



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

June 15, 2022

Justin A. Tomevi, Esq.
Barley Snyder LLC
100 East Market Street
York, PA 17401

**Re: Second Request for Reconsideration for Refusal to Register American Made
(Correspondence ID: 1-3ZKWEH1; SR # 1-8510425523)**

Dear Mr. Tomevi:

The Review Board of the United States Copyright Office (“Board”) has considered Hanover Architectural Products’ (“Hanover”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “American Made” (“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 two-dimensional graphic design, consisting of a five-point black star with the right portion, including part of the top point and lower right point as well as the entirety of the middle right point, of the star missing. There is a negative space extending diagonally on the right of the star. To the right of the negative space, seven curved lines extend slightly diagonally and parallel to each other, folding at the midpoint of each curved line. There is negative space between each curved line. These curved lines are gray except for the left most portions of the three top-most curved lines, which are black. Above the star and the protruding curved lines is the phrase “American Owned” depicted in a sans serif font in all capital letters. Below the star and the protruding curved lines is the phrase “American Made” depicted in a sans serif font in all capital letters. The Work is reproduced below from the submitted deposit copy:



II. ADMINISTRATIVE RECORD

On February 3, 2020, Hanover filed an application to register a copyright claim in the Work. In a letter dated March 27, 2020, a Copyright Office registration specialist refused to

register the claim, finding that the work lacked “the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Joseph Falcon at 1 (Mar. 27, 2020). Hanover then requested that the Office reconsider its initial refusal to register the Work in a June 25, 2020 letter. Letter from Scott Landis to U.S. Copyright Office (June 25, 2020) (“First Request”). Hanover argued that the “Work clearly consists of elements combined in a creative and original manner that should qualify the Work for copyright protection.” First Request at 2. In particular, Hanover distinguished the elements of the Work such as the star and the American flag from “familiar symbols,” arguing first, that one-third of the star had been removed. *Id.* Second, Hanover noted the stripes of the flag “are drawn in such a way as to create the illusion and impression that the flag is flying in the breeze.” *Id.* After reviewing the Work in light of the points raised in the First Request, the Office again concluded that the Work lacked a sufficient amount of creative authorship. Refusal of First Request for Consideration from U.S. Copyright Office to Scott Landis at 3 (Nov. 17, 2020). The Office explained that “[t]he five-point star and curved bands are common shapes, while the remaining elements are four words . . . common shapes and familiar designs, or any minor variation thereof, are not copyrightable . . .” and that the “same is true for words and short phrases.” *Id.*

In a letter dated February 10, 2021, Hanover requested that the Office reconsider for a second time its refusal to register the Work. Hanover again argued that the elements of the Work such as the stars and stripes were modified and “required artistic expression to create.” Letter from Justin Tomevi to U.S. Copyright Office at 3 (Feb. 10, 2021) (“Second Request”). According to Hanover, “[t]he depiction can only be described as something more creative than a patchwork of geometric shapes . . . because it is creatively altered geometric shapes placed together to form something new, which has not yet been created.” *Id.* Hanover also noted that the words “American Made” and “American Owned” were placed specifically to “frame the symbolic flag” and that the words “were selected to connect to the symbolic flag.” *Id.* While Hanover admitted that “arguably the short phrases are not copyrightable, when inserted into, and combined with, other elements, the entire image depicts something original and creative that should be eligible for copyright registration” *Id.*

III. DISCUSSION

After carefully examining the Work and applying the legal standards discussed below, the Board finds that the Work does not contain the requisite original authorship necessary to sustain a claim to copyright.

