United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

August 24, 2016

Natalie A. Blakeney
IP Counsel
Turnberry Associates
19950 West Country Club Drive
Aventura, FL 33180

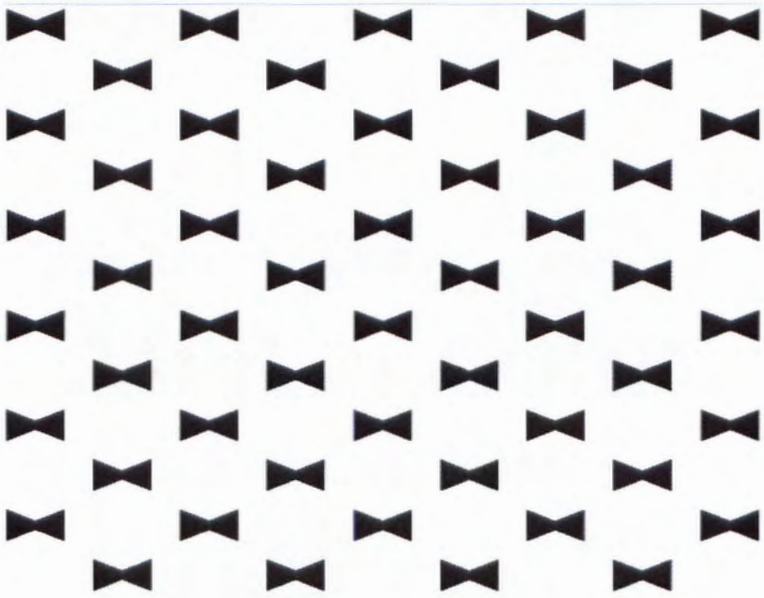
Re: Second Request for Reconsideration for Refusal to Register Bowtie Pattern; Correspondence ID: 1-GLPNWV

Dear Ms. Blakeney:

The Review Board of the United States Copyright Office ("Board") has considered Fontainebleau Resort Properties II, LLC's ("Fontainebleau's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the work titled "Bowtie Pattern" ("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 claimed as 2-D artwork. The design consists of staggered rows of black bowtie-shaped icons on a white background. Each bowtie is constructed of two isosceles triangles, which overlap at their vertex angles. A reproduction of the Work is set forth below.



II. ADMINISTRATIVE RECORD

On August 10, 2015, Fontainebleau filed an application to register a copyright claim in the Work. In a September 21, 2015 letter, a Copyright Office registration specialist refused to register the claim, finding that it "lacks the authorship necessary to support a copyright claim." Letter from Shawn Thompson, Registration Specialist, to Natalie Blakeney, Turnberry Associates (Sept. 21, 2015).

In a letter dated November 11, 2015, Fontainebleau requested that the Office reconsider its initial refusal to register the Work. Letter from Natalie A. Blakeney, Turnberry Associates, to U.S. Copyright Office (Nov. 11, 2015) ("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 original and creative authorship to support a copyright registration." Letter from Stephanie Mason, Attorney-Advisor, to Natalie Blakeney, Turnberry Associates, at 1 (Mar. 3, 2016).

In a letter dated May 3, 2016, Fontainebleau 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 Natalie A. Blakeney, Turnberry Associates, to U.S. Copyright Office (May 3, 2016) ("Second Request"). In that letter, Fontainebleau argued that the Office "is applying far too high a bar for the level of creativity required to register a work." *Id.* at 1. Fontainebleau further argued that "the bowtie design is likely to be interpreted by viewers as a bowtie, not as a combination of two triangles facing each other," and "even if a single bowtie design by itself is not protectable, [Fontainebleau's] distinctive arrangement of the bowtie design clearly demonstrates at least some level of 'creative spark.'" *Id.* at 2.

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 and described in the *Feist* decision. *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." COMPENDIUM (THIRD) § 906.1; *see also Atari Games Corp.*, 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.

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 separable authorship necessary to sustain a claim to copyright.

Addressing first the individual bowtie element of the Work, the *Compendium of U.S. Copyright Office Practices* explains that "common geometric shapes, including . . . triangles" are not protected under the Copyright Act. COMPENDIUM (THIRD) § 906.1. The bowtie element is composed of two triangles that intersect at their vertex angle, such that their bases run parallel to one another. Such a basic combination of common geometric shapes does not possess sufficient

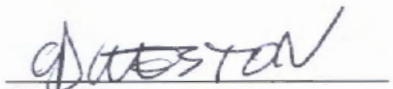
originality to qualify for copyright protection. *See Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496, 499 (deferring to Copyright Office's refusal to register a design "consisting of a distinctive pattern comprising two linked elements facing each other in a mirrored relationship and two unlinked elements in an mirrored relationship and positioned perpendicular to the linked elements").

Of course, works composed of unprotectable elements, such as the Work at issue, 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. Here, the Work consists of a basic combination of ordinary unprotectable shapes, without any color variation and spaced in a predictable manner, and thus as a whole lacks the requisite amount of creativity in its selection, coordination, and/or arrangement to warrant copyright protection.

Fontainebleau cites two cases in which designs incorporating grid patterns or vertical and horizontal stripes were held to be sufficiently original, but these cases are distinguishable. In *Nicholls v. Tufenkian Import/Export Ventures, Inc.*, No. 04 Civ.2110 WHP, 2004 WL 1399187 (S.D.N.Y. June 23, 2004), the court observed that the circles arranged on a grid had unique shading, and were not arranged in a repeating pattern, but rather "four and three quarter rows" of four circles each. *Id.* at *2. Here, the pattern of bowties is a basic alternation of 4- and 5-bowtie rows. In *Covington Indus. Inc. v. Nichols*, No. 02 Civ. 8037, 2004 WL 784825 (S.D.N.Y. Apr. 12, 2004), which involved a pattern of intersecting vertical and horizontal stripes, the stripes varied in width, and were dyed in five different colors. *Id.* at *1. Here, every bowtie in the Work is the same size, color, and orientation.

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.

BY: 

Chris Weston
Copyright Office Review Board