



United States Copyright Office

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December 13, 2019

Susan Upton Douglass, Esq.
Fross Zelnick Lehrman & Zissu, P.C.
4 Times Square, 17th Floor
New York, NY 10036

**Re: Second Request for Reconsideration for Refusal to Register Fly Guy,
Correspondence ID: 1-354GO3Y; SR # 1-6723446081**

Dear Ms. Douglass:

The Review Board of the United States Copyright Office (“Board”) has considered Thrillz LLC’s (“Thrillz”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Fly Guy” (“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 two-dimensional artwork consisting of a blue curved line, with a black curved line underneath, and a blue circle on the right side.

The Work is as follows:



II. ADMINISTRATIVE RECORD

On July 2, 2018, Thrillz filed an application to register a copyright claim in the Work. In an August 7, 2018, letter, a Copyright Office registration specialist refused to register the claim because the Work lacked sufficient authorship to support a copyright claim. Letter from R.

Barker, Copyright Examiner, to Susan Upton Douglass, Fross Zelnick Lehrman & Zissu, P.C. (Aug. 7, 2018).

In October 2018, Thrillz requested that the Office reconsider its initial refusal to register the Work. Letter from Susan Upton Douglass, Fross Zelnick Lehrman & Zissu, P.C., to U.S. Copyright Office (Oct. 28, 2018) (“First Request”). Thrillz asserted that the Work “amply meets the minimal test for copyright protection” and is more complex than other works registered by the Office. *Id.* at 1-3. 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 lacked sufficient creative authorship because the Work consisted solely of “geometrical shapes” combined with “mere coloration” and failed to employ sufficiently creative selection, coordination, or arrangement. Letter from Stephanie Mason, Attorney-Advisor, to Susan Upton Douglass, Fross Zelnick Lehrman & Zissu, P.C. at 3 (Mar. 7, 2019).

In April 2019, Thrillz requested that the Office reconsider for a second time its refusal to register the Work. Letter from Susan Upton Douglass, Fross Zelnick Lehrman & Zissu, P.C., to U.S. Copyright Office (Apr. 23, 2019) (“Second Request”). In that letter, Thrillz emphasized the low threshold of creativity necessary for copyrightability, arguing that, contrary to the Office’s March 2019 letter, the Work’s combination of shapes was creative. *Id.* at 1–3. Thrillz noted that its Work was “highly stylized” in such a way as “to evoke a forward motion.” *Id.* at 3. Finally, in arguing its combination of shapes and colors was sufficiently creative to support a copyright claim, Thrillz pointed to other registrations issued by the Office or specifically by the Board. *Id.* at 3–5.

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 Publications, Inc. v. Rural Telephone Service 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).

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.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3D ED. 2014) (“COMPENDIUM (THIRD)”); *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.

Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See id.* § 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 authorship necessary to sustain a claim to copyright.

The Work's individual elements entirely consist of unprotectable geometric shapes. The Office generally does not register works that "merely consist[s] of common geometric shapes" unless the work arranges them in such a way that the work, as a whole, is sufficiently creative. The Work's employment of two solid colors, blue and white, does not change this conclusion.

Viewing the Work as a whole, the Board finds that the Work falls short of containing a sufficient level of creative authorship. The Work consists of three shapes, two (overlapping) curved lines and a circle, both of which the *Compendium* specifically states are common, unprotectable shapes. COMPENDIUM (THIRD) § 906.1. Similarly, the Work has only two solid colors, black and blue, and lacks any gradients or shading that might bolster a claim of copyrightable authorship. Where a design combines uncopyrightable elements, it can be protectable only if the "elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Satava*, 323 F.3d at 811; *see also* COMPENDIUM (THIRD) § 906.1 (giving example of copyrightable wrapping paper containing four different shapes of different size and orientation and employing over ten colors). Here, the Work's elements are too few and their arrangement insufficiently creative to rise to the level of copyrightable authorship.

Thrillz's arguments do not compel a different result. Thrillz alleges that the Work is "a highly stylized rendition of a person flying through the air" and "evoke[s] a forward motion," but the intended meaning and impression of a work is "irrelevant" to whether the work meets the statutory requirements for copyrightability. COMPENDIUM (THIRD) § 310.3 (the Office uses "objective criteria" in examining a work and "will not consider any meaning or significance that the work may invoke").

Thrillz further invites the Board to compare the Work with prior registrations and cases where the Board has found sufficient creativity, but registration decisions are made "on a case-by-case basis" and "[t]he fact that the U.S. Copyright Office registered a particular work does not necessarily mean that the Office will register similar types of works or works that fall within the same category." *Id.* § 309.3; *see also Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074, 1076 (D.C. Cir. 1991) (stating that the court was not aware of "any authority which provides that the Register must compare works when determining whether a submission is copyrightable"). Even if the Board were to consider those examples, however, it would not change the result. The Work lacks the shading and "axial color gradients" of the American Airlines logo, which the Board found key to "transform[ing]" otherwise unprotectable standard shapes. U.S. Copyright Office Review Board, *Re: Registration Decision Regarding American Airlines Flight Symbol*; SR 1-3537494381 at 6 (Dec. 7, 2018),

<https://www.copyright.gov/rulings-filings/review-board/docs/american-airlines.pdf>. Similarly, the smooth shapes in the Work lack the creative choices in the irregular edges of *Sandy Starfish*.¹ Nor does the work barely pass the line of copyrightability like the *Motion Introduced Tetrahedral Derivative*, which employed different materials, decisions in the height of metal arc, and numerous geometric shapes. See U.S. Copyright Office Review Board, *re: Motion Induced Tetrahedral Derivative*, SR 1-3872480071 at 1–2 (Dec. 4, 2018), <https://www.copyright.gov/rulings-filings/review-board/docs/motion-induced-tetrahedral-derivative.pdf> (warning that even though the work met the threshold for creativity, it was “still quite simple” and “predominated by its standard arrangement” of shapes, making its copyright protection “thin”).

In sum, the ordinary use of common geometric shapes and minimal colors combined in the Work overall lack the requisite amount of creativity in their selection, coordination, 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
Karyn A. Temple, Register of Copyrights
and Director, U.S. Copyright Office
Regan A. Smith, General Counsel and
Associate Register of Copyrights
Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education

¹ U.S. Copyright Office Review Board, *Re: Second Request for Reconsideration for Refusal to Register Sandy Starfish* (Apr. 17, 2019), <https://www.copyright.gov/rulings-filings/review-board/docs/sandy-starfish.pdf>.