



Copyright Review Board

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

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Re: Second Request for Reconsideration for Refusal to Register Words With Friends 2 Tiles (Correspondence ID: 1-4570GV3; SR # 1-7440489181)

Dear Ms. Durkin:

The Review Board of the United States Copyright Office (“Board”) has considered Zynga Inc.’s second request for reconsideration of the Registration Program’s refusal to register two-dimensional artwork claims in the work titled “Words With Friends 2 Tiles” (“Images”). After reviewing the application, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board: (1) affirms the Registration Program’s denials of registration for all of the Images except for the leaf design with the filename “fall_leaves” (“Fall Leaves Tile”); and (2) reverses the denial of registration for Fall Leaves Tile.

I. DESCRIPTION OF THE WORKS

The Images are thirty graphic designs, all of which are rounded squares (or tiles) with a centered letter “W,” a small number four in the top right corner, and a glossy effect horizontally at the top of the squares.¹ The tiles use one of five different background designs: (1) one tile, the Fall Leaves Tile, is orange and has portions of six maple leaves in different shades of orange and green; (2) six tiles have an argyle background design (“Argyle Tiles”); (3) six tiles have a geometric cube background design (“Geometric Cube Tiles”); (4) six tiles have a polka dot background design (“Polka Dot Tiles”); and (5) eleven tiles have a solid color background design with no additional embellishments) (the “Solid Color Tiles”). The designs use a variety of colors and are as follows:

¹ Zynga submitted a single application but confirmed in correspondence with the Office that it sought to “register the tiles individually,” noting that the tiles were published together as part of the game Words With Friends 2. Email from Bethany Kokanovich to U.S. Copyright Office (Dec. 6, 2019).

Fall Leaves Tile



Argyle Tiles



Geometric Cube Tiles



Polka Dot Tiles



Solid Color Tiles



II. ADMINISTRATIVE RECORD

On March 4, 2019, Zynga filed an application to register a copyright claim in the Images. In a February 6, 2020 letter, a Copyright Office registration specialist refused to register the claim, finding that only the Fall Leaves Tile contained copyrightable authorship and that the other tiles contained familiar symbols “such as squares, standard polka dot, chevron or argyle

patterns.” Initial Letter Refusing Registration from U.S. Copyright Office to Tracy-Gene Durkin (Feb. 6, 2020).²

In a May 6, 2020 letter, Zynga requested that the Office reconsider its initial refusal to register the Images. Letter from Tracy-Gene Durkin to U.S. Copyright Office (May 6, 2020) (“First Request”). After reviewing the Images in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Images lacked a sufficient amount of creative authorship. The Office concluded that none of the tiles, including the Fall Leaves Tile, contained sufficient copyrightable authorship because each tile consisted only of common and familiar shapes, namely “rectangular tiles displaying a letter and a number affixed on a solid color background or in some cases a chevron pattern, a leaf pattern or an argyle pattern” combined in an uncreative way. Refusal of First Request for Reconsideration from U.S. Copyright Office to Tracy-Gene Durkin at 3 (July 13, 2020).

In a letter dated October 12, 2020, Zynga requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Work. Zynga argued that each tile contains sufficient creativity to qualify for copyright protection because Zynga made creative choices in positioning the number asymmetrically in the tile, “[a]dding shadows and a highlight” to create depth, “selecting an irregular/incomplete shape for the highlight,” selecting the dots, rectangles, argyle patterns for tile backgrounds, and employing gradients on the tiles filled with single colors. Letter from Tracy-Gene Durkin, to U.S. Copyright Office at 4–5 (Oct. 12, 2020) (“Second Request”). Zynga also argued that the Office failed to consider how Zynga’s “uses of shading, shadows, tones, and gradients” met the modicum of creativity required for copyright protection. Second Request at 5–6.

