United States Copyright Office
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Re: Second Request for Reconsideration for Refusal to Register Log Cabin; Correspondence ID: 1-2O3WIKA; SR 1-5582119381

Dear Mr. Epstein:

The Review Board of the United States Copyright Office ("Board") has considered Cady Noland's ("Noland") second request for reconsideration of the Registration Program's refusal to register a sculpture claim in the work titled Log Cabin ("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

Ms. Noland created the Work as a sculpture for display in an art gallery. The Work is made of logs and wood components arranged to look like the façade of a log cabin. It includes negative spaces shaped like a rectangular door and two evenly-spaced rectangular windows. The Work is twelve feet tall, eighteen feet long, and two-and-one-half feet wide and is stabilized by logs that extend perpendicularly from each end of the rectangular base and structural support that extends off the back of the sculpture. Ms. Noland provided the below image of the Work as the initial deposit for the application:

II. ADMINISTRATIVE RECORD

On July 6, 2017, Noland filed an application to register a copyright claim for sculpture in the Work. In July 2017, a Copyright Office registration specialist refused to register the claim, finding that the Work "lacks the authorship necessary to support a copyright claims" and "is a useful article . . . that . . . does not contain any non-useful design element that could be copyrighted and registered." Letter from Examiner Brown, Registration Specialist, to Andrew Epstein (July 12, 2017).

In August 2017, Noland requested that the Office reconsider its initial refusal to register the Work. Letter from Andrew Epstein to U.S. Copyright Office (Aug. 3, 2017) ("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, although "not a useful article but rather . . . a sculptural work," did "not contain a sufficient amount of creativity either elementally or as a whole to warrant registration." Letter from Gina Giuffreda, Attorney-Advisor, to Andrew Epstein (Sept. 12, 2017).

Noland then filed a second, final request for reconsideration in December 2017 pursuant to 37 C.F.R. § 202.5(c). Letter from Andrew Epstein to U.S. Copyright Office (Dec. 8, 2017) ("Second Request"). Noland claimed that the Work satisfies the creativity standard for originality. She contended that she made many creative choices in executing her idea to "construct the front of a house . . . to showcase the failed promise of the American dream," including using smooth logs, installing window and door openings, settling on the dimensions of the piece, among other decisions." *Id.* at 2-3. She also argued that the Office examined the component geometric shapes that make up the Work but failed to examine the work as a whole, and that "it is the relationship that each of these shapes has to the whole that is important." *Id.* at 4-5. Noland concluded that "the selection, arrangement, and combination of elements present in [the] work clearly meets the threshold of creativity required for a work to obtain copyright protection." *Id.* at 8.[1]

Also in December 2017, Noland requested special relief to allow her to submit additional deposit material. Letter from Andrew Epstein to U.S. Copyright Office (Dec. 5, 2017) for Special Relief per U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1508.8(B) (3d ed. 2017). The proposed additional deposit material depicted the Work as shown in the initial deposit with the further visual element of an American flag upon the Work. In this submission, Noland detailed the specifications of the Work as well as information regarding an alleged infringement and pending lawsuit.

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.*,

[1] While the Board was reviewing the copyrightability of the Work, Ms. Noland also has filed suit for violation of her moral rights in the Work pursuant to Sections 106A and 501 of the Copyright Act in the Southern District of New York. *Noland v. Galerie Michael Janssen*, Civ. Action No. 1:17-cv-05452-JPO (filed July 18, 2017). She filed an amended complaint in that matter this week.

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 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; *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.

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 careful examination, the Board finds that the Work does not contain a sufficient amount of original and creative artistic or graphic authorship to sustain a claim in copyright. The Work is a simple representation of a standard log cabin façade with joinery; thus any authorship is *de minimis* and does not support registration.

As a preliminary matter, the Board denies Noland's request for special relief. Section 1508.8(B) of the *Compendium*, upon which Noland bases her request, reiterates the standards set forth in Copyright Office regulations. 37 C.F.R. § 202.20(d). That regulation provides for special relief in the types of deposits typically requested (*e.g.*, permitting a single copy or identifying material) at the time an application is initially filed. It is not applicable to Noland's request to simply supplement the deposit material already appropriately provided.[2]

Noland contends that she is seeking to register the "Work as a complete sculpture including the materials used, the peaked roof, window and door openings as well as side supports" and that this complete sculpture meets the requisite degree of creativity. Second Request at 5. She concedes that the shape of the façade, and the inclusion of a window and door openings are typical features are found in architecture, but notes that she is not seeking protection for the work as an architectural work. *Id.* Noland asserts that the Office erred in refusing registration and that the previous decision on her initial request for reconsideration inappropriately relied on a discussion of geometric shapes.

The Board appreciates that Noland did not intend for the Work to serve as a functional log cabin façade or as an architectural work. The Board recognizes the Work as a sculptural design, and that Noland intended for the Work to be purely artistic. Nevertheless, the Work is a simple expression of rote designs and representations of a log cabin; the fact that it is not functional or useful is irrelevant to that analysis. *See* Cyril M. Harris, Ed., Dictionary of Architecture & Construction (2000) ("A log cabin is constructed of straight, relatively smooth, round logs stripped of their bark and laid horizontally, one above the other, to form a structure . . . . The logs protrude beyond the joints . . . . [The cabin] typically [has] a pitched roof."); *see, e.g.*, Cabin Series, COVENTRY LOG HOMES, INC., https://www.coventrylog homes.com/ourDesigns/cabin Series.html. The Work thus is a standard representation of a log cabin façade, which does not meet the minimum degree of creativity required for copyright protection. *Satava*,

[2] The Board notes that, even if the request for special relief was appropriate, the simple addition of the American flag would not alter the Board's determination that the Work is not copyrightable.

323 F.3d at 810 ("[E]xpressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law.").

Moreover, the Board does not consider Noland's conceptual choices in producing the Work (or its placement in a larger art historical context) when assessing creativity under the Copyright Act. Noland asserts that "artists have been using geometric shapes in their works for years," providing examples, and that "[n]o one has ever questioned the modern art works of Mondrian, [Ellsworth] Kelly, or Kenneth Noland and dismissed their works simply because they used basic geometric shapes."[3] Second Request at 6. In reaching its decision, however, the Board does not evaluate or dismiss the Work (or its value) as an art object. In fact, in considering whether the Work meets the minimum degree of creativity for copyright protection, the Board must explicitly avoid weighing the artistic merit of a particular work. H.R. Rep. No. 94-1476, at 51 (1976) ("The phrase 'original works of authorship' . . . . does not include requirements of . . . esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them."). As the Supreme Court explained, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Bleistein*, 188 U.S. at 251.

Accordingly, the Board upholds, in the light of the appropriate legal standards, the initial decision to refuse registration of the Work.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office denies the request for special relief and 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
Karyn A. Temple, Acting Register of Copyrights and Director, U.S. Copyright Office
Sarang Vijay Damle, General Counsel and Associate Register of Copyrights
Catherine Zaller Rowland, Associate Register of Copyrights and Director, Public Information and Education

[3] In her Second Request, Noland repeatedly references the Office's prior language refusing registration in relation to simple geometric shapes. The Office, however, did not limit its prior decisions to a discussion of geometric shapes, and the Board has analyzed the Work as a whole, and not simply as a collection of geometric shapes.