



United States Copyright Office

Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

June 24, 2020

Nadya Sand, Esq.
Alston & Bird, LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

Re: Second Request for Reconsideration for Refusal to Register Logo Design (2011); Correspondence ID: 1-3LO9RW2; SR # 1-5751043383

Dear Ms. Sand:

The Review Board of the United States Copyright Office (“Board”) has considered CFA Properties, Inc.’s (“CFA’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Logo Design (2011)” (“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 new version of preexisting logo designs identified below. The preexisting designs depict a chicken’s profile, which consists of a swirl for the head, a circle for the eye, a triangle for the beak, and four oblong circles for the combs. The Work is a cropped version of the preexisting designs and features a repositioned beak. The combs and eye shapes are spaced to appear larger. And the Work is set in a shade that is softer than the red color featured in CFA’s preexisting logo design. The Work and preexisting logo designs are as follows:

The Work



Preexisting Logo Designs



II. ADMINISTRATIVE RECORD

On August 23, 2017, CFA filed an application to register a copyright claim in the Work. CFA excluded “artwork” in the application. In an August 2, 2018, email, CFA clarified that the claim excludes “[p]reviously published 2-dimensional artwork of the letter ‘C’ with elements of a chicken head.” Email from Nadya Sand to U.S. Copyright Office (Aug. 2, 2019). In an August 16, 2018, email, CFA described the work as:

[A]n altered shape of the chicken head design, altered facial features of the chicken head design (new and repositioned beak; altered, repositioned, and cropped comb; and altered spacing of features), and cropped elements; the artwork also includes a new square background that crops the comb and head of the chicken, and, as a result of the cropping, does not depict a letter ‘C’ as did the prior artwork.

Email from Nadya Sand to U.S. Copyright Office (Aug. 16, 2018). In a December 12, 2018, letter, a Copyright Office registration specialist refused to register the claim, finding that “the new material does not contain a sufficient amount of original authorship.” Initial Letter Refusing Registration from U.S. Copyright Office to Nadya Sand (Dec. 12, 2018).

In a letter dated March 12, 2019, CFA requested that the Office reconsider its initial refusal to register the Work. Letter from Nadya Sand to U.S. Copyright Office (Mar. 12, 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 “there are no new sufficiently creative elements embodied in the work, either alone or in combination, upon which a copyright registration is possible.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Nadya Sand (July 1, 2019).

In a letter dated September 30, 2019, CFA 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 Nadya Sand to U.S. Copyright Office (Sept. 30, 2019) (“Second Request”). In that letter, CFA argued that “the Work is entitled to copyright protection and registration because it transforms

and recasts Applicant’s pre-existing materials into an entirely new composition that is distinguishable from the pre-existing materials in a clear and meaningful way.” Second Request at 3. CFA contended that cropping and reframing the preexisting logo designs “creates a new and original composition.” *Id.* Finally, CFA pointed to works recognized by courts as sufficiently creative. *Id.* at 2, 3.

III. DISCUSSION

A. *The Legal Framework*

1) *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.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2017) (“COMPENDIUM (THIRD)”); *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).

2) Derivative Works

The Copyright Office will register a claim in a derivative work where the deposit material contains new authorship with a sufficient amount of original expression. 17 U.S.C. § 103(a) (“The subject matter of copyright . . . includes . . . derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); *see also* COMPENDIUM THIRD § 311.1 (citing H.R. REP. NO. 94-1476, at 57 (1976)). The registration for a derivative work, however, “does not cover any previously published material, previously registered material, or public domain material that appears in the derivative work. Nor does it cover any material that is not owned by the copyright claimant.” *Id.*; *see also* 17 U.S.C. § 103(b) (Copyright in a derivative work is “independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

In the case of derivative works, the “new authorship that the author contributed to the derivative work may be registered, provided that it contains a sufficient amount of original expression, meaning that the derivative work must be independently created and it must possess more than a modicum of creativity.” COMPENDIUM (THIRD) § 311.2 (citing *Waldman Publ’g Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994)). The amount of creativity required for a derivative work is the same as that required for a copyright in any other work: “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102–03 (2d Cir. 1951) (citing *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)). Thus, “the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the [preexisting] work in some meaningful way.” *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009).

Although the amount of originality required is low, courts have recognized that derivative works “[l]acking even a modest degree of originality . . . are not copyrightable.” *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980); *see also L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976). Indeed, “[s]pecial caution is appropriate when analyzing originality in derivative works, ‘since too low a threshold will give the first derivative work creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work.’” *We Shall Overcome Found. v. The Richmond Org., Inc.*, No. 16-cv-2725, 2017 WL 3981311, at *13 (S.D.N.Y. Sept. 8, 2017). Very minor variations do not satisfy this requirement, such as merely changing the size of the preexisting work or recasting a work from one medium to another. *See L. Batlin & Son*, 536 F.2d at 491. Further, a claim to register a derivative work that adds only non-copyrightable elements to a prior product is not entitled to copyright registration. *Boyd’s Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 661 (M.D. Pa. 2005). Ultimately, whatever the addition is, it must be independently protectable for the derivative work to be registered.

