



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

May 27, 2021

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Re: Second Request for Reconsideration for Refusal to Register *Untitled sphere, stem, spike filament 3D sculptural design* (Correspondence ID: 1-410NK7F; SR # 1-8001227961)

Dear Mr. Schwenker:

The Review Board of the United States Copyright Office (“Board”) has considered Bruce Munro’s (“Munro’s”) second request for reconsideration of the Registration Program’s refusal to register a three-dimensional artwork claim in the work titled *Untitled sphere, stem, spike filament 3D sculptural 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 three-dimensional sculpture, which consists of a single clear glass orb on top of an acrylic tubular stem. Up through the stem and inside the clear glass orb is a fiber optic light that is wound to follow the inside curve of the orb. The Work is reproduced below.



II. ADMINISTRATIVE RECORD

On August 24, 2019, Munro filed an application to register a copyright claim in the Work. Three days later, a Copyright Office registration specialist refused to register the claim, finding that it “is a useful article that does not contain any copyrightable authorship needed to sustain a claim to copyright.” Initial Letter Refusing Registration from U.S. Copyright Office, to Carl F. Schwenker (Aug. 27, 2019).

In a letter dated November 23, 2019, Munro requested that the Office reconsider its initial refusal to register the Work. Letter from Carl F. Schwenker, to U.S. Copyright Office (Nov. 23, 2019) (“First Request”). After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and found “the configuration of the illuminated filament within the tube and sphere . . . is not selected and arranged by the author, but instead, caused by the natural curvatures of the hollow tube and sphere.” Refusal of First Request for Reconsideration from U.S. Copyright Office, to Carl F. Schwenker, at 4 (Apr. 24, 2020). The Office again concluded that the Work was a useful article that “does not contain sufficiently creative authorship either in the component elements or the selection and arrangement of the component elements.” *Id.*

Munro subsequently 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 Carl F. Schwenker, to U.S. Copyright Office (July 24, 2020) (“Second Request”). In that letter, Munro objected to the Office’s characterization of the Work as a useful article, asserting that it is a sufficiently creative sculptural work that reflects “myriad creative, non-utilitarian artistic choices regarding the Work’s decorative sculptural design and display feature,” *id.* at 3, and describing the Work as “eerily reminiscent of flower-like blooms.” *Id.* at 4. Munro also highlights his reputation as an artist of international acclaim. *Id.* at 1–2. Finally, Munro asserts that an order from the Southern District of Florida in unrelated copyright litigation require the Board to register the Work. *Id.* at 6.

III. DISCUSSION

A. *The Legal Framework*

1) *Distinction between Ideas and Expression*

Section 102(b) of the Copyright Act provides that copyright protection for expressive works does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). Section 102(b) codifies the longstanding principle, known as the idea-expression dichotomy, that copyright law protects the original expression of ideas but not the underlying ideas themselves. The Supreme Court in 1879 held that the copyright in a book describing a bookkeeping system, with blank forms and ruled lines and headings, did not give the copyright owner the right to prevent others from using the bookkeeping system described nor “the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.” *Baker v. Selden*, 101 U.S. 99, 102–04 (1879).

“[A]ny work or portion of a work that is an idea . . . does not constitute copyrightable subject matter and cannot be registered.” See COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.3(A) (3d ed. 2021) (“COMPENDIUM (THIRD)”). Though the Office is permitted to register a sufficiently original artistic description, explanation, or illustration of an idea, procedure, process, system, method of operation, concept, principle, or discovery, see H.R. Rep. No. 94–1476, at 56 (1976), “the registration would be limited to the copyrightable literary, musical, graphic, or artistic aspects of the work . . .” COMPENDIUM (THIRD) § 313.3(A). This principle is manifested in the Office’s regulations, which bar copyright protection for “[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing.” 37 C.F.R. § 202.1(b). Originality springs from independent creation, not from discovering a yet-unknown mathematical principle. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991) (“[O]ne who discovers a fact is not its maker or originator. The discoverer merely finds and records.”).