III. DISCUSSION

After careful examination and analysis, the Board finds that the Fall Leaves Tile contains sufficient authorship to sustain a copyright claim but the remaining twenty-nine tiles do not.

i. Fall Leaves Tile

The Fall Leaves Tile consists of differently colored and sized maple leaves overlaid by a large letter “W” and a small number four, with a reflective effect at the top of the tile. While the letter “W,” small number four, and glossy effect³ by themselves are unprotectable because they

² Though the specialist found the Fall Leaves Tile contained copyrightable authorship, the Office did not register the tile because the examiner determined Zynga was required to deposit the full game rather than depositing images of the individual tiles. See 37 C.F.R. § 202.20(c)(2)(i)(J) (requiring deposit of a full copy when registering published “two-dimensional games”). After evaluating the full record, the Board concludes that the Work is best viewed as a machine-readable pictorial work and that Zynga was permitted to deposit separate image files for each tile. See 37 C.F.R. § 202.20(c)(2)(viii) (“Where a . . . pictorial, graphic, or audiovisual work . . . has been published only in machine-readable form, the deposit must consist of identifying material”); 37 C.F.R. § 202.21(a) (identifying material deposit “shall consist of photographic prints, transparencies, photostats, drawings, or similar two-dimensional reproductions or renderings of the work” and “should reproduce the actual colors employed in the work”).

³ This glossy effect is common in graphic design and there are numerous online tutorials explaining how to achieve the effect. See, e.g., *The Simplest Glossy Button Vector Tutorial: Only 4 Steps!*, <http://vectips.com/tutorials/glossy->

are mere variations of lettering or standard designs, *see* 37 C.F.R. § 202.1(a), the overall maple leaf design contains protectable creative expression. The leaves are depicted with rounder edges than the sharp, angular edges typical of maple leaves, and they vary in orientation, color, and size to create an overall combination that accents some leaves in the background over others. The Board thus concludes that Fall Leaves Tile contains sufficient creative authorship to meet the statutory requirements for copyright protection, but it cautions that this conclusion applies only to the tile as a whole and not the individual elements.

ii. Argyle Tiles

Each of the Argyle Tiles includes a “W,” the number four, an argyle background, and a graphic element designed to denote a reflective service. The only difference in the six tiles is the color.⁴ As noted above, the “W” and number four constitute mere lettering, which is unprotectable, and the reflective element is a standard design element. Their combination does not elevate the Argyle Tiles above the threshold for creativity because this is a stock arrangement relatively typical for game tiles.⁵ Additionally, argyle patterns are a common design motif, originating with a Scottish clan tartan dating back to at least the 17th century. *See Iconic Argyle*, PRINGLE OF SCOTLAND, <https://pringlescotland.com/pages/iconic-argyle> (last visited Dec 27, 2021). The argyle expressed here, employing squares centered in the tile, is a “mere variation[] on a familiar symbol or design” and thus does not provide the necessary creative authorship. COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.2 (3d ed. 2021) (“COMPENDIUM (THIRD)”). And because each tile overlays a single color on its argyle pattern and the letter and number on the tile, the coloring of each tile amounts to “[m]erely adding or changing” one color in the work. COMPENDIUM (THIRD) § 906.3.⁶ As a result, none of the argyle tiles contains sufficient copyrightable authorship to sustain copyright protection.

iii. Geometric Cube Tiles

The six Geometric Cube Tiles employ a repeating pattern of geometric cubes in the background, with a different color for each tile.⁷ They use the same format and reflective effect seen in the Argyle Tiles. Zynga describes the design as the result of creatively “[o]rienting rectangles at different angles and filling them in different tonal shades.” Second Request at 4–5. But the design is merely a repeating pattern of isometric cubes, a common design motif that is no more than a stock use of a common geometric shape. *See* COMPENDIUM (THIRD) § 906.1.

[button-vector-tutorial/](#) (last visited Dec. 27, 2021); *Glossy Button Tutorial*, <https://www.vexels.com/blog/glossy-button-tutorial/> (last visited Dec. 27, 2021).

⁴ Each tile was submitted with a filename that started with “argyle_” and was followed by the name of a color.

⁵ Many spelling-based games employ square tiles with centered letters. *See, e.g., Scrabble Game*, HASBRO GAMES, <https://shop.hasbro.com/en-us/product/scrabble-game:FA04DD51-5056-9047-F5CD-53F87A967AC6> (last visited Dec. 27, 2021) (tiles containing large centered letters and small number in bottom right); *Dabble Word Game Ages 8+ - Award Winning, Educational, Improves Spelling & Vocabulary and is Fun for The Whole Family*, AMAZON, <https://smile.amazon.com/gp/product/B01N2QN7J5/> (last visited Dec. 27, 2021) (same); *Classic BANANAGRAMS*, BANANAGRAMS, <https://bananagrams.com/products/bananagrams> (last visited Dec. 27, 2021) (tiles contain large centered letters).

