United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

August 12, 2020

Alana M. Fuierer, Esq.
Heslin Rothenberg Farley & Mesiti, P.C.
5 Columbia Circle
Albany, NY 12203

Re: Second Request for Reconsideration for Refusal to Register Cooperstown Vodka Artwork; Correspondence ID: 1-3FPM6MD; SR 1-5612989081

Dear Ms. Fuierer:

The Review Board of the United States Copyright Office ("Board") has considered Cooperstown Bat Company, Inc.'s ("Cooperstown's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the works titled "Cooperstown Vodka Artwork" ("Works"). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms in part and reverses in part the Registration Program's denials of registration.

I. DESCRIPTION OF THE WORKS

The Works are four graphic images. The first image, Stitch Design, is a red graphic design with two stitch-style curved lines. The stitches are made of oblong hash mark-style lines intersecting the curved line to form an obtuse angle. Each hash mark has slightly different angling and appearance. The Stitch Design is as follows:

The second image, Crescent Design, is a crescent shape with a baseball bat intersecting at an angle. The Crescent Design is as follows:

The third image, Cooperstown Vodka Design Variation 1 ("Variation 1"), includes the word "Cooperstown Vodka," with the Crescent Design representing the letter "C" and the remainder of the word "Cooperstown" is written in cursive block-style font. The word "Vodka" is written below "Cooperstown." This design is as follows:

The fourth image, Cooperstown Vodka Design Variation 2 ("Variation 2"), combines Variation 1with the words "Cooperstown, New York," written below with stars on either side. The design is encompassed in a double oval boarder with one oval thicker in width. Variation 2 is as follows:

II. ADMINISTRATIVE RECORD

On December 4, 2017, Cooperstown filed an application to register a copyright claim in the Works. In a May 31, 2018 letter, a Copyright Office registration specialist refused to register the claim, finding that the Works do not contain any copyrightable authorship needed to sustain a claim to copyright. Initial Letter Refusing Registration from U.S. Copyright Office to Shanna Sanders, Heslin Rothenberg Farley & Mesiti P.C. (May 31, 2018).

Cooperstown responded, asking that the Office reconsider its initial refusal to register the Works. Letter from Shanna Sanders, Heslin Rothenberg Farley & Mesiti P.C., to U.S. Copyright Office (August 31, 2018) ("First Request"). After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Works' component parts do not exhibit a sufficient amount of creative authorship and the combinations of the component elements is insufficiently creative to support claims in copyright. Refusal of First Request for Reconsideration from U.S. Copyright Office to Shanna Sanders, Heslin Rothenberg Farley & Mesiti P.C. (March 6, 2019). The Office held that each Work consists of just a few elements arranged into expected, garden-variety configurations. *Id.* at 4.

In a letter dated May 4, 2019, Cooperstown requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Alana M. Fuierer, Heslin Rothenberg Farley & Mesiti, P.C., to U.S. Copyright Office (May 24, 2019) ("Second Request"). In that letter, Cooperstown addresses each design separately arguing generally that the combination and arrangement of elements in each design, as a whole contains a sufficient amount of creative authorship to support registration. *Id.*

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).

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 merely consists 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. 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 Works*

After carefully examining the Works and applying the legal standards discussed above, the Board find that Stitch Design exhibits thin copyrightable authorship and thus may be registered, but Crescent Design, Variation 1, and Variation 2 do not contain the requisite authorship necessary to sustain a claim to copyright.

1. Stitch Design

The Board finds that the combination of elements in the Stitch Design—namely the asymmetrical and differing curvature of each line, the inversion of the bottom line from that normally found in baseball stitching, and the varying appearance of each stitch mark—in the aggregate constitutes a sufficient, although minimal, amount of original and creative authorship. This diversion from typical stitch design differentiates it from other patterns that show stitched lines extending in opposite directions.[1] The decision to register Stitch Design rests on the low standard for copyrightability articulated in *Feist*. The Board's decision relates only to this Work's specific design, *i.e.*, the specific graphical depiction of stitching, and does not extend to any variations thereof. Cooperstown, therefore, possesses only a "thin" copyright that protects only against virtually identical copying. *See Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003).

2. Crescent Design

The Board finds that neither the Crescent Design's individual elements nor the design as a whole demonstrate copyrightable authorship. The constituent elements of the Work—a letter C or crescent circle and a bat image—are lettering, standard geometric shapes, and familiar symbols, none of which are copyrightable. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "familiar symbols or designs" and "lettering"); 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. . . ."). Cooperstown argues that the bat includes "various shaded portions and patterns closer to the left side of the bat together with a dark semicircle in the middle of the drawing" to support its argument that the design is creative.

[1] *See, e.g.*, https://www.mlbshop.com/?query=baseballs&_ref=p-HP:m-TYPEAHEAD:i-r-0c-0:po-0 (last visited May 29, 2020).

Request at 4. This type of shading and dark semi-circle, however, is common and expected in graphic depictions of bats.[2] No element alone, therefore, is sufficiently creative to support a claim to copyright.

When viewed as a whole, the Crescent Design still does not contain enough creativity to support registration. The design merely combines two standard elements arranged in a typical manner with one diagonally intersecting the other. Cooperstown argues the design is arranged such that "the crescent shape ends at the top/barrel of the bat in a way that creatively expresses and suggests the idea that the bat has just been swung, with the crescent shape defining the swing-path." *Id.* What Cooperstown describes is the intended symbolic meaning or impression and the author's inspiration and intent. The Office does not consider these factors when determining whether a work is sufficiently creative, but focuses on the actual appearance of the work submitted for registration. COMPENDIUM (THIRD) §§ 310.3, 310.5. Here, an objective view of the design reveals a simplistic arrangement of two elements with a linear object intersecting a circular shape.

