United States Copyright Office
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August 29, 2018

Fitzpatrick, Cella, Harper & Scinto
Attn: Ms. Lisa Mottes
1290 Avenue of the Americas
New York, NY 10104-3800
Lmottes@fchs.com

Re: Second Request for Reconsideration for Refusal to Register "Frigidaire Stylized Logo"; Correspondence ID: 1-2V1EUL6; SR 1-416979566

Dear Ms. Mottes:

The Review Board of the United States Copyright Office ("Board") has considered Electrolux Home Products, Inc.'s ("Electrolux's") second request for reconsideration of the Registration Program's refusal to register text and artwork claims in the work titled "Frigidaire Stylized 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 the text of the word "Frigidaire" in capital letters with a stylized "A" in the shape of a solid triangle. The text of the letters is blue, and the inside of the stylized "A" triangle is red. A reproduction of the Work is set forth below:

II. ADMINISTRATIVE RECORD

On November 14, 2016, Electrolux filed an application to register a copyright claim in the Work. In a June 20, 2017, letter, a Copyright Office registration specialist refused to register the claim, finding that it lacked "the authorship necessary to support a copyright claim." Letter from C. DiFolco, Registration Specialist, to Timothy Kelly (June 20, 2017).

In a letter dated September 19, 2017, Electrolux requested that the Office reconsider its initial refusal to register the Work. Letter from Lisa Mottes to U.S. Copyright Office (Sept. 19, 2017) ("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 artistic or graphic authorship to support a copyright registration." Letter from Stephanie Mason, Attorney-Advisor, to Lisa Mottes (Jan. 25, 2018).

In a letter dated April 23, 2018, Electrolux 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 Lisa Mottes, to U.S. Copyright Office (Apr. 23, 2018) ("Second Request"). In that letter, Electrolux argued that the Office erred because the stylized "A" combines "creative elements of color selection, shape choice, size, location, and arrangement . . . ." *Id.* at 3.

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).

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).

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 Work consists of the word "Frigidaire" in capital letters and a stylized "A." Words, short phrases, and "mere variations of typographic ornamentation, lettering or coloring" are all ineligible for copyright protection. 37 C.F.R. § 202.1(a), (e); see *CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (citing the Office's regulation and noting, "[i]t is axiomatic that copyright law denies protection to 'fragmentary words and phrases'"). The typeface of the word "Frigidaire," except for the stylized "A," is expressed in "typeface as typeface," which is not registrable. 37 C.F.R. § 202.1(e). Moreover, Electrolux does not appear to contend that there is creative authorship in the word as a whole. *See generally* Second Request.

Rather, Electrolux contends that there is creative authorship in the stylized "A." Second Request at 2-3. The stylized "A" itself, however, is a trivial variation on a letter. As such, it cannot be copyrighted "regardless of how novel and creative the shape and form of the typeface characters may be." COMPENDIUM (THIRD) § 906.4; *see Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978) (finding the Copyright Office properly refused to register a typeface design and noting, "typeface has never been considered entitled to copyright").

The additional coloring of the stylized "A" does not "possess more than a de minimis quantum of creativity." *Feist*, 499 U.S. at 345. In a prior case involving adding visual effects such as "color, shading, and labels" to an existing work, the Fourth Circuit agreed with the Copyright Office that such additions did not give rise to a copyrightable work and that such elements "fall within the narrow category of works that lack even a minimum level of creativity." *Darden v. Peters*, 488 F.3d 277, 287 (4th Cir. 2007). The addition of color to the stylized "A," therefore, is an uncopyrightable element of the Work and insufficient to qualify the Work for registration.

Reviewing the Work in its entirety, including the text, coloration, and stylized "A," the Board finds that it does not meet the threshold for copyright protection.

Lastly, Electrolux contends that the stylized "A" "represents a design choice that was made to reflect the attributes of Electrolux's home appliance products, including having an eye on the future and being innovative, grounded, and stylish." Second Request at 3. This is irrelevant to the copyrightability consideration of the Work. The Board does not assess the espoused intentions of a design's author or a design's visual symbolism or effect in determining

whether a design contains the requisite minimal amount of original authorship necessary for registration. *See* 17 U.S.C. § 102(b); COMPENDIUM (THIRD) §§ 310.3 ("[T]he Office will focus only on the actual appearance . . . of the work that has been submitted for registration, but will not consider any meaning or significance that the work may evoke. The fact that creative thought may take place in the mind of the person who encounters a work has no bearing on the issue of originality."), 310.5 (stating that the Board "will not consider the author's inspiration for the work, creative intent, or intended meaning"). Therefore, the Board does not consider as part of its copyrightability determination the meaning or symbolism ascribed to the triangle shape in this logo; rather, the Board evaluates only the appearance of the Work. Here, the appearance of the Work does not contain the necessary creativity for copyright protection, and the meaning or intention behind choosing a triangle does not rescue the Work from uncopyrightability.

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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