



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

June 28, 2021

William G. Wardlow
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111 NW Hawthorne Avenue, Suite 7
Bend, OR 97703

**Re: Second Request for Reconsideration for Refusal to Register HD logo;
Correspondence ID: 1-3XCBYPG; SR # 1-7334503425**

Dear Mr. Wardlow:

The Review Board of the United States Copyright Office (“Board”) has considered HD Botanicals, LLC’s (“HD Botanicals”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional art claim in the work titled “HD logo” (“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 work consisting of the letters “H” and “D” arranged side-by-side.¹ The left vertical stroke of the “H” and the curved stroke of the “D” are black, and the right stroke of the “H” and the horizontal line to the right of the H are green.² The Work is as follows:

¹ The Work’s deposit also includes a horizontal pattern, which is the result of the deposit copy of the Work being submitted by postal mail to the U.S. Copyright Office and is not claimed as part of the Work. *See* HD BOTANICALS, <https://hdbotanicals.com> (last visited June 21, 2021).

² HD Botanicals has claimed that the green imagery in the middle also represents a cross and that the left vertical stroke of the “H” represents the letter “I.”



II. ADMINISTRATIVE RECORD

On December 19, 2018, HD Botanicals filed an application to register a copyright claim in the Work. In a July 9, 2019, letter, a Copyright Office registration specialist refused to register the claim, finding that it “lack[ed] the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office, to Wardlow Law, LLC (July 9, 2019).

In a letter dated September 16, 2019, HD Botanicals requested that the Office reconsider its initial refusal to register the Work. Letter from William G. Wardlow, to U.S. Copyright Office (Sept. 16, 2019) (“First Request”). 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 “does not contain a sufficient amount of creativity either elementally or as a whole to warrant registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office, to William Wardlow, at 2 (Feb. 14, 2020).

In a letter dated April 2, 2020, HD Botanicals 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 William G. Wardlow, to U.S. Copyright Office (Apr. 2, 2020) (“Second Request”). In that letter, HD Botanicals asserted that the Work “exceeds” the modicum of creativity standard “by a wide margin,” as the Work not only contains the letters “H” and “D,” but, despite titling the Work “HD logo,” also includes “two additional intertwined elements (letters ‘I’ and ‘green cross’) that are set off using intentional spacing.” *Id.* at 1, 3. HD Botanicals also stated “that the ‘green cross’ has a secondary meaning, representing cannabis dispensaries” and that “the solid black portions [of the Work], when observed independently, spell ‘ID’.” *Id.* at 2. Lastly, HD Botanicals expressed that “the way in which the letters and cross are creatively mixed into a novel design” would allow registration. *Id.*

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 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 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, 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).

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3d ed. 2021) (“COMPENDIUM (THIRD)”). 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 careful examination and application of the legal standard discussed above, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

Both the Work's individual elements and the Work as a whole fail to demonstrate copyrightable authorship. The Work consists of stylized, or mere typographic ornamentations of the letters "H" and "D," with portions of both letters in green and black coloring. Even considering the green design as a common cross, or the left portion of the "H" as an "I," all of those also are typography or familiar shapes or designs. None of these elements are subject to copyright protection. 37 C.F.R. § 202.1(a); *see also* COMPENDIUM (THIRD) § 313.4(J). Letters are the building blocks of expression and cannot be protected by copyright law "regardless of how novel and creative the shape and form of the typeface characters may be." COMPENDIUM (THIRD) § 906.4; *see also Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (noting Congress has consistently refused copyright protection to typeface). The cross is a familiar symbol or design and the Work consist of mere coloration, both of which are not copyrightable. 37 C.F.R. § 202.1(a); *see also* COMPENDIUM (THIRD) §§ 313.4(J) (listing "crosses" as a familiar symbols and designs), 313.4(K) (noting that the Office may refuse registration "if the colors merely enhance the visual display of a[n] . . . article," such as "[u]sing color as a simple form of typographic ornamentation").

Neither is the Work as a whole protectable. The Work merely consists of stylized letters depicted in green and black coloring. Or, as HD Botanicals asserts, the Work consists of stylized letters and a cross, both depicted in green and black coloring. The elements "are [not] numerous enough and their selection and arrangement [not] original enough that their combination constitutes an original work of authorship." *Satava*, 323 F.3d at 811. Instead, letters (or letters and cross) are placed side-by-side in a "mere simplistic arrangement" that evidences insufficient creativity. *See id.* In fact, the Work appears similar in *Coach, Inc. v. Peters*, 386 F. Supp.2d 495 (S.D.N.Y. 2005), where the Court held that two unlinked letters facing each other in a mirror image did not contain the requisite level of creativity. Additionally, the arrangement of these non-protectable elements to create a green cross is commonplace and a stock symbol within the cannabis dispensary industry.³ *See, e.g., Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 106 (2d Cir. 2014) (denying copyright protection for elements that are "features of all colonial homes, or houses generally"); *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988) (noting that "as idea and expression merge, fewer and fewer aspects of a work embody a unique and creative expression of the idea; a copyright holder must then prove

³ *See, e.g.,* ALL GREENS DISPENSARY, <https://www.allgreensaz.com> (last visited June 21, 2021); DENVER DISPENSARY, <https://marijuanaediblesdenver.com> (last visited June 21, 2021); GREENHOUSE OF WALLED LAKE, <https://www.greenhousemi.com> (last visited June 21, 2021); NATURAL AID, <https://www.naturalaid.com> (last visited June 21, 2021);

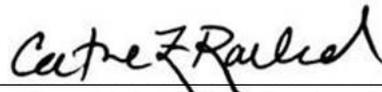
substantial similarity to those few aspects of the work that are expression not required by the idea”).

HD Botanicals also urges that the Work is imbued with meaning. *See* First Request at 2; Second Request at 2. Specifically, HD Botanicals asserts that the green cross represents cannabis dispensaries and that the letters “I” and “D” spell “ID,” which signifies the legal age to purchase cannabis in Oregon and gives the Work “additional secondary meaning . . . namely that purchasers must be prepared to show ID before they can ‘get inside’ to the ‘green cross’ dispensary.” First Request at 2; Second Request at 2. The Office, however, does not consider the author’s intended meaning or any symbolic meaning or impression when evaluating whether a work qualifies for copyright protection. *See* COMPENDIUM (THIRD) §§ 309, 310.3, 310.5 (“[T]he U.S. Copyright Office will not consider the author’s inspiration for the work, creative intent, or intended meaning.”).

In sum, the Board concludes that the Work does not meet the threshold of creativity established by the Supreme Court in *Feist*.

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

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