⁶ The Board notes that Zynga has not indicated it seeks protection for its selection, coordination, and arrangement of the thirty tiles as a whole.

⁷ Each tile was submitted with a filename that started with “geometric_” and was followed by the name of a color.

Because each of these tiles employs a common geometric shape and a single color, along with the “W,” number four, and reflective effect, and because the combination of these elements is insufficiently creative, the Board concludes that each of the Geometric Cube Tiles lacks sufficient creative authorship to support a copyright claim.

iv. Polka Dot Tiles

The six Polka Dot Tiles are similar to the Argyle and Geometric Cube tiles but employ a polka dot background.⁸ The polka dots are centered on the tile, symmetrical, and do not vary in their overall size and color. Polka dots are a familiar pattern, *see* COMPENDIUM (THIRD) § 313.4(J), and a “standard symmetrical arrangement of [] circles does not contain a sufficient amount of creative expression to warrant registration.” *Id.* § 906.1. That element of the design is unprotectable. And, as described above, the letter “W,” number four, and reflective effect are similarly unprotectable. The combination of these elements into the Polka Dot Tiles is *de minimis* and does not demonstrate sufficient creative authorship. After considering the design of each tile, the Board concludes that none of these tiles contain sufficient authorship to sustain copyright protection.

v. Solid Color Tiles

Finally, eleven tiles display a solid-colored background with a light gradient and no other design embellishments.⁹ These tiles thus have even less creativity than the others the Board has already held unprotectable. As noted above, the placement of the “W” and number four, as well as the highlight in the upper area of the tile to create depth, are, by themselves unprotectable. The Solid Color Tiles therefore lack sufficient creative authorship to satisfy the statutory requirement.

In its Second Request, Zynga points to two court decisions it believes support registration of its designs. *See* Second Request at 5. Neither changes the Board’s conclusion for the twenty-nine tiles it finds unprotectable. First, the court in *Nicholls v. Tufenkian Imp./Exp. Ventures, Inc.* did not hold that the design was copyrightable as a matter of law; it only held that the “argument that the Prado design lacks originality raises factual issues that are best left for trial.” 2004 WL 1399187, at *2 (S.D.N.Y. June 23, 2004).¹⁰ And the polka dot design in *Prince Group, Inc. v. MTS Prods.* used varied shading and were placed “in imperfect and conflicting diagonal lines at varying distances from each other.” 967 F. Supp. 121, 125 (S.D.N.Y. 1997). By contrast, Zynga’s polka dot tiles before the Board are evenly spaced and evenly shaded.

⁸ All but one tile was submitted with a filename that started with “polkadot_” and was followed by the name of a color. The other tile, titled “green_tile,” employs the same polka dot pattern.

⁹ Eight of these tiles have a filename beginning “solid_” and ending with the name of a color. A ninth is titled “default,” and a tenth titled “fall_orange.” The eleventh tile is named “pink_ribbon.” Zynga describes the “pink_ribbon” tile as one of several “tiles with a color fill.” Second Request at 5.

¹⁰ Moreover, the design in *Nicholls* was more creative in its use of geometric shapes than the tiles before the Board here. The rug employed rows of circles and rectangles with removed sections and variations of color. *See* Amend. Compl. Ex. B at 1, *Nicholls*, No. 1:04-cv-2110, ECF No. 4 (S.D.N.Y. Apr. 19, 2004) (screenshot of Prado displayed on plaintiff’s website); *Spartina, Athena, Prado*, NICHOLLS CARPETS, <https://web.archive.org/web/20040824174517/http://www.davidshawnicholls.com/carpets/page1/page1.html> (Aug. 24, 2004 capture by Internet Archive Wayback Machine).

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claim in the Fall Leaves Tile and affirms refusal to register of the remaining twenty-nine tiles in the Work. The Board now refers this matter to the Registration Policy and Practice division for registration of the Fall Leaves Tile, provided that all other application requirements are satisfied.



U.S. Copyright Office Review Board
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