Copyright’s merger doctrine, which states that idea and expression merge when the expression cannot be separated from the idea, is a closely related principle that bars copyrightability of certain works. See *Baker*, 101 U.S. at 103 (explaining that if the “art” that a book “teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public”); *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 68 (2d Cir. 1994) (“[W]hen the expression is essential to the statement of the idea, the expression also will be unprotected, so as to insure free public access to the discussion of the idea.”).

2) 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.” 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.

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

As a threshold matter, the Board agrees with Munro that the work is not a useful article because it is a sculptural work intended to be integrated into larger, site-specific installations and is not a lamp with the intrinsic utilitarian function of assisting sight.¹ Nevertheless, the Board finds that the Work, considered as a sculpture, does not contain the requisite authorship necessary to sustain a claim to copyright.

Neither the Work’s individual elements nor its design as a whole merit copyright protection. Munro agrees that the individual elements of the Work are not protected by copyright because they are simple geometric shapes. Second Request at 6; *see also* COMPENDIUM (THIRD) § 906.1. The Board also finds that, viewed as a whole, the selection, coordination, and arrangement of the transparent globe, tube, and lighted curved filament is not sufficient to render the Work original. While it is true that a combination of unprotectable elements can warrant copyright protection, that is the case “only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava*, 323 F.3d at 811. Here, the selection of three elements (orienting the glass orb on top of the tube and inserting a filament inside) is a standard expression of lighted glass orbs.² Munro contends that part of the Work’s purported creativity is the “mix of multiple different selected materials . . . of chosen clarity,” Second Request at 5, but the material composition of a work generally does not have a bearing on the originality analysis. COMPENDIUM (THIRD) § 310.9.

Additionally, although Munro may have guided and chose the curve of the interior filament, Second Request at 5,³ this is a *de minimis* expression of the idea of placing lighted string in glass and granting protection on the basis of this curve would “effectively accord protection to the idea itself.” *New York Mercantile Exchange, Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 116 (2d Cir. 2007); *see* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . .”); *Baker*, 101 U.S. at 102 (finding a clear distinction between the copyright protected work and the underlying system or

¹ *See, e.g.*, LONGWOOD GARDENS, “LIGHT: Installations by Bruce Munro, Opens at Longwood Gardens” (June 9, 2021) (available at <https://longwoodgardens.org/news/press/light-installations-bruce-munro-opens-longwood-gardens#:~:text=Longwood%20Gardens%20opens%20its%20new,Bruce%20Munro%2C%20on%20June%209.&text=Installation%20highlights%20include%20Forest%20of,STEMS%20reminiscent%20of%20blooming%20flowers>) (example of variations of the Work installed as “Forest of Light” in Kennett Square, Pennsylvania).

² *See, e.g.*, Quntis, “39 Ft. Outdoor G40 Globe String Lights” (available at <https://www.quntis.com/products/outdoor-patio-led-30-clear-g40-weatherproof-vintage-hanging-bulbs-string-lights>) (last accessed March 9, 2021); Bannad, “Garden Solar Lights, Cracked Glass Ball Waterproof Warm White LED for Outdoor Décor Decorations Pathway Patio Yard Lawn, 1 Globe (5.9”)” (available at https://www.amazon.com/Cracked-Waterproof-Outdoor-Decorations-Pathway/dp/B08HRMG931/ref=asc_df_B08HRMG931/?tag=hyprod-20&linkCode=df0&hvadid=473931577159&hvpos=&hvnetw=g&hvrnd=16431614672104570322&hvpon=&hvptwo=&hvqmt=&hvdev=c&hvdvcmdl=&hvlocint=&hvlocphy=9007921&hvtargid=pla-984507180854&psc=1) (last accessed March 9, 2021).