As an initial matter, the Board finds that the Work’s individual components are insufficiently creative to be eligible for copyright protection. 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 the copyright 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, “as opposed to copied from other works.” *Id.* Second, the work must possess sufficient creativity. *Id.* Only a “modicum of creativity” is necessary, but the Supreme Court has held that some works fail to meet even this low threshold. *Id.* at 362. 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 this longstanding requirement of originality. *See, e.g.*, 37 C.F.R. § 202.10(a) (stating that “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”); 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs,” “[w]ords and short phrases such as names, titles, slogans,” and “mere variations of typographic ornamentation [or] lettering”).¹

Applying these legal standards to the Work’s elements, neither the star with a portion missing; the seven parallel curved, folded lines; the negative spaces; nor the short phrases “American Made” or “American Owned” are subject to copyright protection. While Hanover asserts that the star and stripes used in the Work are modified in a creative way, *see* Second Request at 2–3, these minor variations of a star and flag do not take each component out of the realm of geometric or familiar shapes. The sets of curved lines protruding from the negative space next to the star are simplistic and lack sufficient creativity to warrant copyright protection. Additionally, the coloring of the star and the curved lines consists solely of two colors (black and gray), which do not “possess more than a *de minimis* quantum of creativity” and are also therefore not protectable. *Feist*, 499 U.S. at 345.

The Board also concludes that the combination of the elements in the Work fails to meet the requirements for copyrightability. The Board acknowledges that 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 claim. 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

¹ *See also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(J) (3d ed. 2021) (“COMPENDIUM (THIRD)”) (“[T]he Office cannot register a work consisting of a simple combination of a few familiar symbols or designs with minor linear or spatial variations, either in two-dimensional or three-dimensional form. Examples of familiar symbols and designs include, without limitation . . . [w]ell-known and commonly used symbols that contain a *de minimis* amount of expression”); *see also id.* § 906.1 (“The Copyright Act does not protect common geometric shapes, either in two-dimensional or three-dimensional form. There are numerous common geometric shapes, including, without limitation, *straight or curved lines* . . .”) (emphasis added).

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 and emphases omitted).

Here, the arrangement and combination of the elements of the Work are similarly not protectable. According to Hanover, “[t]he connection of all elements [in the Work] make for something much more than familiar symbols or geometric shapes.” Second Request at 3. While Hanover admits that the short phrases are not copyrightable, it asserts that when the phrases are “inserted in to, and combined with, other elements, the entire image depicts something original and creative that should be eligible for copyright registration when comparing it to the minimal level of originality and creativity previously recognized . . .” *Id.* The Board disagrees. Instead, when viewed as a whole, the selection, coordination, and arrangement of the star, the protruding curved lines, and the short phrases are not sufficiently creative to render the Work original.² 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) § 906.1.³

Moreover, the overall arrangement of the star and the curved lines or stripes forms a mere variation on a symbol firmly in the public commons — the American flag. There are a limited number of ways to portray the American flag, and the slight variation of one cut-off star (in lieu of the fifty stars on the American flag) and the slightly modified curved lines or stripes in the Work falls into the “narrow category of works in which the creative spark is . . . so trivial as to be nonexistent.” *Feist*, 499 U.S. at 359; *see also* COMPENDIUM (THIRD) § 906.2 (“[T]he copyright law does not protect mere variations on a familiar symbol . . . either in two or three-dimensional form.”).

² Hanover cites to various cases for the proposition that, even if geometric shapes standing alone are not copyrightable, piecing them together can make something new that is sufficiently creative. *See* Second Request at 2 (citing *Titlecraft, Inc. v. Nat’l Football League, et al.*, No. 10-758 (RHK/JJK), 2010 WL 5209293 (D. Minn. Dec. 20, 2010); *Glasscraft Door I, LP v. Seybro Door & Weathership Co. Inc.*, No. H-08-2667, 2009 WL 3460372 (S.D. Tex. Oct. 22, 2009); *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017)). The Board does not disagree that a combination and placement of elements or shapes that are not copyrightable can result in a copyrightable work, but as stated above, the combination of the elements at issue here does not, in the Board’s view, create a work sufficiently original to warrant copyright protection.

³ *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.”).

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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