 636 n.6 (9th Cir. 2008)). Derrick cited to additional cases for the general proposition that logos and packaging design can be copyrightable. *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 long-standing 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." See U.S. COPYRIGHT OFFICE, 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 Works*

After careful examination, the Board finds that the Works fail to satisfy the requirement of creative authorship and thus are not copyrightable. This determination applies to the Works' design elements—several of which are common across the four Works—and each of the four Works as a whole. The copyrightability of the design elements and the Works as a whole are addressed in turn.

1. *Derrick Logo*

The Office finds that Derrick Logo is not protectable under copyright law. The typeface used in the words and the ® symbol are not individually copyrightable. Additionally, the fading oval design is a mere geographic shape that, regardless of color, is uncopyrightable. As a whole, the combination of elements is *de minimis* at best, and too trivial to allow the Office to register the design. *See, e.g.*, 37 C.F.R. § 202.1(a), (e) (prohibiting registration of “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents” and “typeface”); *see also* COMPENDIUM (THIRD) §§ 906.1 (common geometric shapes are not protected by the Copyright Act), 906.4 (typeface is not registerable).

2. *Derrick Corp Dual Pool Artwork, Derrick Corp Hyperpool Artwork, and FLC 500*

The Office also finds that the remaining three designs—Derrick Corp Dual Pool Artwork, Derrick Corp Hyperpool Artwork, and FLC 500 (the “Multipart Works”)—are not protectable under U.S. copyright law.

First, none of these works' constituent design elements—the Derrick Logo itself or the additional ovals, squares, rectangles, pyramids, product titles, typography, and short phrases—are individually subject to copyright protection. Further, the constituent pyramid screen logo (found in each lower right section of the Multipart Works) is a simple combination of wording and a common shape that, while including curved lines on its sides, is a mere variation on a common pyramid shape and not enough to merit registration. As the *Compendium* explains, “the Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations.” COMPENDIUM (THIRD) § 313.4(J). Constituent elements found only in some of the Multipart Works also are not individually registrable. For example, the logo using the words “Dual Pool” and “Derrick DP 600 Shaker” in white set in a rhombus with curved edges and a curved line through the words “Dual Pool” is not registerable because parallelograms (including rhombuses) are unprotectable as common geometric shapes. *Id.* § 906.1 (“The Copyright Act does not protect common geometric shapes . . . including . . . parallelograms.”). Similarly, Derrick Corp Hyperpool Artwork includes a logo comprised of the word “Hyperpool” set within a black letter “H” with a curved top portion of the “H.” This stylized “H” is unprotectable because typeface or lettering is not copyrightable. 37 C.F.R. § 202.1(a), (e); COMPENDIUM (THIRD) § 906.4; *see also* *Coach*, 386 F. Supp. 2d at 498 (upholding the Office's determinations that designs consisting of little more than “variations and arrangements of the letter ‘C’” were not sufficient to warrant registration on grounds that “letters of the alphabet cannot be copyrighted” and that “the mere arrangement of symbols and letters is not copyrightable”). The remaining constituent elements consist either of uncopyrightable coloring, words dictated by industry standards (the ISO standards), contact information, or short phrases. None of these elements are individually copyrightable. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(C).

Second, the combinations of each of the Multipart Works' elements are not protectable. The Board finds that, viewed as a whole, none of the Works are sufficiently original to warrant copyright registration, including in any selection, coordination, or arrangement as a compilation. *See Feist*, 499 U.S. at 359. The Office does not register "labels that consist of only . . . [m]ere spatial placement or format of trademark, logo, or label elements . . . [u]ncopyrightable use of color, frames, borders, or differently sized font, [and] [m]ere use of different fonts or functional colors, frames, or borders, either standing alone or in combination." COMPENDIUM (THIRD) § 913.1. The selection, combination, and arrangement of the Works' design elements are typical of uncopyrightable product labels.

Derrick cites *Jada Toys* for the proposition that because design features of the Hot Wheels logo, such as coloring, combination of words, and stylized graphics, are protectable, the Works here also are protectable. Second Requests at 2-3. The court in *Jada Toys* commented on the copyrightability of the Hot Wheels design in passing, in a footnote, where it noted the issue of copyrightability was not in general dispute and only that the plaintiff "only tangentially dispute[d]" copyrightability of "some elements of the flame logos." *Jada Toys*, 518 F.3d at 637 n.6 (9th Cir. 2008). While that court also stated that "the combination of the words used, the stylization of the flame graphic, and the colors chosen, suggest that elements of the flame logo are protectable for the purposes of a copyright infringement action," it seems that the court did not opine on the general copyrightability of logos. *Id.* This case thus does not persuade the Board that the Works are protectable. The Board concurs that a visual artwork that is used as a trademark, logo, or label is registerable, but *only* if it "contains the requisite qualifications for copyright." 37 C.F.R. § 202.10(b). The Office will not register "a print or label consisting solely of trademark subject matter and lacking copyrightable matter." *Id.*; *see also* COMPENDIUM (THIRD) § 913.1. Registration is not being denied because the Works are logos or labels. The Works are denied registration because, as described above, the Works are not sufficiently original.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the U.S. Copyright Office affirms the refusal to register the copyright claims in the Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action on this matter.

BY:


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Copyright Office Review Board