



United States Copyright Office

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January 23, 2017

Katherine M. Basile
Novak Druce & Quigg, LLP
555 Mission Street, 34th Floor
San Francisco, CA 94105

**Re: Second Request for Reconsideration for Refusal to Register Intel Spiral;
Correspondence ID: 1-AJ8S43; SR # 1-261985471**

Dear Ms. Basile:

The Review Board of the United States Copyright Office (“Board”) has considered Intel Corporation’s (“Intel’s”) second request for reconsideration of the Registration Program’s refusal to register musical work and sound recording claims in the work titled Intel Spiral (“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 of the musical work, but finds that the sound recording satisfies the requirement for creative authorship necessary to sustain a claim to copyright.

I. DESCRIPTION OF THE WORKS

The Work consists of a sound recording and a musical work. The musical work consists of what the Office understands to be a single whole note, D-flat, in unison with its octave, followed by an arpeggio consisting of four quarter notes, a D-flat, G-flat, D-flat, and A-flat. The sound recording, which lasts for 5 seconds and captures the musical work described above, mixes and manipulates layers of instruments in an initial burst of sound, followed by a succession of individual sounds. Some sounds linger into subsequent sounds, creating audio layers.

II. ADMINISTRATIVE RECORD

On December 31, 2009, Intel filed an application to register a copyright claim in the Work. In a November 29, 2010 letter, a Copyright Office registration specialist refused to register the claims, finding that the “[W]ork [did] not contain enough original authorship to support a copyright claim.” Letter from Gareth James, Registration Specialist, to James Cady, Howrey LLP (Nov. 29, 2010).

In a letter dated February 28, 2011, Intel requested that the Office reconsider its initial refusal to register the Work. Letter from Katherine M. Basile to U.S. Copyright Office (Feb. 28, 2011) (“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 contains a “small amount of music [which] does not represent enough musical expression to support a copyright registration [and] the brief series of sounds which consists of only a few seconds do not constitute sufficient authorship to support a claim in the sound recording.” Letter from Virginia Giroux-Rollow, Attorney-Advisor, to Katherine M. Basile (July 19, 2011).

In a letter dated October 19, 2011, Intel 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 Katherine M. Basile, to U.S. Copyright Office (Oct. 19, 2011) (“Second Request”). In that letter, Intel asserted that the Office refused registration of the claims in the musical work and sound recording “based on an improper bias against trademark, an erroneous application of a novelty standard, and an improper focus on the length of the Work.” Second Request at 1. It also asked the Office to register the Work under the rule of doubt “if reasonable doubt remains about the registrability of the Work.” *Id.* at 5.

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).

The *Compendium of U.S. Copyright Office Practices, Third Edition* (“*Compendium*”), which provides guidance on the copyrightability and registrability of all copyright subject matter, states that “[t]o be copyrightable, a musical work must contain a sufficient amount of creative musical expression,” and that the while “[t]here is no predetermined number of notes, measures, or words that automatically constitutes *de minimis* authorship or automatically qualifies a work for copyright registration . . . short musical phrases are not copyrightable because they lack a sufficient amount of authorship [like] words and short textual phrases.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 802.5(B) (3d ed. 2014) (“COMPENDIUM (THIRD)”) (citing 37 C.F.R. § 202.1(a), and adding that “a short phrase of only a few musical notes, such as clock chimes or ‘mi do re sol, sol, re mi do’ would be considered too short and too lacking in creative expression to be registrable.”).

Sound recordings are subject to the same principles of originality and creativity as other forms of works. Applying *Feist*’s standard for sufficient creativity, the Office’s practice is that “a sound recording must contain a sufficient amount of creative, perceptible sound recording authorship [and] elements that determine the sufficiency and creativity of a sound recording include the simultaneous or sequential number of sounds, the length of the recording, and the creativity perceptively expressed in creating, fixing, and manipulating the sounds.” COMPENDIUM (THIRD) § 803.5(B). Further, the *Compendium* explains, “Short sound recordings may lack a sufficient amount of authorship to be copyrightable (just as words and short textual phrases are not copyrightable).” *Id.* § 803.5(B); *see also id.* § 803.1 (“A series of musical, spoken or other sounds requires a temporal succession of sounds rather than a single sound expressed horizontally or simultaneous sounds expressed vertically, such as in a chord.”).

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).

