



July 26, 2021

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Re: Second Request for Reconsideration for Refusal to Register HEART BREAKING IN HALF, HEART BREAKING IN PIECES, HEART BREAKING INTO SMALLER HEARTS, HEART BEATING, HEART JUMPING, HEART WITH WINGS, HEART WITH ARROW, HEART WITH SMALLER HEARTS SPINNING CIRCULAR ON TOP, HEART WITH SMALLER HEARTS STREAMING UP FROM TOP, and HEART WITH SPARKLING LIGHTS (Correspondence IDs 1-3643K55 and 1-2UMJ6LB; SRs 1-2578439039, 1-2578439115, 1-2578318182, 1-2578439321, 1-2578439387, 1-2578438972, 1-2578470934, 1-2578318416, 1-2578470792, 1-2578470868)

Dear Mr. Jennison:

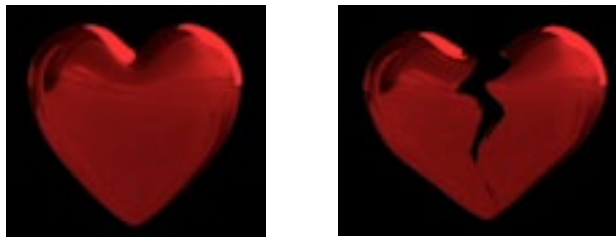
The Review Board of the United States Copyright Office (“Board”) has considered Apple, Inc.’s (“Apple’s”) second request for reconsideration of the Registration Program’s refusals to register animation claims in the following ten motion picture animations: (1) “Heart Breaking in Half” (“*Breaking in Half*”), (2) “Heart Breaking in Pieces” (“*Breaking in Pieces*”), (3) “Heart Breaking into Smaller Hearts” (“*Smaller Hearts*”), (4) “Heart Beating” (“*Beating*”), (5) “Heart Jumping” (“*Jumping*”), (6) “Heart with Wings” (“*Wings*”), (7) “Heart with Arrow” (“*Arrow*”), (8) “Heart with Smaller Hearts Spinning Circular on Top” (“*Spinning*”), (9) “Heart with Smaller Hearts Streaming up from Top” (“*Streaming*”), and (10) “Heart with Sparkling Lights” (“*Sparkling*”) (together, the “Works”). The Board has reviewed the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, and (1) affirms the Registration Program’s denial of registration as to *Beating*, *Jumping*, *Sparkling*, and *Arrow* (together, the “Affirmed Works”) and (2) reverses the Registration Program’s denial of registration as to *Breaking in Half*, *Breaking in Pieces*, *Smaller Hearts*, *Spinning*, *Streaming*, and *Wings* (together, the “Reversed Works”).

I. DESCRIPTION OF THE WORKS

The Works are ten one- to three-second motion picture animations, described below.¹

A. *Breaking in Half*

Breaking in Half is a three-second animation. It starts with a basic heart shape, which wiggles upward and then cracks down the center (from top to bottom). The crack is wider at the top of the heart and narrows to a thin line at the bottom of the heart. Still frames are set forth below:



B. *Breaking in Pieces*

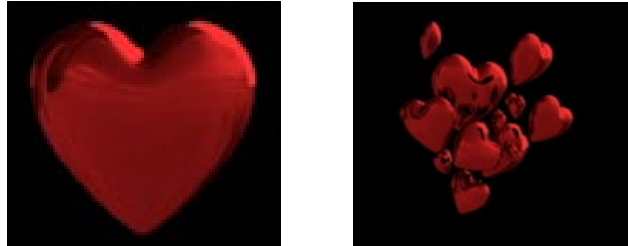
Breaking in Pieces is a three-second animation. It also starts with a basic heart shape that wiggles, but the heart moves upward and then bursts into differently shaped shards of heart pieces. Still frames are set forth below:



¹ With each application, Apple submitted three deposits depicting the animation in red, blue, and purple. The general rule for registration is that a claimant may register one work per application and filing fee. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1101 (3d ed. 2021) (“COMPENDIUM (THIRD)”). Accordingly, the Office limited its review to the animations depicted in red. *See also* 37 C.F.R. § 202.1(a) (prohibiting registration of “mere variations of . . . coloring”).

