



United States Copyright Office

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May 30, 2019

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NBA Properties
Olympic Tower – 645 Fifth Avenue
New York, NY 10022

Re: Second Request for Reconsideration for Refusal to Register D with Ball Design (Detroit Pistons), LAKELAND MAGIC Secondary Logo, SA with Ball Design (San Antonio Spurs); Correspondence IDs: 1-32FSIYR, 1-32FSIZX, 1-32G0BQX; SR 1-4814315971, SR 1-4632160517, SR 1-4814316090

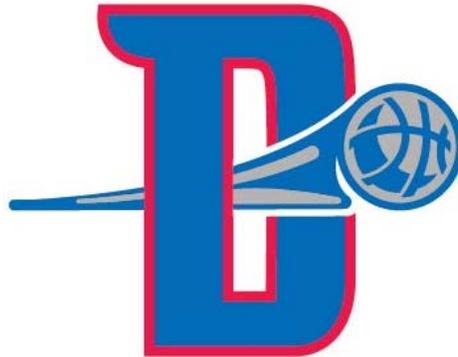
Dear Mr. George:

The Review Board of the United States Copyright Office (“Board”) has considered NBA Properties, Inc.’s (“NBA’s”) second request for reconsideration of the Registration Program’s refusals to register two-dimensional artwork claims in three logos titled “D with Ball Design (Detroit Pistons)” (“Pistons”); “LAKELAND MAGIC Secondary Logo” (“Magic”); and “SA with Ball Design (San Antonio Spurs)” (“Spurs”) (together, the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denial of registration as to the Spurs logo and reverses the Registration Program’s denial of registration as to the Pistons and Magic logos.

I. DESCRIPTION OF THE WORKS

The Works are two-dimensional logos for professional basketball teams.

The Pistons logo contains the letter “D” in blue coloring with a thin red border. A gray and blue basketball is positioned to the right of the letter, intersecting with and positioned in front of the letter “D.” An elongated wedge shape, also in blue and gray, is attached to and indicates movement of the basketball. The basketball and wedge shape feature stylized shading. The wedge and basketball are arranged so that the wedge passes through the center of the “D” to connect with the basketball at the right of the letter. The Work is set forth below:



The Magic logo contains a two-dimensional rendering of a basketball in blue and white with gray stylized shading and black borders. A thin white border and a wider black border, forming the outer perimeter of the design, surround the basketball. Five white five-point stars are positioned within this black band. The Work is set forth below:



The Spurs logo consists of a large black circle accented with straight and curved gray lines that are apparently intended to mimic the seams found on a basketball. At the top of the center of the circle is a straight vertical band that attaches to the letter "S." That vertical line continues below the "S" and attaches to the letter "A." The letters and curved lines appear in the same gray coloring. The Work is set forth below:



II. ADMINISTRATIVE RECORD

On March 16, 2017, NBA filed an application to register a copyright claim in the Magic logo. Then, on April 6, 2017, NBA filed applications to register copyright claims in the Pistons and Spurs logos. In October 30, 2017, letters, a Copyright Office registration specialist refused to register the claims, finding that the Works lacked originality. Letters from Beth Garner, Registration Specialist, to Anil V. George, at 1 (Oct. 30, 2017). In three letters dated January 24, 2017, NBA requested that the Office reconsider its initial refusals to register the Works.

NBA argued that the Works meet the originality threshold. In particular, NBA, stated that the Pistons logo “is not a mere typographic ornamentation or letter, but a unique design,” Letter from Anil V. George to U.S. Copyright Office, at 1 (Jan. 24, 2017) (“Pistons First Request”), that to refuse the Magic logo would be inconsistent with prior decisions, Letter from Anil V. George to U.S. Copyright Office, at 1 (Jan. 24, 2017) (“Magic First Request”), and that in the Spurs logo “the letters ‘S’ and ‘A’ are stylized in a unique way so that they are linked with one another and form one of the channels of a basketball. This is not a mere typographic ornamentation or lettering, but a unique design.” Letter from Anil V. George to U.S. Copyright Office, at 1 (Jan. 24, 2017) (“Spurs First Request”).

After reviewing the Works in light of the points raised in the First Requests, the Office re-evaluated the claims and denied NBA’s first requests for reconsideration. For the Pistons logo, the Office concluded that “[t]he wedge and basketball are common and familiar shapes, while the ‘D’ is a mere letter.” Letter from Stephanie Mason, Attorney-Advisor, to Anil V. George, at 2 (June 14, 2018). For the Magic logo, the Office observed that “[t]he circles, curved lines, five-point stars, and flame that form this design are all common and familiar shapes.” Letter from Stephanie Mason, Attorney-Advisor, to Anil V. George, at 2 (June 14, 2018). Further, the Office found that “the work as a whole consists of a basketball in a simple blue, black, and white color scheme surrounded by a black and white border with five-point star

accents. Arranging a concentric circular border[] around a circular-shaped basketball is a basic configuration.” *Id.* at 3. Finally, the Office concluded that “[t]he circle, curved lines, and straight lines [of the Spurs logo] are common and familiar shapes, while the ‘S’ and ‘A’ are mere letters. . . . Arranging the initials of a profession[al] basketball team within a basketball is an obvious, almost inevitable configuration that does not demonstrate sufficient creativity.” Letter from Stephanie Mason, attorney-advisor, to Anil George, at 2–3 (June 14, 2018).

