



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 Fern Device and ALL BLACKS & Fern Device (SR # 1-9996070597, 1-9976827541; Correspondence ID: 1-4YRGH3L, 1-4YKHG55)

Dear Mr. Brown:

The Review Board of the United States Copyright Office (“Board”) has considered New Zealand Rugby Union Incorporated’s (“NZ Rugby Union”) second requests for reconsideration of the Registration Program’s refusal to register two-dimensional artwork claims in the works titled Fern Device and ALL BLACKS & Fern Device (collectively, the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denials of registration for the Works.

I. DESCRIPTION OF THE WORK(S)

The Works are two-dimensional artworks in black coloring. Fern Device is a graphic design consisting of a fern leaf. ALL BLACKS & Fern Device contains the same fern leaf, with the words “ALL BLACKS” positioned underneath.

The Works are as follows:



Fern Device
SR # 1-9996070597



ALL BLACKS & Fern Device
SR # 1-9976827541

II. ADMINISTRATIVE RECORD

On December 20, 2020, NZ Rugby Union filed separate applications to register copyright claims in the Works. In January 2021, a Copyright Office registration specialist refused to register the claims, determining that each Work lacked sufficient creativity. Initial Letter Refusing Registration of Fern Device from U.S. Copyright Office to Kieran O’Connell at 1 (Jan. 27, 2021); Initial Letter Refusing Registration of ALL BLACKS & Fern Device from U.S. Copyright Office to Kieran O’Connell at 1 (Jan. 27, 2021).

On April 26, 2021, NZ Rugby Union requested that the Office reconsider its initial refusals to register the Works. Letter re: Fern Device from Michael Brown to U.S. Copyright Office at 1 (Apr. 26, 2021); Letter re: ALL BLACKS & Fern Device from Michael Brown to U.S. Copyright Office at 1 (Apr. 26, 2021) (collectively, the “First Requests”). After reviewing the Works in light of the points raised in the First Requests, the Office reevaluated the claims and again concluded that the Works could not be registered. Refusal of First Request for Reconsideration of Fern Device from U.S. Copyright Office to Michael Brown (Aug. 31, 2021) (“Fern Device Second Refusal”); Refusal of First Request for Reconsideration of ALL BLACKS & Fern Device from U.S. Copyright Office to Michael Brown (Aug. 26, 2021) (“ALL BLACKS & Fern Device Second Refusal”). The Office explained that the component elements of Fern Device, a graphic design of a fern leaf, and ALL BLACKS & Fern Device, the same fern leaf design and two-word phrase, both individually and combined do not present sufficient creativity to warrant copyright protection. Specifically, the Office cited *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003), where “the Ninth Circuit held unprotectible a sculptural arrangement which combined elements not copyrightable in themselves.” ALL BLACKS & Fern Device Second Refusal at 3; Fern Device Second Refusal at 3. The Office explained that, like the sculpture in *Satava*, “the combination and arrangement of the component elements” in the Works here, are “insufficiently creative to support a claim in copyright. ALL BLACKS & Fern Device Second Refusal at 3; Fern Device Second Refusal at 3.

In letters dated November 10, 2021, NZ Rugby Union requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusals to register the Works. Letter re: Fern Device from Michael Brown to U.S. Copyright Office (Nov. 10, 2021) (“Fern Device Second Request”); Letter re: ALL BLACKS & Fern Device from Michael Brown to U.S. Copyright Office (Nov. 10, 2021) (“ALL BLACKS & Fern Device Second Request”). NZ Rugby Union’s arguments focused on the graphic design of the fern leaf, which is comprised of several different geometric shapes but primarily inverse triangles. Fern Device Second Request at 2; ALL BLACKS & Fern Device Second Request at 2. NZ Rugby Union argued these shapes are combined in a manner that is sufficiently creative to warrant copyright protection. Fern Device Second Request at 1; ALL BLACKS & Fern Device Second Request at 1. To bolster its arguments, NZ Rugby Union also contended that this creative combination of shapes makes the design distinguishable from a natural fern and other representations of ferns. Fern Device Second Request at 1; ALL BLACKS & Fern Device Second Request at 1.

III. DISCUSSION

After carefully examining the Works and considering the arguments made in the First and Second Requests, the Board finds that the Works do not contain the requisite creativity necessary to sustain claims to copyright.

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.

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 claim. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See id.* 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, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005). A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Satava*, 323 F.3d at 811 (“[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.”).

