



Copyright Review Board

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

June 1, 2021

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**Re: Second Request for Reconsideration for Refusal to Register Circle of Love
(Correspondence ID 1-35Z3EGY; SR# 1-5337061951)**

Dear Mr. Sloane:

The Review Board of the United States Copyright Office (“Board”) has considered Paul Gerben’s (“Mr. Gerben’s”) second request for reconsideration of the Registration Program’s refusal to register a jewelry and sculpture claim in the work titled “Circle of Love” (“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 three-dimensional rendering of the word “LOVE” in the shape of a circle. The “L” is red lacquer; the “O” is silver chrome; the “V” is brown wood grain; and the “E” is lacquer white. The Work is depicted as follows:¹



¹ The mottling in the chrome “O” is a reflection captured by the mirrored surface and is not part of the Work.

II. ADMINISTRATIVE RECORD

On June 7, 2017, Mr. Gerben filed an application to register the Work. A Copyright Office Registration Specialist refused to register the claim for the Work, finding that it “lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Ryan McNagny, Oved & Oved LLP (Jan. 25, 2018).

Mr. Gerben subsequently requested that the Office reconsider its initial refusal to register the Work. Letter from Peter S. Sloane, Leason Ellis, to U.S. Copyright Office (Apr. 23, 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 “arrangement of four letters into a common shape is a basic configuration [that] does not exhibit the creativity necessary to support a registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Peter S. Sloane, at 3 (Jan. 25, 2018) (“First Request Refusal”).

In response, Mr. Gerben 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 Peter S. Sloane to U.S. Copyright Office (Nov. 27, 2018) (“Second Request”). Mr. Gerben contends that (1) “the letters [are] uniquely designed, and unlike anything found in ordinary typography,” and (2) “the arrangement of those letters and the use of negative space result in an original design which evidences artistic creativity.” *Id.* at 2.

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, “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 Copyright 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.” 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.

B. Analysis of the Work

After careful examination and analysis, the Board finds that the Work does not contain the necessary authorship to sustain a claim to copyright.

Both the Work's individual elements and the Work as a whole fail to demonstrate copyrightable authorship. The Work consists of letters that form the word "LOVE," which are designed to fit into a geometric circle shape. Letters and individual words are not protectable by copyright. *See Feist*, 499 U.S. at 363; *Boisson v. Banian, Ltd*, 273 F.3d 262, 269 (2d Cir. 2001) (stating that "the alphabet is in the public domain"); *Coach*, 386 F. Supp. 2d at 498 (upholding refusal to register interlocking "C" design on accessories and stating that "letters, mere variations of letters, and familiar symbols cannot be copyrighted"); 37 C.F.R. § 202.1(a) (prohibiting registration of "familiar symbols or designs; mere variations of typographic ornamentation, [and] lettering or coloring"); COMPENDIUM (THIRD) § 913.1 (stating that "[m]ere scripting or lettering, either with or without uncopyrightable ornamentation" does not satisfy the requirements for copyright registration). That the letters are configured into a circle shape, are three-dimensional, and finished with red, white, metallic, and wood grain surface treatments does not render the letters protectable. Letters containing such trivial alterations cannot be copyrighted, "regardless of how novel and creative the shape and form of the typeface characters may be." COMPENDIUM (THIRD) § 906.4; *see Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (finding the Copyright Office properly refused to register a typeface design and noting, "typeface has never been considered entitled to copyright"). Moreover, the surface variations themselves would not be sufficiently creative, but instead akin to mere coloration. 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.3 ("Merely adding or changing one or relatively few colors in a work, or combining expected or familiar pairs or sets of colors is not copyrightable, regardless of whether the changes are made by hand, computer, or some other process. This is the case even if the coloration makes a work more aesthetically pleasing"). Finally, copyright "does not protect common geometric shapes, either in two-dimensional or three-dimensional form." COMPENDIUM (THIRD) § 906.1. Therefore, the Board finds that the component parts of the Work are not sufficiently creative to support registration.

Additionally, viewed as a whole, the Board finds that the selection, coordination, and arrangement of the Work's elements are insufficient to render the Work eligible for copyright protection. Designing one four-letter word to conform to a basic shape and adding two colors and surface treatments combines too few creative choices in the selection, positioning, and arrangement of elements to warrant copyright protection. COMPENDIUM (THIRD) § 906.1. Granting protection for the Work would be similar to granting protection for mere typeface. *See id.* § 904.6. Further, designing text into shapes is a common technique among artists and illustrators.² Using such a technique does not elevate the combination of letters to the level of creativity required for registration. *See id.*

Mr. Gerben argues that *Boisson v. Banian, Ltd*, 273 F.3d 262 (2d Cir. 2001), supports a conclusion that the "the use of letters and colors can be protectable." Second Request at 3. Mr. Gerben asserts that the Work "is similar to the work deemed protectable in *Boisson*" because "it contains an array of colors and materials, many of which are not typically placed together." This argument, however, is not availing because, in *Boisson*, the Court held that the choice of colors in two quilts was an element protectable by copyright. 273 F.3d at 271. The Court's holding, however, was based on the assortment of colors in the quilts, "combined with [Plaintiff's] other

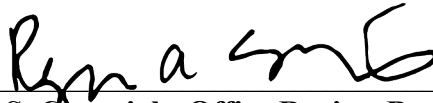
² *How to Warp Text (and Shapes!) in Adobe Illustrator*, MAKEITCENTER.ADOBE.COM (last visited Apr. 16, 2021), <https://makeitcenter.adobe.com/en/blog/envelope-distort.html> (stating "[w]arping or distorting a design to fit a particular shape is a tool commonly used in Illustrator").

creative choices” in designing and making the quilts. *Id.* The quilt at issue in *Boisson* contained an assortment of at least eight colors and prints with “blocks containing various pictures or icons.” *Id.* at 266. In contrast, the current Work combines only two colors and a chrome and wood grain surface treatment, and, as described above, the additional elements of the Work—the letters and circle shape—are unprotectable both individually and as a whole.

The Work, in sum, is a simple word designed to conform to one simple shape containing an unprotectable arrangement of two colors and two surface treatments. The Work does not contain any other elements that could elevate the Work over the creativity threshold. The Work, therefore, does not have sufficient creativity to warrant 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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