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

November 25, 2022

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Re: Second Request for Reconsideration for Refusal to Register Explora Design (SR # 1-8936513654; Correspondence ID: 1-45OQO8P)

Dear Ms. Anderson:

The Review Board of the United States Copyright Office ("Board") has considered Explora Science & Children's Museum of Albuquerque's ("Explora") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the work titled "Explora 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 artwork consisting of two outstretched white hands with the thumbs touching and the thumbs and index fingers of the two hands partially encompassing a yellow star. Both elements are depicted within an irregular green trapezoid. The Work is as follows:

II. ADMINISTRATIVE RECORD

On June 16, 2020, Explora filed an application to register a copyright claim in the Work. In a July 22, 2020 letter, a Copyright Office registration specialist refused to register the claim, finding that the work "lacks the authorship necessary to support a copyright claim." Initial Letter Refusing Registration from U.S. Copyright Office to Svitlana V. Anderson at 1 (July 22, 2020).

In an October 14, 2020 letter, Explora requested that the Office reconsider its initial refusal to register the Work. Letter from Justin R. Jackson to U.S. Copyright Office (Oct. 14, 2020) ("First Request"). After reviewing the Work in light of the points raised in the First Request, the Office reevaluated the claims and again concluded that the Work does not exhibit a sufficient amount of creative authorship to support a copyright registration. Refusal of First Request for Reconsideration from U.S. Copyright Office to Justin R. Jackson (Mar. 5, 2021). The Office's refusal letter explained that minor variations to common and familiar shapes and designs, such as those featured in the Work, are not sufficiently creative to support copyright registration. *Id.* at 2–3.

In a letter dated June 4, 2021, Explora 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 Svitlana V. Anderson to U.S. Copyright Office (June 4, 2021) ("Second Request"). Explora argued that the Work is sufficiently creative to meet the minimal creativity required for registration because of the expressive combination and arrangement of design elements. *Id.* at 2–6.

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board finds that the Work does not contain the requisite originality necessary to sustain a claim to copyright.

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 "familiar symbols or designs"); *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. *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"); *Atari Games Corp. v. Oman*, 888 F.2d 878, 883 (D.C. Cir. 1989) ("[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."); U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) ("COMPENDIUM (THIRD)") (The "author's use of those shapes [must] result[] in a work that, as a whole, is sufficiently creative."). Still, "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." *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 496 (S.D.N.Y. 2005) (upholding refusal to register basic designs of two "C" shapes).

After carefully examining the Work and applying the legal standards discussed above, the Board finds that the Work is not sufficiently creative to sustain a claim to copyright. Both the individual elements of the Work and the Work as whole fail to demonstrate sufficient creativity.

The Work is a combination of three elements: hands, a star, and a trapezoidal background. The star and trapezoid are common shapes that are individually ineligible for copyright protection. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "familiar symbols or designs"); COMPENDIUM (THIRD) § 313.4(J) (listing a star as an example of a common representational shape); COMPENDIUM (THIRD) § 906.1 (listing a trapezoid as a common geometric shape). The forest green color identified by Explora is also not protectable. *See* COMPENDIUM (THIRD) § 313.4(K) ("The Office cannot register a claim to copyright in color in and of itself . . . ."). Finally, the simple, abstract depiction of hands is not determined by creative choices, but represents a basic idea from nature. No artist can claim copyright in ideas first expressed in nature. *Satava*, 323 F.3d at 812 (There can be no copyright protection for "elements of expression that nature displays for all . . . ."). Likewise, no artist should be able to claim copyright in two basic, abstracted white hands placed side-by-side. *See id.*; *High Five Threads, Inc. v. Michigan Farm Bureau*, No. 1:20-CV-604, 2021 WL 1809835, at *3 (W.D. Mich. May 6, 2021) ("[A] simple outline of a human hand . . . is the most basic representation of something from nature, familiar to every child who has ever traced her own hand."); *Blehm v. Jacobs*, 702 F.3d 1193, 1204 (10th Cir. 2012) ("[C]ommon anatomical features, and natural poses are ideas that belong to the public domain."). Thus, none of the individual elements in the Work are sufficiently creative to be protected by copyright.

Explora is correct in suggesting that a work composed of common or familiar shapes and figures may be registered if the work as a whole contains a sufficient amount of creative expression. Second Request at 3, 5; *see also Satava*, 323 F.3d at 811; COMPENDIUM (THIRD) §§ 313.4(J), 906.1. But here, the combination of elements demonstrates only *de minimis* creativity, which is not protected under the Copyright Act. Small stylistic changes in unprotectable common shapes, such as the irregular angles in the Work's trapezoidal background, cannot sustain copyright registration. *See, e.g.*, *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102–03 (2d Cir. 1951) (An author must contribute more than "merely trivial"

variation to secure a copyright). Finally, placing the star within two hands is a predictable arrangement that reflects the use of hands to symbolically depict the grabbing, touching, and reaching for the stars. The combination and arrangement of the familiar shapes of a trapezoid, two hands, and a star in solid colors is not creative enough to warrant copyright protection.

Explora suggests that the hands, and thus the work, are sufficiently creative because "[w]hile there are many choices in illustration[s] of hands, these hands were created with extensive creative input, i.e., selection of size, rotation, layout appearance, and child-like hands showing promotion of learning and education." Second Request at 2. The Office, however, will not consider the author's inspiration for the work, creative intent, or intended meaning. COMPENDIUM (THIRD) § 310.5. Moreover, "it is not the variety of choices available to the author that must be evaluated, but the actual work that the author created." *Id.* § 310.8.

Explora also argues that the Work is equally as, if not more, creative than an example from the Compendium. *See* Second Request at 5 (commenting on the allegedly "striking" resemblance between this Work and a registrable wrapping paper pattern). The Office does not compare works and makes determinations of copyrightability on a "case-by-case basis." COMPENDIUM (THIRD) § 309.3. Furthermore, the Work differs from the example in that the wrapping paper features more design elements—such as stars, circles, and triangles in different colors and sizes—and a more original arrangement than the Work in question.

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
Suzanne V. Wilson, General Counsel and
Associate Register of Copyrights
Maria Strong, Associate Register of Copyrights and
Director of Policy and International Affairs
Jordana Rubel, Assistant General Counsel