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs”); *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”). Through its regulations, the Office provides guidance that copyright does not protect familiar shapes or designs. 37 C.F.R. § 202.1(a); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.2 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (noting that familiar shapes and designs are not protectable).

Applying these standards, neither Fern Device nor ALL BLACKS & Fern Device contain the requisite creativity necessary to sustain copyright claims. Fern Device is a graphic design of a fern leaf, which is itself a common element found in nature and not copyrightable. *Satava*, 323 F.3d at 812. NZ Rugby Union argues that the fern leaf design is not a standard representation of a leaf but a “carefully designed assembly of various design elements” that include inverse triangles that make up the fronds of the fern leaf, the asymmetrical alignment of the upper and

lower fronds, the absence of a central stem, two curved lines made by the straight edges of the upper and lower fronds, and the u-shaped frond at the tip of fern leaf. Fern Device Second Request at 1–2. When viewed individually, these design elements are each a trivial alteration to a common shape that does not inject the necessary creativity into a work. *See Satava*, 323 F.3d at 810 (“There must be something more than a ‘merely trivial’ variation, something recognizably the artist’s own.”) (citation omitted).

Additionally, even when viewed as a whole, the “various design elements” NZ Rugby Union identifies form a fern leaf—an “element[] of expression that nature displays for all observers” and is therefore in the public domain. *Id.* at 812. That the design is not a depiction of a specific type of fern leaf, Fern Device Second Request at 1, and is distinguishable from other representations of fern leaves, *id.* at 2–3, does not alter the Board’s analysis. The design is clearly recognizable as a familiar symbol of nature, and contains only trivial, uncopyrightable variations. COMPENDIUM (THIRD) § 906.2. As Fern Device consists only of the graphic design of a fern leaf, it is ineligible for copyright protection.

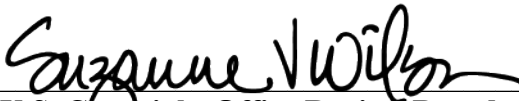
ALL BLACKS & Fern Device consists of two component elements, neither of which is individually copyrightable: the same graphic design of a fern leaf from Fern Device and the words “ALL BLACKS.” For the reasons discussed above, the graphic design of a fern leaf is not copyrightable. The words “ALL BLACKS” is a short phrase and thus not copyrightable. 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases such as names, titles, and slogans”). Adding the words “ALL BLACKS” to the graphic design of a fern leaf, a familiar symbol, does not make the design sufficiently creative. The arrangement of a short phrase underneath a logo is common and expected, especially in the context of sports teams, and therefore does not satisfy the creativity requirement. *See* COMPENDIUM (THIRD) § 308.2 (“[T]here is nothing remotely creative’ about a work that merely reflects ‘an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.’” (quoting *Feist*, 499 U.S. at 363)). Thus, ALL BLACKS & Fern Device is also ineligible for copyright protection.

NZ Rugby Union asserts that the court in *Satava* did not hold that the “combination of the elements [in the sculpture] was not copyrightable[,]” but rather that the plaintiff possessed a copyright in the sculpture that was “limited to the actual depiction” and “did not . . . prevent others from combining those elements to create their own designs.” Fern Device Second Request at 4; ALL BLACKS & Fern Device Second Request at 4. The Office disagrees. Contrary to NZ Rugby Union’s assertion, the court in *Satava* concluded that the plaintiff’s work—a jellyfish sculpture in a glass-in-glass medium—was “composed of unprotectable ideas and standard elements, and also that the combination of those unprotectable elements [were] unprotectable.” 323 F.3d at 807. Although the court determined that “a *combination* of unprotectable elements may qualify for copyright protection,” it held that to be true “only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Id.* at 811 (emphasis added). Here, as in *Satava*, the Works’ combinations of unprotectable, standard elements fall short of the originality standard and are likewise unprotectable. The *Satava* court did go on to conclude that the plaintiff made “some copyrightable contributions” to the work. *Id.* at 812 (identifying “the distinctive curls of particular tendrils; the arrangement of certain hues[,]” and “the unique shape

of jellyfishes’ bells” as protectable elements not dictated by jellyfish physiology or the sculptural medium), and, as NZ Rugby Union alluded to, that the plaintiff “possesse[d] a thin copyright that protects against only virtually identical copying” of these “original elements (or their combination).” Unlike in *Satava*, however, the Works are composed entirely of uncreative elements and, for the reasons discussed above, these elements are not protectable individually or in combination.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claims in the Works. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

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