



United States Copyright Office

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November 22, 2016

Thomas Kjellberg, Esq.
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036

Re: Second Request for Reconsideration for Refusal to Register Skeleton – Stegosaurus Stenops; Correspondence ID: 1-1BHV5OR

Dear Mr. Kjellberg:

The Review Board of the United States Copyright Office (“Board”) has considered the American Museum of Natural History’s (“Museum’s”) second request for reconsideration of the Registration Program’s refusal to register a register a sculpture/three-dimensional artwork claim in the work titled “Skeleton – Stegosaurus Stenops” (“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 three-dimensional arrangement of bones that depicts the skeletal structure of the dinosaur stegosaurus stenops. The bones are arranged on a metal frame and are positioned so that the stegosaurus stenops appears to be mid-step with its head situated slightly to the left. The Work is depicted in Appendix A.

II. ADMINISTRATIVE RECORD

On February 18, 2015, the Museum filed an application to register a copyright claim in the Work. In response to a Copyright Office inquiry regarding the application, the Museum explained that it is seeking to register the “skeletal construct” of the stegosaurus, which is composed of both “fossilized bone” excavated from a Museum expedition in Wyoming in 1901 as well as “casts” created by the Museum. Letter from Scott A. Leslie, American Museum of Natural History, to U.S. Copyright Office 1 (Mar. 10, 2015) (“Supplemental Letter”). The Museum assembled the disorganized bones and casts into a “complete skeleton based on their scientific interpretation of how the extinct dinosaur and its various bones may have appeared,” explaining the significant labor required to complete the Work. *Id.* at 2. The Museum included a photograph that “depicts the work as it stood at the Museum in 1932.” *Id.* at app. 1.

In an April 23, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from Shawn Thompson, Registration Specialist, to Scott Leslie, American Museum of Natural History (Apr. 23, 2015).

In a letter dated July 21, 2015, the Museum requested that the Office reconsider its initial refusal to register the Work. Letter from Scott Leslie, American Museum of Natural History, to U.S. Copyright Office (July 21, 2015) (“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 “does not contain a sufficient amount of original and creative authorship to support copyright registration” because it “only features a few very basic elements in a simple and realistic combination.” Letter from Stephanie Mason, Attorney-Advisor, to Scott Leslie, American Museum of Natural History (Nov. 12, 2015).

In a letter dated February 9, 2016, the Museum 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 Thomas Kjellberg, Cowan, Liebowitz & Latman, to U.S. Copyright Office (February 9, 2016) (“Second Request”). As an initial matter, the Museum requested that the application be amended to exclude “naturally occurring, unfinished fossil portions” from the copyright claim and to state that the basis of the claim is “sculpture/3-D artwork.”¹ *Id.* at 1. Next, the Museum tried to distinguish the Work from cases in which courts found that realistic depictions of live animals were not copyrightable by suggesting that the Work “depicts a long-extinct creature no human being has ever seen.” *Id.* at 3. Specifically, the Museum asserted that the Work is a sculpture/three-dimensional work of art that required “a host of creative decisions as to the restoration, preparation and arrangement of pre-existing fossil bones” as well as “the fabrication of entirely new component pieces, fashioned exclusively by 20th century human minds and hands,” and the Museum’s copyright claim “extended only to the original expression it contributed to its particular depiction of [the Work].” *Id.* The Museum disagreed with the Office’s conclusion that the Work did not possess more than a *de minimis* quantum of creativity necessary to find it registrable, and contended that these creative decisions satisfy the requisite *de minimis* standard. *Id.* at 4. The Museum further argued that because the Office previously registered two fossil works, “SUE T. Rex” (VA0001743746) and “Tyrannosaurus rex fossil named ‘Sue’ and Missing Bones” (VA0001101813), it should register this Work. *Id.* at 1-2.

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*,

¹ Applicants cannot amend copyright claims at the point of the Second Request. The Office only examines the authorship that is explicitly claimed in the application. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 503.3 (3D ED. 2014).

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. Cal. 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 U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3D ED. 2014) (“COMPENDIUM (THIRD)”). 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 and thus is not copyrightable as sculpture/three-dimensional artwork.

The Work is comprised of a stegosaurus stenops skeleton, posed in mid-step with its head turned to the left. The Museum acknowledges that the majority of the Work consists of skeleton fossils found in nature, with any missing portions supplemented by casts created by the Museum. Supplemental Letter at 1. Further, the fossils were arranged to “create[] a complete skeleton based upon . . . scientific interpretation of how the extinct dinosaur and its various bones may have appeared.” *Id.* at 2.

