



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

August 18, 2023

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**Re: Second Request for Reconsideration for Refusal to Register Fume Artwork
(SR # 1-11098304031; Correspondence ID: 1-5ALLUZI)**

Dear Mr. Johnson:

The Review Board of the United States Copyright Office (“Board”) has considered BFL Metal Products Co. Ltd.’s (“BFL”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Fume Artwork” (“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 graphic logo in black coloring. The design consists of the word “fume,” which is modified so that the bottom stroke of the letter “e” extends to the right and bends upwards and to the left into two semi-circles. These semi-circles curve across the top of all the letters except the letter “f.”

The Work is as follows:



II. ADMINISTRATIVE RECORD

On January 10, 2022, BFL filed an application to register a copyright claim in the Work. In a January 11, 2022 letter, a Copyright Office registration specialist refused to register the

claim, determining that the Work “lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to James Johnson at 1 (Jan. 11, 2022).

On April 13, 2022, BFL requested that the Office reconsider its initial refusal to register the Work, arguing that the Work “exceeds the extremely low level of creativity required to constitute a work of authorship and sustain a copyright claim.” Letter from James Johnson to U.S. Copyright Office at 2 (Apr. 11, 2022) (“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 could not be registered. Refusal of First Request for Reconsideration from U.S. Copyright Office to James Johnson at 4 (July 22, 2022). The Office explained that the Work “does not contain a sufficient amount of creativity to warrant registration” because the Work’s individual elements and its combination and arrangement of the component elements are both insufficiently creative. *Id.* at 2–3. The Office also rejected BFL’s contention that “copyrightable authorship is to be found in the choices that were made in creating the [W]ork,” explaining that “copyrightability is based on how a work is perceived, not how or why it was designed.” *Id.* at 3 (citing *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017)).

On October 24, 2022, BFL 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 Joshua Cooper to U.S. Copyright Office (Oct. 24, 2022) (“Second Request”). In that letter, BFL concedes that “a cloud design or stylized word appearing on its own may not be afforded protection” but argues that the Work’s combination of the two “in a distinctive manner that is both creative and original . . . undoubtedly indicates some ingenuity to be afforded copyright protection.” *Id.* at 3. BFL also compares the Work to two other works that the Tenth Circuit held as protectable and to three other works that the Office recently registered. *Id.* at 4–6.

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 creativity 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.

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 claim. Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See id.* 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, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005). A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[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.”).

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, and slogans; 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”). Through its regulations, the Office provides guidance that copyright does not protect familiar shapes or designs. 37 C.F.R. § 202.1(a); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (noting that common geometric shapes are not protectable).

Here, neither the Work’s individual elements nor the Work as a whole are sufficiently creative to be copyrightable. Turning first to the individual elements, a single word is not protectable by copyright. 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases”). Familiar shapes and designs are also not protectable alone. COMPENDIUM (THIRD) § 906.1. BFL’s Work consists of the word “fume,” which is modified so that the bottom stroke of the letter “e” extends to the right and bends upwards and to the left into two semi-circles. BFL refers to these elements as a “stylized word” and a “cloud design,” respectively. Second Request at 2–3. Because the Work’s individual elements are a word combined with a familiar cloud design, these individual elements are not sufficiently creative to be protected by copyright. Indeed, BFL concedes that “a cloud design or stylized word appearing on its own may not be afforded protection.” *Id.* at 3.

The Work as a whole is also not sufficiently creative to be protected by copyright. *Atari Games* provides that even if individual components of a given work are not copyrightable, those components may be protectable if selected or combined “in a distinctive manner indicating some ingenuity.” 888 F.2d at 883. However, such “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*, 323 F.3d at 811. The Work is composed of only two elements: a stylized word and a cloud design. The selection and arrangement of the Work’s unprotectable elements are not original enough that their combination constitutes an original work of authorship. BFL argues that the “the cross stroke of the letter ‘[f]’ is reminiscent of a vaping device, and the remaining letters are intended to appear as a trail of smoke or vapor emitted from the device, ending with the cloud of smoke or vapor extending off of and above the letter ‘[e].’” Second Request at 3. However, “[t]he symbolic meaning or impression of a work is irrelevant” to determination of whether a work is sufficiently creative. COMPENDIUM (THIRD) § 310.3. “[T]he

Office will focus only on the actual appearance or sound of the work that has been submitted for registration, but will not consider any meaning or significance that the work may evoke.” *Id.*

The Board is not persuaded by BFL’s argument that the Work is similar to the two diagrams that the Tenth Circuit held were protectable in *Enterprise Management Limited, Inc. v. Warrick*, 717 F.3d 1112 (10th Cir. 2013). The diagrams in that case were composed of numerous words and symbols, arranged in a particular order to show the linkages between different concepts. *Id.* at 1113–15. Although the elements of BFL’s Work are also arranged from left to right, that arrangement does not reflect creativity. Instead, it is a common configuration of letters in the English language. The Work consists of a single word combined with a related graphic shape—a word meaning smoke combined with a simple line to depict a cloud of smoke—which is an obvious and expected logo configuration. See *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989, 989–90 (8th Cir. 1986) (upholding refusal to register “logo consist[ing] of four angled lines which form an arrow and the word ‘Arrows’ in cursive script below the arrow”).

BFL also argues that the Work is similar to three works that the Office recently registered. Second Request at 5–6. The Office does not compare works; it makes determinations of copyrightability on a “case-by-case basis” and “[a] decision to register a particular work has no precedential value.” COMPENDIUM (THIRD) § 309.3. Nevertheless, the works the Office registered each had more elements than the Work here, included shading and a unique combination of shapes in the case of Hexagon Shaped Logo,¹ and included the arrangement of various shapes, and words in the cases of Fitness Activity Circuit and Fitness Activity Circuit 2.²

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

¹ See U.S. Copyright Office Review Board, *Decision Reversing Refusal of Registration of Hexagon Shaped Logo* (Apr. 14, 2022), <https://www.copyright.gov/rulings-filings/review-board/docs/hexagon-shaped-logo.pdf> (combination of stylized shading of square and chevrons, combined with white hexagonal-shaped band and arrow designs sufficiently creative).

² See U.S. Copyright Office Review Board, *Decision Reversing Refusal of Registration of Fitness Activity Circuit and Fitness Activity Circuit 2* (June 15, 2022), <https://www.copyright.gov/rulings-filings/review-board/docs/fitness-activity-circuit.pdf> (combinations of dots, dashes, straight and curved lines, footprints, circles, pictorials of people in exercise positions, the names of physical activities, six different colors, among other things sufficiently creative).