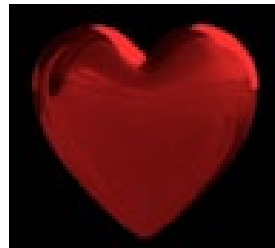
C. Smaller Hearts

Smaller Hearts is a three-second animation. It starts with a basic heart shape that bounces once and then dissipates into differently sized hearts, with the smaller hearts floating upward.



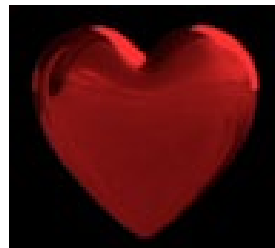
D. Beating

Beating is a two-second animation that, again, begins with a basic heart shape. The heart fluctuates from a larger to smaller size to imitate a beating heart. There are eight “beats.” A still frame is set forth below:



E. Jumping

Jumping is a three-second animation in which a basic heart shape “jumps” in place twice, moving slightly to the right. A still frame is set forth below:



F. *Wings*

Wings is a one-second animation with a basic heart shape flanked by two white wings. The wings move slightly up and down twice to depict flapping. A still frame from the Work is set forth below:



G. *Arrow*

Arrow is a two-second animation of a heart with an arrow entering and exiting its top left and bottom right quadrants. The heart jumps as the arrow disappears, and the arrow flies back into the frame and into the heart. A still frame is set forth below:



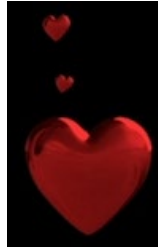
H. *Spinning*

Spinning is a two-second animation of a large heart slowly bouncing as five smaller hearts spin in circular motion overhead. The smaller hearts are reflected onto the surface of the large heart. A still frame is set forth below:



I. *Streaming*

Streaming is a one-second animation with two differently sized small hearts floating from the top left quadrant of a larger heart. The heart appears to beat once. A still frame is set forth below:



J. *Sparkling*

Sparkling is a one-second animation with differently sized white diamond shapes appearing and reappearing in varying locations on and around a large heart. The heart moves slightly to mimic floating. Still frames are set forth below:



II. ADMINISTRATIVE RECORD

On July 23, 2015, Apple filed ten applications to register copyright claims in the Works.² In a January 16, 2018, letter, a Copyright Office registration specialist refused to register the claims, finding that the Works lacked originality. Letter from Performing Arts Division to John Jennison, Esq., at 1 (Jan. 16, 2018).

In substantively identical letters dated April 16, 27, and 30, Apple requested that the Office reconsider its initial refusals to register the Works. Letters from John N. Jennison to U.S. Copyright Office at 1 (Apr. 2018) (“First Requests”). After reviewing the Works in light of the points raised in the First Requests, the Office re-evaluated the claims and again concluded that they “do not contain a sufficient amount of original and creative authorship to support copyright registrations.” Refusal of First Requests for Reconsideration from U.S. Copyright Office to John Jennison (Aug. 27, 2018). The Office stated that each animation is composed of uncopyrightable common and familiar shapes, “such as circles, semicircles, hearts, ovals, or minor variations thereof.” *Id.* at 4. Considered as a whole, the Office found that “each work consists of a short

² Apple also filed fifty-five applications for additional animations, which were the subject of first requests for reconsideration, but are not the subject of any second requests for reconsideration. The Board thus does not address those animations here.

animation sequence no more than 2 seconds long, and each sequence is comprised of only one or two movements with minor linear or spatial variations.” *Id.*

In ten substantively identical letters dated January 11, 2019, Apple requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works.³ Letters from John N. Jennison to U.S. Copyright Office, at 1 (Jan. 11, 2019) (“Second Requests”). Apple asserted that the author made “original and uncommon creative decisions on the moderation of choice and ordering to display the individual images with dramatic elements to impart the beating motion.” Second Requests at 1. Taken as a whole, Apple contended that “the sum of the individual creative components and the resulting complex compilation, the amount of original and creative authorship supports copyright registration.” *Id.* at 8.

