



June 1, 2021

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Re: Second Request for Reconsideration for Refusal to Register Objective Real Estate Partners Design; Correspondence ID: 1-40HXXF7; SR # 1-7997417521

Dear Mr. Eulgen:

The Review Board of the United States Copyright Office (“Board”) has considered Objective Real Estate Partners, LLC’s (“Objective Real Estate Partners”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Objective Real Estate Partners Design” (“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 logo. It consists of two semi-circular bands, which are tapered at both ends. The bands are arranged so that they form an incomplete circle, which the ends of each band overlapping. One of the bands is dark grey, and the other band is light grey.

The Work is as follows:



II. ADMINISTRATIVE RECORD

On August 29, 2019, Objective Real Estate Partners filed an application to register a copyright claim in the Work. In an August 29, 2019 letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the authorship necessary to support”

a claim to copyright. Initial Letter Refusing Registration from U.S. Copyright Office to Lee Eulgen (Aug. 29, 2019).

In a letter dated November 27, 2019, Objective Real Estate Partners requested that the Office reconsider its initial refusal to register the Work. Letter from Lee J. Eulgen to U.S. Copyright Office (Nov. 27, 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 creative artistic or graphic authorship to support a copyright registration.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Lee Eulgen (Apr. 14, 2020).

In a letter dated July 13, 2020, Objective Real Estate Partners 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 Lee J. Eulgen to U.S. Copyright Office (July 13, 2020) (“Second Request”). In that letter, Objective Real Estate Partners states that the Work “presents creativity comparable to other works recently held copyrightable by the Second and Ninth Circuits,” citing cases that support the premise “that a combination of uncopyrightable elements can be protectable.” *Id.* at 1–2. It argues that the “original combination of twisting, shaded crescents, with a thin white division of negative space between them, presents creativity sufficient to warrant copyright protection.” *Id.* at 3.

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).

Similarly, while the Office may register a work that consists merely of geometric shapes, for such a work to be registrable, the “author’s use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”); see also *Atari Games*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but would not register a picture consisting merely of a purple background and evenly-spaced white circles. COMPENDIUM (THIRD) § 906.1.

Finally, Copyright Office registration specialists (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. See COMPENDIUM (THIRD) § 310.2. 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 carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work does not contain the requisite authorship necessary to sustain a claim to copyright.

The Board finds that none of the Work's individual components are sufficiently creative to be eligible for copyright protection. The constituent elements—two semi-circular tapered bands, or crescents—are not individually subject to copyright protection. The Copyright Act does not protect common geometric shapes, such as circles or curved lines. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs”); COMPENDIUM (THIRD) § 906.1 (noting that common geometric shapes, including curved lines and circles, are not protectable); *see also Coach*, 386 F. Supp. 2d at 498 (finding Office application of these rules to deny registration to pattern of linked and unlinked “C” symbols was not arbitrary or capricious).

The combination of these unprotectable elements in the Work as a whole does not elevate its creativity beyond the threshold for copyright protection. While designs that combine uncopyrightable elements can be copyrightable if they are creatively combined, the Work does not have that spark of creativity. *See Satava*, 323 F.3d at 811 (noting that copyright protection is appropriate when the “elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.”). Here, the Work consists of a simple combination of only two elements—two tapered crescents arranged as mirror images of each other to form a circle—displayed in two different shades of grey with no other shading or color variation. The Work is thus an example of “[m]erely bringing together only a few standard forms or shapes with minor linear or spatial variations” that does not qualify for copyright protection. COMPENDIUM (THIRD) § 905; *see also John Muller & Co. Inc. v. N.Y. Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986) (affirming that a work consisting of four angled lines and one word lacked the level of creativity needed for copyrightability); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, No. 82-5438, 1983 U.S. Dist. LEXIS 14631, at *4 (E.D. Pa. Aug. 15, 1983) (finding that copying of “[v]ariations of square, rectangles, circles and ellipses” was not infringement because “[s]uch basic geometric shapes have long been in the public domain and therefore cannot be regulated by copyright”). The Work is, in fact, even less creative than the design in *Coach*, which involved four “C” shapes, two mirroring each other in a linked arrangement and two perpendicular to the linked pair, that was found unprotectable. *Coach*, 386 F. Supp. 2d at 496. The Court held that such a “simple arrangement” of unprotectable elements was not registrable. *Id* at 498.¹

Finally, Objective Real Estate Partners argues that several creative decisions qualify the Works for copyright protection. Specifically, it notes that the combination of elements “present both two- and three-dimensionality as well as fluid movement,” arguing that these perceptions

¹ The cases cited by Objective Real Estate Partners to the contrary do not suggest a different outcome. The cases state the general principal, with which the Board agrees, that it is possible to have a copyrightable work derived from uncopyrightable elements. The works in those cases, however, all had more creativity than the Work here. *See Sophia & Chloe, Inc. v. Brighton Collectables, LLC*, 708 F. App'x. 460 (9th Cir. 2018); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001); *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001).

contribute to the Work's creative appearance rather than being indicative of the author's inspiration or intended meaning. Second Request at 3. While a two- or three-dimensional aspect of a work does contribute to its actual appearance, however, Objective Real Estate Partners' perception of "fluid movement" does not. The Board focuses on the actual appearance of the fixed Work and does not consider any meaning or significance that the Work may evoke. The fact that creative thought may take place in the mind of the person who encounters a work has no bearing on originality. *See* COMPENDIUM (THIRD) § 310.3. Similarly, the Office will not consider the author's inspiration, creative intent, or intended meaning nor the aesthetic value when examining a work. *Id.* § 310.2, 310.5.

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

Regan A. Smith, General Counsel and

Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of

Copyrights and Director, Public Information and
Education

Kimberley Isbell, Deputy Director of Policy and
International Affairs