



United States Copyright Office

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April 21, 2016

Buchanan Ingersoll & Rooney PC
Attn: Bassam N. Ibrahim
1737 King St., Suite 500
Alexandria, VA 22314-2727

Re: Second Request for Reconsideration for Refusal to Register JJ 1 Logo, JJ 2 Logo, and JJ 3 Logo
Correspondence ID: 1-PY74VI

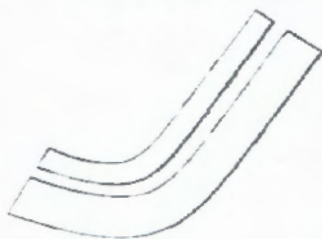
Dear Mr. Ibrahim:

The Review Board of the United States Copyright Office (the “Board”) has examined Aktieselskabet af 21 November 2001’s (“Aktieselskabet’s”) second request for reconsideration of the Registration Program’s refusal to register two-dimensional artwork copyright claims in the works titled “JJ 1 Logo,” “JJ 2 Logo,” and “JJ 3 Logo.” After reviewing the applications, deposit copies, and relevant correspondence in the case, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORKS

“JJ 1 Logo,” “JJ 2 Logo,” and “JJ 3 Logo” (the “Works”) are three variations of a single, two-dimensional, graphic logo design. The graphic logo design consists of two adjacent “J” shapes, one larger than the other. In JJ 1 Logo, the “J” shapes are outlined by a solid line. In JJ 2 Logo, the “J” shapes are outlined by a jagged or wavy line. In JJ 3 Logo, the “J” shapes are composed of parallel rows of small, evenly spaced dots.

Photographic reproductions of the three works are set forth below:



JJ 1 Logo



JJ 2 Logo



JJ 3 Logo

II. ADMINISTRATIVE RECORD

On September 9, 2013, Aktieselskabet filed an application to register copyright claims in the Works. In a December 3, 2013 letter, a Copyright Office registration specialist refused to register the Works, finding that they “lack the authorship necessary to support a copyright claim.” Letter from Kathryn Sukites, U.S. Copyright Office, to Bryce Maynard, Buchanan Ingersoll & Rooney PC (Dec. 3, 2013).

In a March 4, 2014 letter, Aktieselskabet requested that the Office reconsider its initial refusal to register the Works. Letter from Bassam N. Ibrahim, Buchanan Ingersoll & Rooney PC, to U.S. Copyright Office (March 4, 2014) (“First Request”). After reviewing the Works in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Works do not contain a sufficient amount of original and creative artistic authorship to support copyright registration. Letter from Stephanie Mason, U.S. Copyright Office, to Bassam N. Ibrahim, Buchanan Ingersoll & Rooney PC (July 7, 2014).

In a September 24, 2014 letter, Aktieselskabet requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Bassam N. Ibrahim, Buchanan Ingersoll & Rooney PC, to U.S. Copyright Office (Sept. 24, 2014) (“Second Request”). In that letter, Aktieselskabet disagreed with the Office’s conclusion that each Work, as a whole, does not include the minimum amount of creativity required to support registration under the Copyright Act. Specifically, Aktieselskabet claimed that the selection and arrangement of each Work’s constituent elements have a sufficient amount of creative authorship required to support registration under the Copyright Act. In support of its claim, Aktieselskabet argued that its claims to copyright are directed to the “highly stylized” adjacent “J” shapes and that “consumers will likely not even recognize the designs” as letters. *Id.* at 1-2. Aktieselskabet further asserted that the Works “were created by a professional graphic designer and obviously required some degree of creativity and originality, no matter how modest.” *Id.* at 2.

III. DECISION

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 long-standing requirements of originality and creativity in the law, as affirmed by the *Feist* decision. *See* 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) (“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. However, 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, 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) (emphasis in original).

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. 2014) (“COMPENDIUM (THIRD)”). They are not influenced by the attractiveness of a design, the espoused intentions of the author, the design’s visual effect or appearance, its symbolism, the time and effort it took to create, or its commercial success in the marketplace. *See* 17 U.S.C. § 102(b); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). The fact that a work consists of a unique or distinctive shape or style for purposes of aesthetic appeal does not necessarily mean that the work, as a whole, constitutes a copyrightable work of art.

B. Analysis of the Works

After careful examination, the Board finds that the Work fails to satisfy the requirement of creative authorship and thus is not copyrightable.

Here, it is undisputed that the Works' constituent elements—"J" shapes with a solid outline, "J" shapes with a jagged or wavy outline and "J" shapes composed of evenly spaced dots—are not individually subject to copyright protection. See 37 C.F.R. § 202.1(a) (prohibiting registration of "mere variations of typographic ornamentation, lettering, or coloring"). The question then is whether the combination of those elements is protectable. In evaluating this question, the Copyright Office follows the principle that works should be judged in their entirety and not based solely on the protectability of individual elements within the work. See *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). Works composed of public domain elements may be copyrightable, but only if the selection, coordination, and/or arrangement of those elements reflect authorial discretion that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist*, 499 U.S. at 359.

The Board finds that, viewed as a whole, the selection, combination, and arrangement of the two "J" shapes that comprise each of the Works is not sufficient to render any of the Works original. The Works consist of little more than a two adjacent, stylized "J" shapes, one larger than the other, placed atop one another. As explained in the *Compendium of U.S. Copyright Office Practices*, neither "mere scripting or lettering, either with or without uncopyrightable ornamentation," nor "mere use of different fonts or functional colors, frames, or borders, either standing alone or in combination," satisfy the requirements for copyright registration. COMPENDIUM (THIRD) § 913.1; see also *Coach* at 386 F. Supp. 2d at 498 (upholding the Office's determination that designs consisting of little more than "variations and arrangements of the letter 'C'" were not sufficient to warrant registration on grounds that "letters of the alphabet cannot be copyrighted" and "the mere arrangement of symbols and letters is not copyrightable"). Here, as noted, the combination of public domain letters and basic variations in typographic expression, considered as a whole, lack the requisite amount of creativity in their selection, coordination, and/or 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). The level of creative authorship involved in this configuration of unprotectable elements is, at best, *de minimis*, and too trivial to merit copyright registration.

Aktieselskabet contends that its claims to copyright are directed to the "highly stylized" adjacent "J" shapes and that "consumers will likely not even recognize the designs" as letters. Second Request at 1-2. Aktieselskabet also contends that the Works "were created by a professional graphic designer and obviously required some degree of creativity and originality, no matter how modest." *Id.* at 2. But neither of these contentions support Aktieselskabet's claim of sufficient creativity. Despite Aktieselskabet's assertions to the contrary, the fact remains that all three Works are composed of *de minimus* variations of the standard "J" shape. Moreover, the intangible attributes that Aktieselskabet ascribed to the Works—including the professional skills of the Works' designer—are not evident in the deposit itself and therefore they cannot be examined in an objective manner. Even if these attributes were present in the deposit, the Board does not assess the espoused intentions of a design's author, or a design's visual impact, in determining whether a design contains the requisite minimal amount of original authorship necessary for registration. See 17 U.S.C. § 102(b); see also *Bleistein*, 188 U.S. at 251. Accordingly, the fact that the Works were the fruit of a professional design process and can be described as "highly stylized" would not qualify the Works for copyright protection.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the U.S. 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 on this matter.

BY: Catherine Rowland
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Review Board Member