Cooperstown argues that the Crescent Design is "optionally" used to form a fanciful and imaginative stylized letter "C" but also argues that the Crescent Design "is not merely a stylized letter C." Request at 4. The Board finds that the design does amount to a stylized letter and is used as such. When passing the 1976 Copyright Act, Congress "considered, but chose[] to defer, the possibility of protecting the design of typefaces" and did not "regard the design of typeface, as thus defined, to be a copyrightable 'pictorial, graphic, or sculptural work.'" H.R. Rep. No. 94-1476 at 55, 1976 U.S.C.C.A.N. 5659, 5668. Carrying out Congress's policy decision, the Office does not register typeface, "regardless of how novel and creative the shape and form of the typeface characters may be." COMPENDIUM (THIRD) § 906.4; *see also Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (noting Congress has consistently refused copyright protection for typeface). Although some graphical works largely comprised of lettering may be copyrightable, those "very limited cases" are when such characters include original pictorial art that forms the entire shape of typeface characters, such as where the work is "an add-on to the beginning and/or ending of the [typeface] characters." COMPENDIUM (THIRD) § 906.4. But the "mere use of text effects (including chalk, popup papercraft, neon, beer glass, spooky-fog, and weathered-and worn [effects]), while potentially separable, is *de minimis* and not sufficient to support a registration." *Id.* Crescent Design is a stylized letter C with an applied wooden effect, which

[2] *See e.g.*, *Baseball Bat Clip Art #41036*, CLIPARTIX.COM, https://clipartix.com/baseball-bat-clip-art-image-41036/ (last visited June 16, 2020); *Baseball Bat Clip Art #40993*, CLIPARTIX.com, https://clipartix.com/baseball-bat-clip-art-image-40993/ (last visited June 16, 2020); *Baseball Bat Clip Art #41007*, CLIPARTIX.com, https://clipartix.com/baseball-bat-clip-art-image-41007/ (last visited June 16, 2020); *Wooden Baseball Bat*, GETTY IMAGES, https://www.gettyimages.com/detail/illustration/wooden-baseball-bat-royalty-free-illustration/165659415 (last visited June 16, 2020); *Wooden Baseball Bat on a White Background*, GETTY IMAGES, https://www.gettyimages.com/detail/illustration/wooden-baseball-bat-on-a-white-background-royalty-free-illustration/176936608 (last visited June 16, 2020); *Baseball Bat BW*, TIMTIM, http://www.timtim.com/drawing/view/drawing_id/5120 (last visited June 16, 2020).

amounts to uncopyrightable typeface. This combined with the typical baseball bat does not inject a sufficient amount of creativity into an otherwise uncopyrightable work.

3. Variation 1 and Variation 2

The Board finds that neither Variation 1 nor Variation 2 demonstrates copyrightable authorship. Cooperstown does not assert that any individual element is sufficiently creative, aside from the Crescent Design discussed above. *See* Second Request at 7 ("Applicant is not seeking to register in isolation a word or short phrase, a familiar symbol, lettering, coloring, or a geometric shape . . . it is an original combination of all of these"). And while the Board agrees that combinations of unprotectable elements may be selected, coordinated, or arranged in a manner that is sufficiently creative for copyright protection, it finds that a reasonable observation does not support Cooperstown's assertion that Variations 1 and 2 meet this threshold.

The designs are standard arrangements with the product name written in a stylized font and the city and state of origin written directly below and capped on either side by stars encompassed in a circular border. The Office does not register two-dimensional works that consist only of "mere scripting or lettering . . . uncopyrightable use of frames, borders or differently sized font . . . and mere use of different fonts, frames or borders either standing alone or in combination." COMPENDIUM (THIRD) § 913.1. These Works fall squarely in this category of uncopyrightable material. These Works combine basic cursive lettering, which in Variation 2, is centered in the middle of a typical circular border. Adding the border, geographic location, and two stars still reflects the employment of a standard logo template, lacking sufficient creativity.

Cooperstown also asserts that the designs at issue here are more creative than copyright-protected logos at issue in several cases, without discussing the manner in which the Cooperstown designs display more creativity. *See* Request at 6–7 (citing *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 155 F. Supp. 2d 1, 23 (S.D.N.Y. 2001), *Coach Inc. v. Horizon Trading USA, Inc.* 908 F. Supp. 2d 426, 435 (2d Cir. 2002), and *Gen. Steel Domestic Sales, LLC v. Chumley*, 129 F. Supp. 3d 1158, 1179–80 (D. Colo. 2015)). None of the cited cases, however, discuss the copyrightable authorship contained in the logos at issue. Further, copyrightability decisions are made "on a case-by-case basis" and "[t]he fact that the U.S. Copyright Office registered a particular work does not necessarily mean that the Office will register similar types of works or works that fall within the same category." COMPENDIUM (THIRD) § 309.3.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claim in Stitch Design. The Board now refers this matter to the Registration Policy and Practice division for registration of this Work, provided that all other application requirements are satisfied. But the Board affirms the refusal to register the copyright claims in Crescent Design, Variation 1, and Variation 2. 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
Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education
Kimberley A. Isbell, Deputy Director of Policy and
International Affairs