Musical works and sound recordings are subject to the same principles of originality and

creativity as other forms of works. Applying the *Feist* standard, the Office's practice is that "short musical phrases consisting of only a few musical notes standing alone" or, similarly, "sounds [] consisting of such elements" "are not copyrightable and cannot be registered with the U.S. Copyright Office, even if the phrase is novel or distinctive." COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(C) (3d ed. 2014) ("COMPENDIUM (THIRD)"). In the case of musical works, common property material including "[d]iatonic or chromatic scales, [a]rpeggios, or [c]hord symbols based on standard chord progressions" are not copyrightable. *Id.* at 802.5(A). As for sound recordings, the *Compendium* further explains:

To be registrable, a sound recording must contain a sufficient amount of creative, perceptible sound recording authorship fixed as a series of musical, spoken, or other sounds. Elements that determine the sufficiency and creativity of a sound recording include the simultaneous or sequential number of sounds, the length of the recording, and the creativity perceptively expressed in creating, fixing, and manipulating the sounds. Short sound recordings may lack a sufficient amount of authorship to be copyrightable (just as words and short textual phrases are not copyrightable).

Id. § 803.5(B) (citations omitted); *see also id.* § 803.1 ("A series of musical, spoken or other sounds requires a temporal succession of sounds rather than a single sound expressed horizontally or simultaneous sounds expressed vertically, such as in a chord.").

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 Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

B. Analysis of the Works

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work is comprised of a *de minimis* musical work not sufficient to sustain a claim in copyright, but a sound recording that does contain sufficient creative authorship necessary to sustain a claim to copyright.

1) Musical Work

The Board finds that the musical work is not copyrightable because it lacks a sufficient amount of creative expression to qualify for copyright protection. The musical work contains only a single whole note, D-flat, in unison with its octave, followed by an arpeggio consisting of four quarter notes, a D-flat, G-flat, D-flat, and A-flat. While "[t]here is no predetermined number of notes [or] measures . . . that automatically constitutes *de minimis* authorship or automatically qualifies a work for copyright registration," "short musical phrases are not copyrightable because they lack a sufficient amount of authorship." COMPENDIUM (THIRD) § 802.5(B). Further, in addition to the initial D-flat whole note, the musical work contains only one other element: an arpeggio consisting of four quarter notes with the same root as the

preceding whole note—a common musical motif that is not protectable under copyright. *Id.* at 802.5(A). While the Board agrees with Intel that even short works may be copyrightable so long as they possess “a ‘spark’” demonstrating “the minimal level of creativity required in designing, selecting, and arranging the components of [the] Work,” Second Request at 4-5, in this case, the *de minimis* combination of a single note and one arpeggio in a common arrangement does not render the musical work copyrightable. See COMPENDIUM (THIRD) §§ 313.4(B) (citing “[a] musical phrase consisting of three notes” as an example of a *de minimis* work of the performing arts); 802.5(B) (“[A] short phrase of only a few musical notes such as clock chimes or ‘mi do re sol, sol, re mi do’ would be considered too short and too lacking in creative expression to be registrable.”).

Intel’s arguments to the contrary are not persuasive. First, Intel asserts that the Office refused registration “based on an improper bias against trademark, an erroneous application of a novelty standard, and an improper focus on the length of the Work.” Second Request at 1. While the Office agrees that a work can be both the subject of copyright protection and trademark protection, see *Id.* at 1-2, whether a work has received trademark protection is not a factor in determining whether a work is also copyrightable. In this case, applying the standards outlined above, the Board has determined that the musical work lacks sufficient creative authorship, independent of whether it may or may not be protectable as a trademark.

Next, Intel argues that Office’s emphasis on the musical work’s “resulting expression” is essentially a “novelty standard [that] improperly eschews the creative process [that the] [a]pplicant undertook to create, arrange, and select various elements of the Work.” Second Request at 2 (citing *Tempo Music, Inc. v. Famous Music Corp.*, 838 F.Supp. 162, 168 (S.D.N.Y. 1993)). While the Board agrees that a copyrightable work must demonstrate sufficient originality and independent creation, rather than make a showing of novelty, here, the *de minimis* musical work lacks sufficient original authorship. See *Feist*, 499 U.S. at 345 (stating that “[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”). In other words, regardless of the number of choices allegedly made, the resulting Work does not demonstrate sufficient creativity to warrant copyright protection. See COMPENDIUM (THIRD) § 310.8 (“It is not the variety of choices available to the author that must be evaluated, but the actual work that the author created.”). Moreover, Intel’s reliance upon the discussion of novelty in *Tempo Music* is misplaced, as that case did not decide the question of originality, but rather considered whether there should be a *per se* rule against registering individually-created harmonies due to lack of novelty.

