United States Copyright Office
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July 14, 2016

Puo-I "Bonnie" Lee
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104-2000

Re: Second Request for Reconsideration for Refusal to Register Five-Petal Flower; Correspondence ID: 1-N27VRB

Dear Ms. Lee:

The Review Board of the United States Copyright Office ("Board") has considered Pilobolus, Inc.'s ("Pilobolus") second request for reconsideration of the Registration Program's refusal to register a choreography claim in the work titled "Five-Petal Flower" ("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 14-second video recording in which human silhouettes appear against a blue screen. On the left-hand side is the silhouette of a woman facing the right side of the screen. On the right-hand side several people quickly tumble onto the stage, forming the silhouette of a five-petal flower with their intertwined bodies. Simultaneously, the silhouette of a giant hand moves from the left to the right side of the screen, and appears to pull at the top of the five-petal flower. The hand then points at the flower formation in a common gesture that means "stay put." The flower formation stays still for the remainder of the video. The hand moves back to the left side of the screen and appears to pluck off the head of the woman, who shrugs her arms and slightly kicks her legs outward as if stunned. Her hands reach for the headless top of her body to feel for the head, and then return to her sides. The giant hand moves over the woman's body and her head reappears; the hand moves again and most of her body disappears underneath the hand. The woman remains near-motionless before the video abruptly ends.

II. ADMINISTRATIVE RECORD

On June 20, 2013, Pilobolus filed an application to register a copyright claim in the Work. In a September 17, 2013 letter, a Copyright Office registration specialist refused to register the claim, finding that it "does not contain an amount of choreographic authorship

substantial enough to warrant a claim to copyright in choreography" and noting that "[t]he legislative history makes it clear that choreography does not include simple routines." Letter from Micky Goldstein, Registration Specialist, to Puo-I "Bonnie" Lee, Bryan Cave, LLP (Sept. 17, 2013).

In a letter dated November 4, 2013, Pilobolus requested that the Office reconsider its initial refusal to register the Work. Letter from Bonnie Lee, Bryan Cave LLP, to U.S. Copyright Office (Nov. 4, 2013) ("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 Work "do[es] not contain a sufficient amount of choreographic authorship to support [a] claim[] in copyright." Letter from Stephanie Mason, Attorney-Advisor, to Bonnie Lee, Bryan Cave, LLP (Apr. 28, 2014).

In a letter dated June 26, 2014, Pilobolus 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 Bonnie Lee, Bryan Cave, LLP, to U.S. Copyright Office (June 26, 2014) ("Second Request"). In that letter, Pilobolus listed a number of awards and accolades it has received for its work, which it describes as "a unique form of shadow-based choreography using proprietary techniques for projecting, distorting and manipulating light to create silhouettes using human bodies." Second Request at 2. Pilobolus argued that its work is "widely recognized as an original and never-before-seen form of dance expression" that "employs the human body as pure sculptural matter, with dancers linking and unlinking, twisting and tumbling to create an ever-changing series of forms." Second Request at 2-3.

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 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"). As applied to choreography, the *Compendium of U.S. Copyright Office Practices, Third Edition*, explains,

> Individual movements or dance steps by themselves are not copyrightable, such as the basic waltz step, the hustle step, the grapevine, or the second position in classical ballet. Likewise, the U.S. Copyright Office cannot register short dance routines consisting of only a few movements or steps with minor linear or spatial variations, even if the routine is novel or distinctive. The individual elements of a dance are not copyrightable for the same reason that individual words, numbers, notes, colors, or shapes are not protected by the copyright law. Individual dance steps and short dance routines are the building blocks of choreographic expression, and allowing copyright protection for these elements would impede rather than foster creative expression.

U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 805.5(A) (3d ed. 2014) ("COMPENDIUM (THIRD)") (citations omitted).

Some combinations of common or standard dance elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a copyright. *See Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) (explaining that "individual [dance] steps [] may be utilized as the choreographer's basic material in much the same way that words are the writer's basic material.") (quoting U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 450.06 (2d ed. 1984) ("COMPENDIUM (SECOND)")). 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 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).

Finally, 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 appearance, 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, the Board finds that the Work fails to satisfy the requirement of creative authorship in a choreographic work and thus is not copyrightable.

Here, it is undisputed that the Work is comprised of bodily movements and the largely static combination of several bodies into the shape of a flower. The question is whether the combination of the static portrayals and performative movements result in copyrightable choreography. The Board finds that, viewed as a whole, the individual movements collectively result in a 14-second routine that is *de minimis*, such that to "allow[] copyright protection for these elements would impede rather than foster creative expression." COMPENDIUM (THIRD) § 805.5(A). The tumbling sequence creating the five-petal flower formation and the reactions of the woman having her head "plucked off" are each comprised of simple gestures and movements. Similarly, the giant hand in silhouette that "grows" the "flower" and plucks and then replaces the woman's head uses very simple hand gestures to accomplish these acts: it pulls, points, plucks, and wiggles. It is true that, as explained above, the combination of simple movements may satisfy the requirement for copyrightable authorship if they are selected, coordinated, and/or arranged in a sufficiently creative manner. The Board finds, however, that viewed as a whole, the collection and arrangement of these simple movements are insufficient to enable copyright registration.

Pilobolus argues that "[a]pplicable legal authority does not require that choreography be of a certain length in order to qualify for copyright registration." Second Request at 2. While it is true there is no bright line test, the Office "cannot register short . . . routines consisting of only a few movements or steps with minor linear or spatial variations, even if the routine is novel or distinctive," because "[i]ndividual dance steps and short dance routines are the building blocks of choreographic expression, and allowing copyright protection for these elements would impede rather than foster creative expression." COMPENDIUM (THIRD) § 805.5(A) (citing *Horgan,* 789 F.2d at 161.

Pilobolus also asserts that the Work is copyrightable because it "can only be performed by dancers specifically trained for the work, because the work requires extraordinary physical strength." Second Request at 3. But the execution of the dancers is only one factor in determining whether a work contains copyrightable choreographic authorship. *See* COMPENDIUM (THIRD) § 805.2 (identifying six elements that may be found in choreographic works, including execution by skilled performers, but noting that "the presence or absence of a given element is not determinative of whether a particular dance constitutes choreography."). If a work lacks sufficient dance steps, movements and/or patterns it does not meet the test for a choreographic copyright claim, no matter the dancers' contributions. *See id.* § 805.1.

Finally, Pilobolus points out that its dance collective has received numerous accolades, and states that because the "Philobus style" employs a "never-before-seen form of dance expression," it has been praised as "not a typical dance company." Second Request at 1-3. But the Board may not consider Philobus' entire repertoire when evaluating the copyrightability of the brief sequence contained in the applied-for Work. Accordingly, the Board concludes that the Work does not possess the requisite amount of creative authorship to warrant copyright 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.

BY: _____
Regan A. Smith
Copyright Office Review Board