United States Copyright Office
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October 17, 2016

Anne Hiaring Hocking
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Re: Second Request for Reconsideration for Refusal to Register HUF 12 GALAXY LOGO; Correspondence ID: 1-1CR9MZP

Dear Ms. Hocking:

The Review Board of the United States Copyright Office ("Board") has considered Keith Hufnagel's ("Mr. Hufnagel's") second request for reconsideration of the Registration Program's refusal to register a two-dimensional artwork claim in the work titled HUF 12 GALAXY LOGO ("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 graphic work that consists of the capitalized letter "H" surrounded by twelve five-point stars. The stars are evenly arranged around the "H" in a circle, and the entire logo is printed in black.

A reproduction of the Work is set forth below.

II. ADMINISTRATIVE RECORD

On June 12, 2014, Mr. Hufnagel filed an application to register a copyright claim in the Work. In a May 20, 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 Larisa Pastuchiv, Registration Specialist, to Anne Hocking, Hiaring & Smith (May 20, 2015).

In a letter dated August 15, 2015, Mr. Hufnagel requested that the Office reconsider its initial refusal to register the Work. Letter from Anne Hocking, Hiaring & Smith to U.S. Copyright Office (Aug. 15, 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 Anne Hocking, Hiaring & Smith (Dec. 11, 2015).

In a letter dated February 26, 2016, Mr. Hufnagel 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 Anne Hiaring Hocking, Donahue Fitzgerald LLP, to U.S. Copyright Office (Feb. 26, 2016) ("Second Request"). In that letter, Mr. Hufnagel noted that the Work "consists of a selection and arrangement of non-copyrightable elements which, as a whole, is a protectable expression of ideas." *Id.* at 1-2.

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).

Finally, 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 OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2014) ("COMPENDIUM (THIRD)").

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 requisite creative authorship necessary to sustain a claim to copyright.

It is undisputed that the Work's constituent elements—a capitalized letter "H" and twelve five-point stars—are not individually subject to copyright protection. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of "familiar symbols or designs; mere variations of typographic ornamentation, [and] lettering or coloring"); *see also* Second Request at 3 (acknowledging that the elements of the Work are "non-copyrightable").

The question then is whether the combination of those elements is protectable. Works composed of public domain elements may be copyrightable but only if the selection, coordination, or arrangement of those elements reflects sufficient choice and authorial discretion that is not so obvious or minor that the "creative spark is utterly lacking or so trivial as to be nonexistent." *Feist*, 499 U.S. at 359.

The Board finds that, viewed as a whole, the selection, coordination, and arrangement of the elements that comprise the Work are not sufficient to render the Work original. As explained in the *Compendium of U.S. Copyright Office Practices*, neither "[m]ere scripting or lettering, either with or without uncopyrightable ornamentation" nor "[m]ere spatial placement or format of trademark, logo, or label elements" satisfies the requirements for copyright registration. COMPENDIUM (THIRD) § 913.1; *see also Coach* at 386 F. Supp. 2d at 499 (stating that "the mere arrangement of symbols and letters is not copyrightable"). The Work's arrangement is neither "unique" nor "distinctive" as Mr. Hufnagel stresses. Second Request at 3. Instead, the Board finds that the combination of one upper case letter surrounded by a circle of five-point stars is an extremely basic configuration which lacks the requisite amount of creativity to warrant copyright protection. *See Feist*, 499 U.S. at 359.

Additionally, Mr. Hufnagel's assertion that "the positions of the stars are such that they mimic the effect of stars in motion circling around the letter H, akin to a motion picture cartoon when one character injures its head and feels dazed and confused or excited" does not convince the Board. Second Request at 3. The symbolic meaning or impression of a work is irrelevant to the determination of whether a work constitutes copyrightable subject matter, and the Board will not consider any meaning or significance that the work may evoke. *See* COMPENDIUM (THIRD) § 310.3.

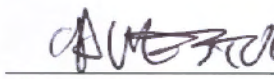
Mr. Hufnagel further argues that the Work is similar to the video game found to be copyrightable in *Atari Games Corp.*, pointing out that the court in that case "found the rudimentary rectangles, circles, human figures and 'bats' in the early video game were protectable when selected, ordered and arranged in a particular pattern." Second Request at 5. A comparison of the Work with the video game at issue in *Atari* does not persuade the Board that the Work contains a sufficient amount of creative authorship. The court in *Atari*

determined that the motion of the game's elements over several screens, the sequence of the screens, the "coordination of a *square* 'ball" and the rectangular *shrinking* paddle," as well as the "choice of colors, . . . the placement and design of the scores, the changes in speed, the use of sounds, and the synchronized graphics and sounds" were neither obvious nor inevitable, thereby constituting a copyrightable work of authorship. *Atari Games Corp.* 979 F.2d at 246-47. The Work's simple arrangement of a circle of stars surrounding an "H" cannot be compared to a complex video game consisting of movement, various screens, graphics, and sounds.

Finally, we note that the fact that Mr. Hufnagel had many stylistic choices and design alternatives open to him does factor into the calculus of originality. It is not the variety of choices available to the author that must be evaluated, but the actual work. *See* COMPENDIUM (THIRD) § 310.8. Ultimately, viewed as a whole, the level of creative authorship involved in this configuration of unprotectable elements is *de minimis* and too trivial to enable copyright registration. *See id.* § 310.1.

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