



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

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Re: Second Request for Reconsideration of Refusal to Register Recentering Black and Native Trans and Queer People in Pride (SR # 1-11288869071; Correspondence ID: 1-5GMKFOS)

Dear Mr. Kaufman:

The Review Board of the United States Copyright Office (“Board”) has considered Julia Feliz’s second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Recentering Black and Native Trans and Queer People in Pride” (“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 rectangular, two-dimensional graphic design that consists of eleven differently colored stripes. The stripes all have angled and/or straight ends. They are arranged in a manner that divides the Work into two separate right-angle triangles. The five stripes on the left side of the design are angled upwards and form one of the triangles, while the six on the right side of the design are positioned horizontally and form the other triangle. There also appears to be faint colorations that might suggest a non-flat surface.

The Work is as follows:



II. ADMINISTRATIVE RECORD

On April 14, 2022, Mx. Feliz filed an application to register a copyright claim in the Work. In a May 19, 2022 letter, a Copyright Office registration specialist refused to register the claim after determining that the Work lacks the creative authorship necessary to support a copyright claim. Initial Letter Refusing Registration from U.S. Copyright Office to Joshua Kaufman (May 19, 2022).

On July 5, 2022, Mx. Feliz requested that the Office reconsider its initial refusal to register the Work, arguing that the “selection, coordination, and arrangement of the elements [in the Work] contain sufficient creative authorship” to render the work eligible for copyright registration. Letter from Joshua Kaufman to U.S. Copyright Office at 2 (July 5, 2022) (“First Request”). They also argued that the Office’s decision to refuse registration in this case would render many works by famous artists ineligible, as well. *Id.* at 2. 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 Joshua Kaufman at 1 (Nov. 2, 2022). The Office explained that “the combination and arrangement of the component elements [was] insufficiently creative to support a claim in copyright.” *Id.* at 3.

In a letter dated January 12, 2023, Mx. Feliz requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider its refusal to register the Work for a second time. Letter from Joshua Kaufman to U.S. Copyright Office at 1 (Jan. 12, 2023) (“Second Request”). Mx. Feliz attempted to distinguish the Work from works held ineligible for copyright registration by arguing that the distinctive color scheme and arrangement of the elements in the Work “exhibit[] sufficient artistic expression” to render the work registerable. *Id.* at 2. They also reiterated their argument from the First Request that broad application of the Office’s decision here would render many works by famous artists ineligible for registration. *Id.* at 3. In doing so, they asserted that the Office’s determination would be “contrary to the purposes of the Copyright Act.” *Id.*

III. DISCUSSION

After carefully examining the Work and considering the arguments made in the First and Second Requests, the Board concludes 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.

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 “words and short phrases such as names, titles, and 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”). In its regulations and publications, the Office has explained that copyright does not protect common geometric shapes or familiar designs. *See id.* § 202.1(a); U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (noting that common geometric shapes such as lines, triangles, and trapezoids are not protectable). Likewise, copyright does not protect “a system for matching pairs and sets of colors” or “mere variations in coloring.” *See* COMPENDIUM (THIRD) § 313.4(K); 37 C.F.R. § 202.1(a).

At the same time, 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. *See Feist*, 499 U.S. at 358 (noting that 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). As the Ninth Circuit has explained, “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 v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

Thus, 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; *cf. Hoberman Designs, Inc. v. Glo works Imports, Inc.*, No. 14-cv-6743, 2015 WL 10015261, at *4 (C.D. Cal. 2015) (holding that the work’s use of common “geometric shapes like squares, triangles, and trapezoids . . . [did] not preclude copyright protection”). However, to demonstrate the required modicum of creativity, a work consisting of common geometric shapes must combine “multiple types of geometric shapes in a variety of sizes and colors, culminating in a creative design that goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement.” COMPENDIUM (THIRD) § 906.1; *see id.* § 313.4(J) (stating that a work consisting of uncopyrightable elements can only be registered if it “as a whole contains a sufficient amount of creative expression”).

In their second request for reconsideration, Mx. Feliz argues that their selection of shapes and colors along with their arrangement of these elements in the Work evidence creative choices that warrant protection under the applicable law. Second Request at 2. The Board has reached a contrary conclusion. After applying the above legal standards to the Work, it concludes that the individual elements of the Work and the Work as a whole fail to demonstrate sufficient creativity.

The Board’s analysis begins with its observation that the Work consists of minor variations to the same basic shape: a stripe. It recognizes that these stripes take slightly different

forms—appearing as “triangles, right trapezoids, isosceles trapezoids, and acute trapezoids” of different shapes and sizes. *See* First Request at 2. But the uniform width and arrangement of these strips within the constraints of the Work’s overall rectangular shape dictate any minor variations in form, not the author’s creative choices. *See* COMPENDIUM (THIRD) § 906.1.