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 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).

³ The Office granted Apple an extension to file the Second Request for Reconsideration. *See* Letter from U.S. Copyright Office to John Jennison, Jennison & Shultz, P.C. 1 (Nov. 27, 2018).

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 (THIRD) § 906.1; *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.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See id.* § 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 Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that *Beating*, *Jumping*, *Sparkling*, and *Arrow* are not sufficiently creative, but that *Breaking in Half*, *Breaking in Pieces*, *Smaller Hearts*, *Spinning*, *Streaming*, and *Wings* do contain the requisite authorship.

First, none of the Affirmed Works demonstrates the measure of creativity needed to sustain a claim to copyright. All of the Affirmed Works include a familiar heart design and some

very minimal amount of motion, which is *de minimis* and thus unprotectable by U.S. copyright law. The red color adds to the familiar and predictable nature of the heart designs. Additionally, the metallic texture on the hearts is a basic effect that is common in graphic design.⁴

Specifically, the Affirmed Works are insufficiently creative as follows:

- *Beating*: *Beating* is a depiction of a single, basic heart shape in a two-second animation during which the heart “beats” rhythmically. The heart design is a familiar shape, which copyright law does not protect. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs”). While the heart has some shading to indicate a shiny surface, that by itself does not elevate the design’s creativity enough to warrant copyright protection. The animation is a brief beating motion, which is a common way to depict a heart in motion. The overall animation thus is a common beating motion of a familiar shape. The combination of these unprotectable elements into an animated work is simply not sufficient to warrant copyright protection.
- *Jumping*: *Jumping* features the same basic heart as *Beating* and uses a three-second animation with two simple jump motions. The jumping motion is brief, simple, and not sufficient for copyright protection. *See, e.g.*, *Atari Games Corp. v. Oman*, 979 F.2d 242, 245–46 (D.C. Cir. 1992) (recognizing that an element of a work may be unprotectable where the design is “mechanical, garden-variety, typical or obvious, or as projecting age-old practice[s], firmly rooted in tradition and so commonplace that [the combination of elements] has come to be expected as a matter of course, or as practically inevitable.”) (citations omitted). Again, this overall animation has only *de minimis* authorship and is not protectable by copyright law.
- *Sparkling* and *Arrow*: While these Affirmed Works have minor elements in addition to those seen in *Beating* and *Jumping*, they are still not sufficiently creative to warrant copyright protection. Both contain the same simple heart design present in the other Affirmed Works, combined with one- and two-second animations, respectively. The one-second animation of flashing white lights, namely, the repeated depiction of four-point stars at various locations around a red heart, is common,⁵ and the animation is too brief to warrant copyright protection. Likewise, the animation of a heart pierced by an arrow is a “garden-variety” depiction of a common trope. *See Atari Games Corp.*, 979 F.2d at 246. The brief animations of typical depictions of a simple heart design do not surmount the bar, albeit low, of creativity.

Apple contends that all of the Works consist of a large number of images combined to make the animations, and that this fact supports a finding of copyrightability. *See Second*

⁴ *See generally*, Liz Stinson, *The Futuristic Gleam of “Liquid Metal” is Everywhere Right Now—Here’s Why*, AIGA EYE ON DESIGN, <https://eyeondesign.aiga.org/the-futuristic-gleam-of-liquid-metal-is-everywhere-right-now-heres-why/>; Kyle Christensen, *Design 101: How To Make & Apply Basic Metal Textures To 3D Words In Illustrator*, RED BRANCH MEDIA, <https://redbranchmedia.com/blog/design-101-how-to-make-apply-basic-metal-textures-to-3d-words-in-illustrator/>.

⁵ *Sparkling Heart Emoji*, EMOJIPEDIA, <https://emojipedia.org/sparkling-heart/> (displaying seventeen illustrations and one animation of the heart with sparkling lights emoji, featuring four-pointed stars, from eighteen different platforms and brands).