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 authorship necessary to sustain a claim to copyright.

The new expression contained in the Work consists of “merely trivial” revisions and therefore does not possess the “modicum of creativity” required to merit registration as a derivative work. *Alfred Bell & Co.*, 191 F.2d at 102–03. CFA stated that the Work is derived from preexisting logo designs that are previously published works. *See* Second Request at 3; Email from Nadya Sand to U.S. Copyright Office (Aug. 2, 2019). Therefore, any copyright claim in the Work only covers the new authorship and does not cover the previously published material. In the Work, the new expression consists solely of repositioned and resized preexisting elements—circles, triangles, and a swirl, as well as a minor change in color.

The combination of trivial alternations to the preexisting shapes do not meaningfully distinguish the Work from the preexisting logo designs. *See Schrock*, 586 F.3d at 521 (noting that “the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative

work to make it distinguishable from the [preexisting] work in some meaningful way.”). The Work merely crops and reframes the “C” from the preexisting stylized Chick-fil-A word logo into a square shape, predictably distancing the shapes that represent the comb, beak, and eye to widen the chicken’s silhouette, while using a slightly different shade of red. Where a design combines uncopyrightable elements, it is protected by copyright when the “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 new contributions are too few and too minor to make the Work distinctive from the preexisting logo designs in a meaningful way.

CFA argued that simply cropping a preexisting image amounts to sufficient creative authorship. The Board finds that to be contrary to the principles enunciated in established precedent and Office policy. Citing dicta from a district court decision, CFA stated that “[t]he decision to crop and reframe a pre-existing work in a manner that creates a new and original composition represents original creative expression and more than a merely trivial variation that is entitled to copyright protection.” Second Request at 3 (citing *SHL Imaging, Inc. v. Aristan House, Inc.*, 117 F. Supp. 2d 301, 306 (S.D.N.Y. 2000) (“A cropped photograph of an earlier photograph is a derivative work.”)). It is conceivable that a photograph could be cropped in such a way as to “recast, adapt[], or transform[]” it, resulting in a protectable derivative work. *Id.* In this case, however, the cropping results in only minor, *de minimis* changes to the original designs, and does not transform the source works in any meaningful way, and therefore does not contain authorship that is separately protectable from those underlying works. *See e.g., L. Batlin & Son*, 536 F.2d at 491 (holding the differences between the plaintiff’s bank and the public domain bank—shortening the figure from eleven to nine inches, shortening and narrowing the base, changing the shape of the carpetbag, and adding an umbrella—insufficient to constitute protectable originality); *Axiom Mfg. v. McCoy Invs.*, 846 F. Supp. 2d 732, 752 (S.D. Tex. 2012) (holding minor differences in shapes, angles, and spacing insufficient to constitute protectable originality); *cf. Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 263 (4th Cir. 2019) (finding “no apparent transformation,” in the context of fair use, where “the only obvious change” defendant made to a photograph “was to crop it so as to remove negative space”).

CFA further invited the Board to compare the new authorship in the Work with changes made to the derivative work in *Eden Toys, Inc. v. Florelee Undergarment Co., Inc.* 697 F.2d 27, 35 (2d Cir. 1982). In *Eden*, the Second Circuit held that the changes made to the Paddington drawing (see below, right) created a sufficiently original derivative work from the original (see below, left). *Id.* at 34–35.



The Board notes that registration decisions are made “on a case-by-case basis.” COMPENDIUM (THIRD) § 309.3; *see also Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q. 2d 1074, 1076 (D.C. Cir. 1991) (stating that the court was not aware of “any authority which provides that the Register must compare works when determining whether a submission is copyrightable”). The Board further observes that the Paddington derivative work includes a greater number and variety of expressive alterations not present in the Work under review. For example, the Work lacks the addition of shading and transformed elements (*e.g.*, “the changed proportions of the hat, the elimination of individualized fingers and toes”) upon which the *Eden* court relied to grant protection to the derivative work. *See Eden*, 697 F.2d at 35.

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

Regan A. Smith, General Counsel and
Associate Register of Copyrights

Catherine Zaller Rowland, Associate Register of
Copyrights and Director, Public Information and
Education

Kimberley Isbell, Deputy Director of Policy and
International Affairs