



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 FlashBone
(SR # 1-11196330061; Correspondence ID: 1-5HQCGTX)**

Dear Mr. Bathke:

The Review Board of the United States Copyright Office (“Board”) has considered Milan Grbovic’s (“Grbovic”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “FlashBone” (“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 graphic artwork consisting of the top half of a white bone positioned above a partially cropped yellow lightning bolt, all centered against a black background. As depicted in the deposit submitted with the registration application, the Work is as follows:



II. ADMINISTRATIVE RECORD

On March 16, 2022, Grbovic filed an application to register a copyright claim in the Work. In an April 25, 2022 letter, a Copyright Office registration specialist refused to register the claim, determining that the Work “lacks the original creativity needed to sustain a

registration.” Initial Letter Refusing Registration from U.S. Copyright Office to John Bathke at 1 (Apr. 25, 2022).

On July 22, 2022, Grbovic requested that the Office reconsider its initial refusal to register the Work, arguing that the selection, arrangement, and coordination of the designs in the Work satisfy the requisite level of creativity for copyrightability. Letter from John T.D. Bathke to U.S. Copyright Office at 4 (July 22, 2022) (“First Request”). Grbovic stated that the Work “juxtaposes separate-colored designs or shapes,” and that the white bone design and the yellow lightning bolt design “are cropped and arranged in a way that is unique and sufficiently creative.” *Id.* at 4–5. Grbovic also argued that the Work is similar to a work comprising geometric shapes for which the Board reversed the refusal of registration. *Id.*

After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Work could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to John Bathke (Nov. 22, 2022). The Office explained that, viewing the Work as a whole, it found “the combination and arrangement of the component elements to be insufficiently creative to support a claim in copyright.” *Id.* at 3.

In a letter dated February 22, 2023, Grbovic 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 John T.D. Bathke to U.S. Copyright Office (Feb. 22, 2023) (“Second Request”). In the Second Request, Grbovic restated the arguments from the First Request, arguing again that the Work “contains the requisite ‘creative spark’ to warrant copyright protection.” *Id.* at 1.

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board finds that the Work does not contain the requisite creativity necessary to sustain a claim 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 v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[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, or mere variations of those shapes and designs. *Id.* § 202.1(a); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 313.4(J), 906.1–2 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (noting that common shapes and familiar symbols and designs are not protectable).

Applying these legal standards, the Board finds that the individual elements of the Work and the Work as a whole fail to demonstrate sufficient creativity. Here, the Work consists of the top half of a white bone design placed above a partially cropped yellow lightning bolt. Both bones and lightning bolts are common and familiar designs, and their respective coloring (a white bone and a yellow thunderbolt) in the Work aligns with how each is commonly depicted. Although the designs are cropped, their cropping is a minor variation that does not alter their familiarity or remove them from the corpus of familiar designs. *See* COMPENDIUM (THIRD) § 313.4(J) (“familiar symbols or designs with minor linear or spatial variations” are not copyrightable).

Nor does the placement and arrangement of the two designs together demonstrate sufficient creativity. Grbovic argues that the selection, arrangement, and coordination of these designs are “unique,” yet the Work merely attaches the bone design at a slight angle atop the lightning bolt design. This simplistic arrangement does not demonstrate the level of creativity necessary to be eligible for copyright protection. *Id.* § 906.2.

Finally, Grbovic’s comparison to the Board’s prior decision for a different work is likewise unavailing. The Office does not compare works; it makes determinations of copyrightability on a “case-by-case basis,” and “[a] decision to register a particular work has no precedential value.” *Id.* § 309.3. Nevertheless, the Board notes that the Work is distinguishable from the work in the decision that Grbovic cites. The cited work consisted of two side-by-side curved triangle shapes (with a curved star placed inside the middle of one triangle), both placed above a curved polygon, which together created the overall shape of a sailboat. The cited work incorporates stylized angles and curvature into the individual geometric shapes and arranges the

shapes into precise spacing that together depict a new design.¹ This demonstrates far greater creativity than the simplistic depictions, slight angling, and minor cropping present in the Work.

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

Suzanne V. Wilson, General Counsel and

Associate Register of Copyrights

Maria Strong, Associate Register of Copyrights and

Director of Policy and International Affairs

Jordana Rubel, Assistant General Counsel

¹ U.S. Copyright Office Review Board, *Decision Reversing Refusal of Registration of Northwind logos with boat* (Oct. 9, 2020), <https://www.copyright.gov/rulings-filings/review-board/docs/northwind-logo.pdf>.