³ Munro describes the composition as “carefully arranged and joined, particularly juxtaposed, and intentionally configured, to exhibit interior fibered windings positioned in a curled decorative arrangement.” Second Request at 2. The Board notes, however, that this assertion does not directly address the Office’s response to the first request for reconsideration’s concern that the interior fiber merely follows the overall shape of the orb. Response to First Request at 4.

idea, a “proposition, so [] evident, that it requires hardly any argument to support it”). Inserting a filament in an orb or other glass object appears to be a common design choice.⁴ Munro has selected one fiber and bent it in such a manner that, however intentional, must conform and bend to the overall shape of the orb. Further, it is unclear whether the fiber within the Work remains stable once placed or is subject to movement and repositioning. *Kelley v. Chicago Park District*, 635 F.3d 290, 303 (7th Cir. 2011) (finding that stable fixation is a constitutional requirement for copyright protection). The only creative expression in the Work is inextricably tied up with the idea of placing a light inside of an orb. Indeed, the replicable nature of this idea and its *de minimis* expression is demonstrated within Munro’s larger site-specific works. As a result, according protection to the Work would inappropriately allow Munro to prevent others from using this well-trod idea.

Munro also claims that “the Southern District of Florida has already weighed in and opined on the copyrightability of [the] Work,” affirming its eligibility for copyright protection. Second Request at 6. The court there, however, did not focus on a single orb. Instead, a review of the order reveals that the court examined multiple site-specific light installations, “Forest of Light,”⁵ “River of Light,” “Field of Lights,” “Fireflies,” “Water-Towers,” and “Brass Monkeys.” *Munro v. Fairchild Tropical Botanic Garden, Inc.*, Case No. 1:20-cv-20079, Order at 1–2 (S. D. Fla. July 13, 2020). Those site-specific works include the selection, coordination, and arrangement of many, sometimes in the thousands, lighted sculptures in various shapes, colors, and sizes. The order does not address whether this particular Work, which is a single orb, is sufficiently creative. Accordingly, the court’s copyright analysis of the larger site-specific works is highly distinct from the inquiry here, and the Board declines to apply the court’s conclusion to this matter.

The other cases Munro relies on do not suggest a different conclusion. Munro invites the Board to compare the Work with a number of prior Review Board and federal court cases because he believes the work contains a similar level of authorship. Prior registration decisions, however, have “no precedential value” and are “not binding,” on the Office. COMPENDIUM (THIRD) § 309.3. The Board notes, however, that each example cited by Munro contains far more creative expression than the Work here.

Finally, Munro’s remaining arguments are not relevant to the inquiry of whether the Work is sufficiently creative. The second request goes into great detail about the reputation of Munro and the history of his international exhibitions. Second Request at 1–2. The Copyright Office, however, does not consider the reputation of an author or a work’s artistic merit. *Id.* § 310.2. Similarly, while Munro describes the Work as “eerily reminiscent of flower-like

⁴ See, e.g., Venus Decoration, “Cracked Glass Ball Light” (last accessed May 26, 2021) (*available at* https://www.theapollobox.com/product/sku1089300/cracked-glass-ball-light?gclid=CjwKCAjw47eFBhA9EiwAy8kzNMYIF4oAbOOxUkCvdaJeaRHV5ogIKW7G09Hf8qgVY2uPcGHxwifCnRoCR-UQAvD_BwE); Martha Stewart, “Mason Jar Fairy Lights” (Sept. 4, 2020) (*available at* <https://www.marthastewart.com/1527640/fairy-light-jars>); Ideal Home, “Fairy light ideas – creative ways to display and decorate with string lights in your home and bedroom” (Feb. 9, 2021) (*available at* <https://www.idealhome.co.uk/diy-and-decorating/creative-fairy-light-displays-8454>) (“12. Pop fairy lights in a glass jar.”)

⁵ Reg. No. VA 2-176-825. Munro did not register the remaining works at issue in litigation.

blooms,” Second Request at 4, the subjective impression that a viewer might have about the Work is similarly not a factor in evaluating copyright eligibility. *Id.* § 310.3.

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

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