



United States Copyright Office

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

Maribeth Meluch, Esq.
Isaac Wiles Burkholder & Teetor LLC
Suite 700, Two Miranova Place
Columbus, OH 43215
mmeluch@isaacwiles.com

April 23, 2020

Re: Second Request for Reconsideration for Refusal to Register HumpStock Logo; Correspondence ID: 1-3JLN2DO; SR # 1-6373586661

Dear Ms. Meluch:

The Review Board of the United States Copyright Office (“Board”) has considered HumpStock, Ltd.’s (“HumpStock’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional claim in the work titled “HumpStock Logo” (“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 consists of the word “Humpstock” in letters outlined in black against a grey background arranged together in a linear configuration along with a graphic of a rifle, in pink coloring. Below is the phrase “Because it is your right to REALLY love your gun,” also in black coloring. The Work is as follows:



II. ADMINISTRATIVE RECORD

On March 12, 2018, HumpStock filed an application to register a copyright claim in the Work. In a letter dated September 11, 2018, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.”

Initial Letter Refusing Registration from U.S. Copyright Office to Maribeth Meluch (Sept. 11, 2018).

In a letter dated January 16, 2019, HumpStock requested that the Office reconsider its initial refusal to register the Work. Letter from Maribeth Meluch to U.S. Copyright Office (Jan. 16, 2019) (“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, as a whole, lacked sufficient creative authorship because “[f]eaturing a business name with a common shape related to that business is a basic, garden-variety logo configuration” and found the overall “combination and arrangement of the component elements to be insufficiently creative to support a claim in copyright.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Maribeth Meluch (May 21, 2019).

In a letter dated June 25, 2019, HumpStock 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 Maribeth Meluch, to U.S. Copyright Office (June 25, 2019) (“Second Request”). In that letter, HumpStock emphasized that “[t]his work contains far more than simple words, phrases and geometric shapes.” Second Request at 1. HumpStock noted that there is “inherent creativity by the author in depicting a certain population of gun owner’s love for their guns” by switching the words “hump” and “bump” and arranging an image of a rifle within the phrase “humpstock” in a way that depicts reproductive organs. Second Request at 1. HumpStock asserts sufficient creative original authorship since the Work combines “words, a graphic design of a rifle, and color, in a unique and creative way, to create a completely independent pictorial work of art expressing an idea about the obsession of some gun owners with their guns.” Second Request 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, 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).

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

The Board finds that none of the Work's individual components are sufficiently creative to be eligible for copyright protection. The Work consists of the word "Humpstock" in letters outlined in black against a grey background arranged together in a linear configuration. A graphic of a rifle, in pink coloring, is positioned over these words. Below is the phrase "Because it is your right to REALLY love your gun," also in black coloring. Neither the word "Humpstock" nor the phrase underneath are copyrightable. Words, short phrases, and "mere variations of typographic ornamentation, lettering or coloring" are all ineligible for copyright protection. 37 C.F.R. § 202.1(a), (e); *see CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (citing the Office's regulation and noting, "[i]t is axiomatic that copyright law denies protection to 'fragmentary words and phrases'"). HumpStock argues that the term "Humpstock" is copyrightable because the author creatively substituted "bump" in "bumpstock" with "hump." However, mere wordplay is insufficient to warrant copyright protection. COMPENDIUM (THIRD) § 313.4(C) ("The U.S. Copyright Office cannot register individual words or brief combinations of words, even if the word or short phrase is novel or distinctive or lends itself to a play on words."); *see also Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (concluding that the Office's regulation barring the registration of short phrases is "a fair summary of the law").

Aside from the text, the only other component of the Work is the image of a rifle. The rifle is a familiar shape and as stated above, familiar shapes or any minor variations thereof, are not copyrightable. 37 C.F.R. § 202.1(a); *see also OddzOn Prod., Inc. v. Oman*, 924 F.2d 346, 349 (D.C. Cir. 1991) (no abuse of discretion in refusal to register Koosh ball for lack of creativity because it formed the "familiar shape" of a sphere). Further, the rifle image is not protectable because it includes the bare minimum to show a rifle, without a copyrightable design. The rifle image has no design attributable to the author; the familiar rifle image is available for all designers to use. Additionally, the coloring of the text and rifle does not "possess more than a *de minimis* quantum of creativity" and is therefore not protectable. *Feist*, 499 U.S. at 345; *see also Boisson v. Banian, Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (indicating mere coloration cannot support a copyright claim), COMPENDIUM (THIRD) § 906.1 ("Merely . . . combining expected or familiar pairs or sets of colors is not copyrightable.").

Additionally, viewed as a whole, the Board finds that the selection, coordination, and arrangement of the shapes, colors, and letters that comprise the Work are insufficient to render the work sufficiently creative and original. Humpstock argues that the threshold for originality is concededly one with a low threshold in that all that is needed is that the author contributed something more than a merely trivial variation, something recognizably his own. Second Request at 1 (quoting *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 100, 103 (2d Cir. 1951)). However, while "the standard of originality is low . . . it does exist." *Feist*, 499 U.S. at 363. For this

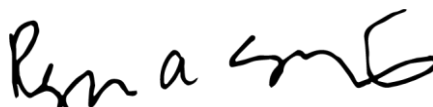
reason, the Office refuses registration of logos that consist only of “wording,” “uncopyrightable ornamentation,” “spatial placement” of elements, and “mere use of different colors, frames, borders, or differently sized font.” COMPENDIUM (THIRD) § 913.1. Here, Humptock merely combined a familiar shape of a rifle with short phrases and *de minimis* coloring. Placing the rifle image over the word “Humpstock” is a “garden-variety” logo configuration that is not entitled to copyright protection. *Feist*, 499 U.S. at 349.

Humpstock further argues that “[t]he author intentionally combined the word HUMPSTOCK with a graphic design of a rifle to convey a message regarding gun owners’ attachments to their guns,” and states that the rifle was deliberately made pink to “convey the appearance of aspects of the female reproductive organs.” First Request at 1. When examining a work for copyrightable authorship, the Copyright Office uses objective criteria to determine whether a work is sufficiently creative for copyright protection. The symbolic meaning or impression that a work conveys is irrelevant to whether a work contains a sufficient amount of creativity to support a copyright claim. COMPENDIUM (THIRD) § 310.3. Equally irrelevant is the intent of the author. *Id.* § 310.5. To extrapolate that the rifle coloring and placement over the letter “H” represents the joining of female and male reproductive organs requires a subjective interpretation of the Work that does not play a role in evaluating whether the Work is protected by copyright. *See* 17 U.S.C. § 102(b); COMPENDIUM (THIRD) § 310.3 (“[T]he Office will focus only on the actual appearance . . . of the work that has been submitted for registration, but will not consider any meaning or significance that the work may evoke. The fact that creative thought may take place in the mind of the person who encounters a work has no bearing on the issue of originality.”).

In sum, the ordinary textual expression, simple color scheme, familiar design, and configuration that make up the Work, as a whole, lack the requisite amount of creativity in their selection, combination, and arrangement to warrant copyright protection. *See Feist*, 499 U.S. at 359; *see also* COMPENDIUM (THIRD) § 913.1 (explaining the types of logo designs that the Office typically refuses to register). Thus we find that the level of creative authorship involved in this combination of unprotectable elements is, at best, *de minimis*, and too trivial to merit 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.



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