Thus, the Work contains a limited number of geometric elements, each of which individually is uncopyrightable, and their arrangement into two right-angle triangles is a common, unoriginal configuration. *See id.* § 906.1; *see also id.* § 906.2 (“[C]opyright law does not protect mere variations on a familiar symbol or design, either in two- or three-dimensional form.”); *id.* § 313.4(J) (noting that “[c]ommon patterns, such as standard chevron, polka dot, checkerboard, or houndstooth designs” are not copyrightable). Furthermore, the selection and arrangement of the stripes’ colors does not imbue the Work with sufficient creativity to satisfy copyright’s originality requirement. The horizontal-colored stripes are displayed in the same order as they appear in a naturally occurring rainbow. *See id.* § 313.4(K) (“If the author . . . merely added, changed, or combined expected or familiar sets . . . of colors, the Office . . . may refuse to register the claim.”); *id.* § 906.3 (“Merely . . . combining expected or familiar pairs or sets of colors is not copyrightable.”).

In addition, although the Office does not consider either “[t]he symbolic meaning or impression of a work” or “the author’s inspiration for the work, creative intent, or intended meaning” for the work when conducting the copyrightability determination, the rainbow arrangement here appears to be preordained by the standard color arrangement found in numerous variations of the Pride flag and the symbolic meaning ascribed to each of the colors in the flag.¹ *Id.* §§ 310.3, 310.5. The Work’s title further indicates that representing “Black and Native Trans and Queer People” determined Mx. Feliz’s additional color selections of white, pink, blue, brown, and black stripes, which appear in flags representing trans and queer communities of color.² Just as Rural was required by the Kansas Corporation Commission to publish a pre-selected list of names and addresses from its subscribers in *Feist* (which it then arranged in a manner dictated by logic rather than creative choices), so too was Mx. Feliz required to use a pre-selected set of colors to evoke the symbolic inclusion of certain communities. *See* 499 U.S. at 363; COMPENDIUM (THIRD) §§ 906.2, 906.3; *see also* COMPENDIUM (THIRD) § 313.4(J) (stating that uncopyrightable familiar symbols and designs include “[c]ommon representational symbols, such as a spade, club, heart, diamond, star, yin yang, fleur de Lys, or the like”); COMPENDIUM (THIRD) § 313.4(K) (citing 17 U.S.C. § 102(b) (“The Office cannot register a claim to copyright in . . . a system for . . . sets of colors.”)).

Mx. Feliz’s comparison to the directory at issue in *Key Publications, Inc. v. Chinatown Today Publishing Enterprises* is inapposite. 945 F.2d 509 (2d Cir. 1991). Unlike the elements of the Work, a limited number of colored stripes that were selected and arranged to resemble

¹ *See, e.g., Pride Flag Guide: Rainbow (Original Design)*, LIBRARY.LGBT (last modified Fed. 14, 2022), <https://flag.library.lgbt/flags/rainbow-original-design/> (noting that original design was created in 1978).

² *Pride Flag Guide: Rainbow (Philadelphia Variant)*, LIBRARY.LGBT (last modified Fed. 14, 2022), <https://flag.library.lgbt/flags/rainbow-philadelphia-variant/> (noting that “the City of Philadelphia, USA, added two stripes – a black and a brown one – to the existing rainbow flag to make people of colour feel more represented in the LGBT community”); *Pride Flag Guide: Transgender*, LIBRARY.LGBT (last modified Fed. 14, 2022), <https://flag.library.lgbt/flags/transgender/> (noting that “[t]rans woman Monica Helms . . . designed the Transgender flag in 1999”).

familiar design patterns, the directory's selection and arrangement of thousands of business names, addresses, and phone numbers, separated into hundreds of descriptive categories (*e.g.*, "BEAN CURD BEAN SPROUT SHOPS") were "not common to yellow pages" and "not copied" from another work. *Id.* at 512–14. Accordingly, the Board finds that the level of creative authorship involved in the Work's configuration of elements is, at best, *de minimis*, and too trivial to support copyright registration. *See* COMPENDIUM (THIRD) § 313.4(B) ("Works that contain no expression or only a *de minimis* amount of original expression are not copyrightable and cannot be registered with the U.S. Copyright Office.").

Finally, Mx. Feliz's argument that the Office's refusal to register the Work is contrary to the purposes of the Copyright Act and would render certain famous works ineligible for copyright registration also fails. *See* First Request at 2, 4–8; Second Request at 2. In general, the Office does not compare works and makes determinations of copyrightability on a "case-by-case basis." COMPENDIUM (THIRD) § 309.3. Nonetheless, the Board finds that the Work is distinguishable from most of the other works identified by Mx. Feliz, including those that feature "the design and brush strokes of a painting" which the Office has recognized can demonstrate creativity. *See id.* § 905 ("In the case of two-dimensional works, original authorship may be expressed in a variety of ways, such as . . . the design and brush strokes of a painting . . .").

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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