To be protected by copyright, a work must be an original work of authorship, that is, a product of independent creation with sufficient creativity. 17 U.S.C. § 102(a); *Feist*, 499 U.S. at 345. The Work fails both of these requirements, because the Work is created by, or is intended to duplicate, nature. COMPENDIUM (THIRD) § 309.1. As the Seventh Circuit explains, “[a]uthors of copyrightable works must be human; works owing their form to the forces of nature cannot be copyrighted.” *Kelly v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011) (citing 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:19 n.1 (2010)).

Though the fossils and casts were arranged by the Museum, they were arranged to duplicate what the stegosaurus stenops looked like when it was alive “based upon . . . scientific interpretation.” Supplemental Letter at 2. Further, though some unquantified, but admittedly minority portion of the fossils were created as casts by Museum employees, it is clear that the goal of reproducing those fossils was to recreate a genuine skeleton. Thus, the choices in creating the fossils—including their length, width, shape, and texture—are not the product of creative choices, but are dictated by the remainder of the skeleton, which was clearly created by nature and not human authorship. See *Satava*, 323 F.3d at 810-11 (plaintiff could not prevent others from depicting accurate jellyfish physiology, such as “tendrils-like tentacles,” “rounded bells,” or “bright colors,” even though the plaintiff’s creation was not an actual jellyfish, but was a glass-in-glass sculpture); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987) (in an infringement case concerning stuffed dinosaur toys, a court “prevent[ed] reliance upon any similarity in expression resulting from . . . the physiognomy of dinosaurs” because to do so would protect the idea of a dinosaur); *Craig Frazier Design, Inc. v. Zimmerman Agency, LLC*, No. C 10-1094 SBA, 2010 U.S. Dist. LEXIS 107170, at *17 (N.D. Cal. Sept. 27, 2010) (finding that, while the styling and shading of a graphic depiction of a duck’s bill was subject to copyright protection, any design elements that “flow from a duck’s physiology” were not protected). Even

if the issue of human authorship is put aside, the physiological characteristics of animals are considered “standard, stock, or common” and not protectable by copyright. *Alpi Int’l, Ltd. v. Anga Supply, LLC*, No. 13-cv-4888, 2015 U.S. Dist. LEXIS 60822, *8 (N.D. Cal. May 8, 2015). The Work’s pose is unprotectable, as it is a typical pose of any four-legged animal. *See Satava*, 323 F.3d at 811 (noting plaintiff could not prevent the depiction of jellyfish swimming vertically, as “jellyfish swim vertically in nature and often are depicted swimming vertically”); *Aliotti*, 831 F.2d at 901, n.1 (noting a Tyrannosaurus was a carnivore and thus “is commonly pictured with its mouth open” and Pterodactyls and Pteranodons were winged creatures and thus are commonly displayed as mobiles). The Board finds that, viewed as a whole, any creative elements contributed to the Work by the Museum are not numerous enough, nor are the elements’ selection, coordination, or arrangement sufficient to render the Work original.

Though the process of excavating, cataloging, organizing, and preparing the Work undoubtedly entailed an enormous amount of work, the Board does not consider the amount of time, effort, or expense required to create a work. *See, e.g., Feist*, 499 U.S. at 352-54, 364 (rejecting the “sweat of the brow” doctrine).

The Museum’s reference to the Office’s registration of “SUE T. Rex” (VA0001743746) and “Tyrannosaurus rex fossil named ‘Sue’ and Missing Bones” (VA0001101813) does not compel the Board to register this Work. The Office has a policy of not comparing works that have been previously registered or refused registration. COMPENDIUM (THIRD) § 309.1. Each claim to copyright is examined on its own merits, with the Office applying uniform standards of copyrightability throughout the examination process. Because copyrightability involves a mixed question of law and fact, differences between any two works can lead to different results. *See* COMPENDIUM (THIRD) § 602.4(C) (“When examining a claim to copyright, the U.S. Copyright Office generally does not compare deposit[s] to determine whether the work for which registration is sought is substantially similar to another work.”); *see also Homer Laughlin China Co. v. Oman*, No. 90-3160, 1991 WL 154540, at *2 (D.D.C. July 30, 1991) (court was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable”).²

Separate and apart from the originality determination, the Board is also concerned that any copyright in the sculpture may have expired. As noted by the Museum, the Work was completed and on public display in 1931, but the record does not contain important additional information regarding whether the Work was published, whether a copyright notice was affixed to the Work, or if the Work’s term was timely renewed. Depending on the answers to these issues, any copyright in the Work may have already expired.

² The Copyright Office notes that it is reviewing the previously issued registrations relating to the Tyrannosaurus rex skeleton and may refer those registrations to the Registration Program for reevaluation.

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: *Catherine Rowland*
Catherine Rowland
Copyright Office Review Board

APPENDIX A