Similarly, Intel’s intention of “embracing engineering and humanity” cannot factor into the Board’s determination of copyrightability. As stated above, the espoused intentions of the author, and the Work’s symbolism are not factors in determining whether a design is copyrightable. See COMPENDIUM (THIRD) § 310.5; *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

Finally, the Board declines Intel’s request for the Office to employ the rule of doubt “if a reasonable doubt remains about the registrability of the Work.” Second Request at 5. Under the rule of doubt “the Office may register a claim to copyright, even though the Office has

reasonable doubt as to whether the material submitted for registration constitutes copyrightable subject matter or whether the other legal and formal requirements of the statute have been met.” COMPENDIUM (THIRD) § 607. Examples include when an “applicant submits an application to register a computer program with a deposit copy consisting solely of object code, rather than source code” or “if the applicant submits a redacted deposit copy under a grant of special relief in order to protect trade secret material that appears in the work.” *Id.* The Office may also register a work under the rule of doubt “[i]n exceptional cases [when] the office . . . has not taken a position on a legal issue that is directly relevant to whether the work constitutes copyrightable subject matter or whether the other legal and formal requirements of the statute have not been met.” *Id.* Here, the musical work is neither undetectable to human eyes or ears, nor redacted, and the Office is able to evaluate Intel’s application based on the well-established principles of copyrightability for musical works outlined above. Accordingly, the Board refuses to apply the rule of doubt in this case.

2) Sound Recording


The Board does, however, find that the sound recording satisfies the requirement for creative authorship necessary to sustain a claim to copyright. While the musical work consists merely of a be a single whole note followed by an arpeggio consisting of four quarter notes with the same root as the preceding whole note, and therefore is not subject to copyright protection, the Board agrees with Intel that the sound recording is copyrightable. Specifically, as the Second Request points out, the sound recording contains a perceptible and sufficient amount of creative production authorship through its “[c]ombin[ing] and blend[ing] [of] synthesized, digital sounds . . . to achieve a sonic arrangement that capture[s] aspects of . . . engineering.” Second Request at 3. Additionally, the recording was “[r]efin[ed] and master[ed] with a special spatial enhancer.” Second Request at 3; COMPENDIUM (THIRD) § 803.3(B) (“production authorship in a sound recording include[s] capturing and manipulating sounds and compiling and editing those sounds to make a final recording.”). Such authorship, combined with the “audio sparkle” element, which mixes “seven sounds including a tambourine, an electric spark, and a hammer on a pipe,” and was “enhanced by sound design,” the Board finds sufficient to support a copyright claim in sound recording. First Request at 3; Decl. of Walter Werzowa, 2.

And while “[s]hort sound recordings may lack a sufficient amount of authorship to be copyrightable,” here, the sound recording, unlike the musical work, goes beyond the *mere* combination of two uncopyrightable, common property elements (*i.e.*, a note and an arpeggio). COMPENDIUM (THIRD) § 803.5(B). Rather, the sound recording combines sound design and other original and perceptible production authorship described above, rescuing it from the *de minimis* authorship realm. *See, e.g., Steward v. West*, No. CV 13-02449 BRO (JCx), 2014 U.S. Dist. LEXIS 186012, at *20-21 (C.D. cal. Aug. 14, 2014) (finding sufficient originality in sound recording even where there was insufficient originality in the underlying musical composition); *Pryor v. Warner/Chappell Music, Inc.*, No. CV 13-04344 RSWL, 2014 WL 2812309, at *6 (C.D. Cal. June 20, 2014) (finding that sound recording of two word snippet of “get down,” featuring the performer’s “signature voice” and original music was sufficient for copyright protection); *ABS Entm’t, Inc. v. CBS Corp.*, No. CV 15-6257 PA (AGRX), 2016 WL 4259846, at *4-9 (C.D. Cal. May 30, 2016) (holding that editing, remastering, and mixing process can create sufficiently original work to qualify for copyright protection as a derivative work).

This decision will be forwarded to the Registration Program so that the registration process may proceed for the sound recording claim. However, if there are any issues with the application other than copyrightability, the Registration Program may be in contact with you to resolve those issues before finalizing the 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 musical work, but reverses the refusal to register the copyright claim in the sound recording. Accordingly, the Board's decision will be referred to the Office's Registration Program so that the application for the Work can be amended to refuse registration of the musical work claim, and continue registration of the sound recording. As to the musical work claim, pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.

BY: 
Chris Weston
Copyright Office Review Board