



July 28, 2016

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Re: Sparkle 1 TransactionSent, Sparkle 2 TransactionComplete, Sparkle 3 Error, and Sparkle 4 Notification; Correspondence ID: 1-6VMCTE

Dear Mr. McCue:

The Review Board of the United States Copyright Office has considered Visa International Service Association's ("Visa's") second request for reconsideration of the Registration Program's refusals to register the sound recordings entitled Sparkle 1 TransactionSent, Sparkle 2 TransactionComplete, Sparkle 3 Error, and Sparkle 4 Notification (collectively, the "Works"). After reviewing the applications, deposits, and relevant correspondence, the Board affirms the Registration Program's denial of registration.

I. DESCRIPTIONS OF THE WORKS

The Works consist of four separate sound recordings, ranging from .5 to 2 seconds in length. The Office understands these recordings to be sounds that Visa employs to accompany error notifications and alerts relating to Visa transactions. Sparkle 1 TransactionSent is 2 seconds in length and consists of a short burst of sounds "stacked" on top of each other, with a few sounds trailing out of the burst before the recording ends. Sparkle 2 TransactionComplete is of similar duration and structure. Sparkle 3 Error is less than 1 second in length and contains what the Board perceives to be sounds stacked on top of each other in a brief single burst. Finally, Sparkle 4 Notification consists of 0.5 seconds of three very quick sounds in succession.

II. ADMINISTRATIVE RECORD

On July 30, 2009, Visa filed four separate applications, deposits and fees to register the Works as sound recordings. (Visa did not also seek to register the Works as musical works.) A Copyright Office registration specialist refused to register the claims in the recordings because they did not contain the minimum amount of original authorship to support a claim of copyright. Letter from Aaron Watson, Registration Specialist, to Denise Yee, Visa (June 4, 2010).

In a letter dated September 7, 2010, Visa requested reconsideration of the Office's refusal to register the Works. Letter from Michael J. McCue, Lewis and Roca LLP, to Aaron Watson (Sept. 7, 2010) ("First Request"). In this letter, Visa argued that the Office applied a higher standard of originality and creativity than was intended by the Copyright Act and the courts. First Request at 1. Visa also asserted that the Copyright Office inappropriately applied literary work principles to sound recordings. *Id.* (discussing 37 C.F.R. § 202.1(a)). Visa then argued that the four Works exceed the low threshold for copyrightability, noting there is no duration requirement for sound recordings; nor do they need to be comprised of a minimum amount of notes. *Id.* at 2. Visa further described the "numerous artistic choices" made in creating the sound recordings, for example, "the selection of [a] buzz sound" in Sparkle 1 Transaction, "the tiny bell sound playing ascending notes that sound like sparkles" in Sparkle 2 Transaction Complete, "the selection of the PVC sound" in Sparkle 3 Notification, and "the selection of the time (4/4)" in Sparkle 4 Error. *Id.* at 2-3.

After reviewing the Works in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Works did "not contain a sufficient amount of original and creative sound recording authorship upon which to support a copyright registration." Letter from Virginia Giroux-Rollow, Attorney-Advisor, to Michael J. McCue (Jan. 4, 2011).

In a letter dated June 3, 2011, Visa requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register claims in the Works. Letter from Michael J. McCue, to Virginia Giroux-Rollow (June 3, 2011) ("Second Request"). Visa argued that (1) section 202.1(a) of the Office's regulations, which addresses "material not subject to copyright" including "words and short phrases," does not apply to sound recordings; (2) the Copyright Act does not impose a strict durational requirement in order for sound recordings to be registered; (3) courts have found short sound recordings to merit copyright protection; and that (4) the artistic choices in the Works satisfy the originality standard. *Id.* In support of its last point, Visa compared the choices made in creating its Works to those at issue in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), and *Los Angeles New Services v. Tullo*, 973 F.2d 791 (9th Cir. 1992). *Id.* at 6. Visa characterizes these precedents as establishing that "a single photograph of anything . . . is protectable by copyright because it embodies several artistic choices," and asserts that, by comparison, the Works should be registered because "the Visa sound recordings embody more artistic choices" than the photographs in those cases. *Id.* at 5-7.

III. DECISION

A. 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 requirements 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 “[i]n order 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 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 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, 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).

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)”). As 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. They are not influenced by the attractiveness of a work, the espoused intentions of the author, the work’s effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not necessarily mean that the work, as a whole, constitutes a copyrightable work of art.

B. Analysis of the Works

After careful examination, the Board finds that the Works each fail to satisfy the requirement of creative authorship and thus are not copyrightable.

Each of the recordings contains *de minimis* sound recording authorship insufficient to render the recordings protectable. Each recording is no more than 2 seconds long and consists either of a single short burst of sounds or a very brief succession of sounds. As such, the creativity in each of the Works is too slight to base a claim of authorship. *See* 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 803.5(B). The Works are instead more properly considered the sonic equivalents of words or short textual phrases. *See* COMPENDIUM (THIRD) § 803.5(B) (“[S]hort sound recordings may lack a sufficient amount of authorship to be copyrightable (just as words and short textual phrases are not copyrightable).”) (citing 37 C.F.R. § 201.2(a), COMPENDIUM (THIRD) § 313.4).

