



United States Copyright Office

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December 4, 2019

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5 Columbia Circle
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Re: Second Request for Reconsideration for Refusal to Register Double Helix Loader, Correspondence ID: 1-3CZU623; SR 1-5504364391

Dear Ms. Fuierer:

The Review Board of the United States Copyright Office (“Board”) has considered Illumina, Inc.’s (“Illumina’s”) second request for reconsideration of the Registration Program’s refusal to register a sculpture claim in the work “Double Helix Loader” (“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 rotating image consisting of two wave-shaped lines that conversely overlap to form a double helix. Each line is made up of ten dots that taper sequentially from smaller to larger in size as the lines circle around each other. One line is turquoise the other line is grey. The image moves such that it appears as if the viewer is looking at one shape perpetually rotating in a circular motion on a horizontal plane. A still image from the work is below.



II. ADMINISTRATIVE RECORD

On July 31, 2017, Illumina filed an application to register a copyright claim in the Work. In a March 8, 2018, letter, a Copyright Office registration specialist refused to register the claim,

finding that the Work “does not contain enough original audiovisual authorship to be copyrightable, and the image itself represents a minor variation of a familiar symbol that is not copyrightable.” Letter from Gareth James, Registration Specialist to Alana Fuierer, Heslin Rotherberg Farley & Mesiti, P.C. (Mar. 8, 2018).

In a letter dated June 8, 2018, Illumina requested that the Office reconsider its initial refusal to register the Work. Letter from Alana M. Fuierer. to U.S. Copyright Office (June 8, 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 to warrant registration. Letter from Stephanie Mason, Attorney-Advisor to Alana Fuierer (Jan. 11, 2019). The Office stated that the circles and wavy lines that make up the Work are both common and familiar shapes and designs. *Id.* at 3. The Office then looked at the Work as a whole and determined that the Work is insufficiently creative because “the simple twining movement of just two waved lines is an obvious, common configuration. . .” and “. . . the work merely brings together a few uncopyrightable elements in an expected, garden-variety configuration. . .” *Id.*

In a letter dated April 10, 2019, Illumina 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 Alana Fuierer to U.S. Copyright Office (Apr. 10, 2017) (“Second Request”). Illumina argued that the Office “erred by failing (1) to give proper weight to the numerous, creative design elements that make up the work’s visual material; and (2) to consider the creative ‘flow’ of the work as a whole.” *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 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 merely consists 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.]

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 creative authorship necessary to sustain a claim to copyright.

Neither the individual elements of the Work nor the Work as a whole contain a sufficient amount of creativity. The individual elements of the Work are made up of simple geometric shapes—circles or dots—and two colors, none of which are copyrightable. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs. . . or colors”); COMPENDIUM (THIRD) § 906.1 (“the copyright act does not protect common geometric shapes, either in two-dimensional or three-dimensional form. . . including. . . straight or curved lines. . .”).

Illumina describes the dots and the spacing in between the dots as irregularly and variably shaped and sized. Second Request at 7. But the variation is sequential, methodical, consistent, and typical, ranging from the smallest to the largest. The dots are perfect circles, with even spacing between the dots, apart for inherent increases or decreases in space due to the size of one dot relative to the next. Any variations in the dots and spacing of the Work are typical and expected, without possessing sufficient creativity to support copyright registration.

Illumina also argues that the variation in color of the dots is creative element and that the configuration creates the copyrightable expression of a double helix. Second Request at 7. The coloring, like the dots, only varies slightly and in a typical, ombré manner that is common and insufficiently creative. Furthermore, a double helix itself is an uncopyrightable familiar symbol. The double helix in the Work here is a minor variation at best. It does not contain any significant differences distinguishing it from any other standard double helix shape and therefore, is not sufficiently creative.


Illumina further argued that “the speed and randomness of rotation, the transitions between colors and shading, [and] the varying arrangement and movement of the circular dots and spacing. . .” as “artistic, fanciful expression. . . all of which demonstrate the requisite low-threshold of creativity in the overall ‘flow’ of the animation.” Second Request at 10 (internal citations omitted). The Board does not find this argument persuasive. While combinations of unprotectable elements may be selected, coordinated, or arranged in a manner that is sufficiently creative for copyright protection, reasonable observation does not support Illumina's assertion that the Work here meets this threshold. The work as a whole merely displays one shape rotating in a consistent manner on a horizontal plane with the dots changing from smaller to larger in ombré shades of grey and teal. This effect is not sufficient to inject the requisite amount of creativity into the Work. *See* COMPENDIUM (THIRD) § 310.3. The speed and position of the rotation does not vary nor is it random, *compare* Second Request at 10, rather it moves in a steady and consistent orbit. Such a standard cyclical rotation is common, routine, and expected.

Finally, Illumina cites two cases where copyrightable designs consisted of a combination of dots or circles: *Prince Grp., Inc., v. MTS Prod.*, 967 F.Supp. 121 (S.D.N.Y. 1997) and *Olem Shoe Corp. v. Washington Shoe Co.*, No. 09-23494-CIV, 2011 WL 6202282, at *10-11 (S.D. Fla. Dec. 1, 2011). Second Request at 8-9. The Office, however, considers each work submitted for copyright registration on its own merits in accordance with the statute and relevant legal principles as cited above. Differences between any two works thus can lead to different results. See COMPENDIUM (THIRD) 602.4(C) (“When examining a claim to copyright, the U.S. Copyright Office generally does not compare deposit[s] to determine whether the work for which registration is sought is substantially similar to another work.”); see also *Homer Laughlin China Co. v. Oman*, No. 90 Civ. 3160, 1991 WL 154540, at *2 (D.D.C. July 30, 1991) (stating that court was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable”); accord *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 499 (indicating the Office “does not compare works that have gone through the registration process”).

In any event, each of the works at issue in the cases cited by Illumina is distinguishable from the Work here. In *Prince Group Inc.* the court identified several creative elements not present in the Work here. 967 F. Supp. at 125. Specifically, the dots in that case had an irregular shape and were shaded with a “crescent of white around half of the perimeter of each dot” in several different colors. *Id.* The dots were placed in “imperfect and conflicting diagonal lines at varying distances from each [other, which gave] the appearance of randomness, [and] distinguished [the] arrangement from the regularity of the generic polka dot design.” *Id.* Similarly, the work in *Olem Shoe Corp.* contained an uncommon design created from dots placed at varying distances along vertical and horizontal planes. 2011 WL 6202282 at *10-11. Here, the dots are perfectly round, evenly spaced circles consisting of only two colors. Further, the overall arrangement of the design is methodical and symmetrical with a consistent flow. *Prince Grp. Inc.*, and *Olem Shoe Corp.* thus do not weigh in favor of registering 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.



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