Requests at 2–3. For example, Apple alleges that *Beating* and *Jumping* both feature over 100 images. *Id.* It is not the numerosity of images, however, that determines copyrightability. One hundred images of a simple, unadorned circle, for example, would not be protected by copyright simply due to quantity. Instead, copyright law requires a review of whether an overall work has the requisite spark and modicum of creativity. In this situation, the Board bases its decision on “the total sequence of images displayed,” which here are quite minimal. *Atari Games Corp.*, 888 F.2d at 883. That there are a number of images that together make the animation does not persuade the Board otherwise, as any creativity in the Affirmed Works is *de minimis*.

Second, the Board finds that, unlike the Affirmed Works, all of the Reversed Works have a sufficient level of creativity under copyright law. All of the Reversed Works include the simple heart design shown in all of the Works, but they all include something in addition to common tropes and shapes. In each case, the Reversed Works begin with the basic heart shape, but the heart also transforms into an uncommon design or presents additional shapes using a series of sequential images that convey the illusion of motion. *See* COMPENDIUM (THIRD) § 906.1 (stating that a work is registrable where it “combines multiple types of geometric shapes in a variety of sizes and colors, culminating in a creative design that goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement”); *id.* § 808.4(E) (“Animation is the rapid display of a series of still images to create an illusion of motion.”); *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.”). Specifically, the Reversed Works include additional elements as follows:

- *Breaking in Half*: *Breaking in Half* uses three-dimensional animation to depict a heart shivering upward then splitting in half. The split begins in the middle of the heart and then travels downward along an unsymmetrical path. As the heart breaks, it tilts to the right. This is not a common animation or design and includes the minimum creativity needed for copyright protection.
- *Breaking in Pieces* and *Smaller Hearts*: These Reversed Works include hearts that transform from complete hearts into differently shaped shards of heart pieces or differently shaped hearts. The different types of hearts and pieces are notable in their animation and are sufficiently creative to warrant copyright protection.
- *Spinning* and *Streaming*: These Reversed Works include a large heart that slowly moves upward and downward as several smaller hearts circle around, or float from, the large heart. This arrangement and use of certain numbers of hearts meets copyright law’s low threshold for protection.
- *Wings*: This Reversed Work includes a creative depiction of a pair of flapping wings. Each wing includes detailed drawings of feathers in various sizes and shapes, which makes the animation sufficiently creative to warrant copyright protection.

Additionally, all of the Reversed Works include different light sources to give the animated shapes dimension and shadows that shift as the shapes perform various movements, which further supports the extension of copyright protection. *See Nicholls v. Tufenkian Imp./Exp.*

Ventures, Inc., 2004 WL 1399187, at *1–*2 (S.D.N.Y. June 23, 2004) (denying defendant’s motion to dismiss on the basis that plaintiff’s work lacked originality where the work contained circles arranged into a grid format with additional shading on each circle); *Prince Group, Inc. v. MTS Prods.*, 967 F. Supp. 121, 125 (S.D.N.Y. 1997) (holding that a polka dot design was protectable where the dots, among other factors, featured shading and consisted of many colors). For these reasons, the Board reverses the refusal to register the copyright claims in the Reversed Works.

Nevertheless, the Board notes that the animations in the Reversed Works are still relatively simple and brief. Therefore, the Board cautions that the resulting protection is thin and applies only to the overall works and not to a heart design in general. See *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (protecting only the work’s original and creative elements “against only virtually identical copying”).

Thus, after analyzing both the individual elements of the Works and the combinations of those elements, the Office concludes that the Reversed Works meet the standard for originality under *Feist*, while the Affirmed Works do not.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claims in (1) *Breaking in Half*, (2) *Breaking in Pieces*, (3) *Smaller Hearts*, (4) *Spinning*, (5) *Streaming*, and (6) *Wings*. The Board now refers those works to the Registration Policy and Practice division for registration of these works, provided that all other application requirements are satisfied.

The Board affirms the refusal to register the copyright claim in (1) *Beating*, (2) *Jumping*, (3) *Sparkling*, and (4) *Arrow*. 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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Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education

Kimberley Isbell, Deputy Director of Policy and
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