The Board is not persuaded by Visa’s arguments to the contrary. First, Visa contends that section 202.1 of the Office’s regulations, entitled “Material not subject to copyright,” does not govern evaluation of the Works because “there is no authority for the proposition that this

clause applies to works other than literary works . . . [the] clause on its face only applies to words and phrases comprised of words . . . [and] there is no requirement in the definition of sound recordings that they must be of a particular minimum length.” Second Request at 2. This unduly narrow interpretation of section 202.1(a) overlooks the general requirement of originality, *i.e.*, independent creation and sufficient creativity, applicable to *all* copyrightable works. *See Feist*, 499 U.S. at 363 (1991) (“As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.”). While section 202.1(a) lists specific “examples” of types of *de minimis* works, it would be incorrect to infer that a lower threshold for originality applies to other types of works not referenced in the regulation, such as sound recordings or sculpture. *See id.*; COMPENDIUM (THIRD) § 313.4(B) (discussing *de minimis* expression); *id.* § 803.5(B) (applying the *de minimis* doctrine to sound recordings); *see also* WILLIAM F. PATRY, 2 PATRY ON COPYRIGHT § 4:2 (citing 202.1(a) to illustrate that the *de minimis* doctrine applies to all works subject to copyright protection). Indeed, a recent Central District of California opinion noted that the originality requirement is a “bedrock of copyright law” when evaluating whether derivative sound recordings possessed sufficient creative authorship to be copyrightable. *See ABS Entertainment, Inc. v. CBS Corp.*, CV 15-6257 slip op. at 5-7 (C.D. Cal. May 30, 2016) (noting that the *Compendium* contains “helpful characterizations” on this topic that are entitled to *Skidmore* deference).

To be sure, the Office is aware that the Sixth Circuit has declined to apply a *de minimis* standard in evaluating claims of copyright infringement based upon digital sampling of sound recordings. *See Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005). The Office does not believe this logic should govern the separate question of whether a very brief recording can constitute a complete copyrightable work, particularly where the Ninth Circuit, and other courts and treatises, have squarely rejected the argument that sound recordings are somehow excepted from the *de minimis* doctrine. *VMG Salsoul v. Ciccone*, CV 14-55837, at 19-21 (9th Cir. June 2, 2016) (evaluating claim of infringement and holding that “nothing in the neutrally worded statutory definition of ‘sound recordings’ suggests that Congress intended to eliminate the *de minimis* exception,” and further noting that “almost every district court not bound by that decision has [also] declined to apply *Bridgeport*’s rule”); *see also, e.g.*, MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b], at 13-59 to 13-66 (citing cases and criticizing *Bridgeport* as “unprecedented” and “at odds with the balance of jurisprudence”); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1340-41 (S.D. Fla. 2009) (“Section 114(b) does not seem to support the distinction between sound recordings and all other forms of copyrightable work that the *Bridgeport* court imposes.”), *aff’d* 635 F.3d 1284 (11th Cir. 2011); *TufAmerica, Inc. v. WB Music Corp.*, 67 F. Supp. 3d 590 (S.D.N.Y. 2014) (conducting a *de minimis* inquiry and granting motion to dismiss claim of infringement based on the sampling of the syllable “oh”).

Second, Visa argues that there is no durational requirement for sound recordings. While it is true there is no bright line test for the duration of copyrightable sound recordings, the denial of registration here is not based solely upon the brevity of the sound recordings, but rather a determination that the perceptible Works lack “a sufficient amount of creative, perceptible sound recording authorship fixed as a series of musical, spoken, or other sounds.” COMPENDIUM (THIRD) § 803.5(B). In making this determination, the Board evaluated the simultaneous and/or

sequential number of sounds, and the amount of authorship involved, including the degree of creativity in the selection, fixation, and manipulation of the sounds.

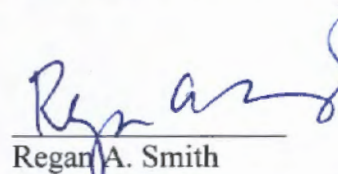
Third, Visa asserts that some courts have found short sound recordings to be copyrightable. Second Request at 5. The cases Visa points to, *Santrayll v. Bunell*, 39 U.S.P.Q.2d 1052, 1054 (S.D.N.Y. 1996) and *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980), are inapposite in that they concern musical works and not sound recordings. Regardless, the Works appear to fall short of the authorship evaluated in those cases. In *Santrayll*, the musical composition at issue was the hook to the popular song "Here Comes the Hammer" and consisted of the repeated use of the word "uh-oh" arranged within a distinctive musical rhythm. *Santrayll*, 39 U.S.P.Q.2d at 1054. In *Elsmere Music*, which considered the song "I Love New York" re-imagined as "I Love Sodom" in a parody production, the court found the taking of the repeated words "I Love" accompanied by an arrangement of four notes to involve the heart of the musical composition. *Elsmere Music*, 482 F. Supp. at 744.

Finally, Visa asserts that the Works "reflect[] numerous artistic decisions that made each work protectable," including "instrumentation, selection of chords, the selection of the notes, the voicing of the notes, the rhythm, the duration of each note, the key, and the selection of the time." Second Request at 6. The Board must reject this rationale. Many of the purported choices in instrumentation, chord and note selection, rhythm, key, and time implicate the underlying *musical work*, as opposed to demonstrating indices of *performance or production* necessary for sound recording authorship. See COMPENDIUM (THIRD) § 803.3. The perceptible *sound recording* authorship elements here are so slight that they cannot support a registration. See *id.* § 803.5(B) ("To be registrable, a sound recording must contain a sufficient amount of creative, perceptible sound recording authorship."); see also *Feist*, 499 U.S. at 363 (1991). In sum, while the Board agrees with Visa that artistic choices can result in copyrightable sound recordings, it finds that the Works at issue lack a sufficient amount of original authorship to qualify for protection.

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:



Regan A. Smith
Copyright Office Review Board