In three letters dated September 14, 2018, NBA requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Anil V. George to U.S. Copyright Office, at 1 (Sept. 14, 2018) (“Pistons Second Request”); *see also* Letter from Anil V. George to U.S. Copyright Office, at 1 (Sept. 14, 2018) (“Magic Second Request”); Letter from Anil V. George to U.S. Copyright Office, at 1 (Sept. 14, 2018) (“Spurs Second Request”). NBA argues that the Works were “crafted with the sport, team history, and locale in mind for the express purpose of immediately conveying those associations with a single image.” Pistons Second Request at 3; *see also* Magic Second Request at 3; Spurs Second Request 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 id.* § 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 Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that the Spurs logo does not contain the requisite authorship necessary to sustain a claim to copyright and that the Pistons and Magic logos do contain the requisite authorship necessary to sustain a claim to copyright.

The individual elements of all three logos – stylized letters and shapes – are not copyrightable. *See Feist*, 499 U.S. at 363; *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498 (S.D.N.Y. 2005) (stating that “letters, mere variations of letters, and familiar symbols cannot be copyrighted”); 37 C.F.R. § 202.1(a) (prohibiting registration of “familiar symbols or designs; mere variations of typographic ornamentation, [and] lettering or coloring”); COMPENDIUM (THIRD) § 913.1 (stating that “[m]ere scripting or lettering, either with or without uncopyrightable ornamentation” does not satisfy the requirements for copyright registration). The question, then, is whether the combination of these elements is protectable.

The Pistons logo, considered as a whole, is registrable. The combination of the letter “D” and various geometric shapes featuring numerous colors and shading exhibits sufficient creativity. COMPENDIUM (THIRD) § 906.1 (stating that a work is registrable where it “combines 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”). The elements interact with one another in a singular manner; for example, the basketball passes through the letter “D,” as emphasized by the wedge shape to the left of the basketball illustrating movement. *See 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.”). The basketball and wedge shapes also feature stylized shading, which courts have considered a significant element in demonstrating originality. *See Nicholls v. Tufenkian Imp./Exp. Ventures, Inc.*, 2004 WL 1399187, at *1–*2 (S.D.N.Y. June 23, 2004) (denying defendant’s motion to dismiss on the basis that plaintiff’s work lacked originality where the work contained circles arranged into a grid format with additional shading on each circle); *Prince Group, Inc. v. MTS Prods.*, 967 F. Supp. 121, 125 (S.D.N.Y. 1997) (holding that a polka dot design was protectable where the dots,

among other factors, featured shading and consisted of many colors). For these reasons, the Board reverses the refusal to register the copyright claim in the Pistons logo.

Similarly, the Magic logo, considered as a whole, is registrable. The Magic logo features four colors and, as in *Nicholls* and *Prince Group*, shading on the basketball, which adds three-dimensionality to the artwork. *See Nicholls*, 2004 WL 1399187, at *1–*2; *Prince Group*, 967 F. Supp. at 125. Moreover, the basketball is surrounded by a double border in black and white that incorporates numerous star designs, an arrangement that is not common or intuitive. *See* COMPENDIUM (THIRD) § 906.1 (stating that a work that “includes circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color” will be registered). The design of the Magic logo, however, is still relatively simple. Therefore, the Board reverses the refusal to register the copyright claim in the Magic logo, but it cautions that the resulting protection is thin. *See Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (protecting only the Work’s original and creative elements “against only virtually identical copying”).

By contrast, the Spurs logo, considered as a whole, is not registrable. The placement of the lines on the basketball merely conforms to the size of the circle and helps to create the standard appearance of a basketball. *See Satava*, 323 F.3d at 810-11 (stating that an element of a work, such as the proportions of a sculpture or shape contained in a sculpture, may be unprotectable where the design of that element “naturally follow[s] from the idea of such a sculpture” or is standard in that area of sculpture). Relatedly, the arrangement of the “S” and “A” – unprotectable in themselves – also corresponds to the dictates of the basketball shape and design. *Id.* The minimal color scheme of black and gray does not add sufficient creativity to the design. Accordingly, the combination of the shapes does not produce a work that contains the necessary creativity according to *Feist*.

Finally, NBA argues that the three logos at issue were crafted with the intention that they contain symbolic associations to team history and the sport, and that the resulting logos demonstrate those connections through unique design choices. *See* Pistons Second Request at 3; Magic Second Request at 3; Spurs Second Request at 3. For example, NBA offers that the Pistons logo features the team’s signature colors and that “[t]he stylized letter ‘D’ and the basketball reference . . . continue the themes of the iconic, classic logos of the team going back to 1958.” Pistons Second Request at 3. With regard to the Magic logo, NBA puts forth similar contentions but does not reference specific features of the Magic logo. Magic Second Request at 3. Lastly, NBA contends that the Spurs logo emulates a cattle brand, which is central to the history of San Antonio. Spurs Second Request at 3. These arguments, however, do not factor into the Board’s decision. 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”). As part of the Board’s copyrightability determination as to the Works, the Board does not consider the intention or symbolism ascribed to the logos. Rather, the Board exclusively evaluates the appearance of the logos.

Thus, after analyzing both the individual elements of the Works and the combinations of those elements, the Office concludes that the Pistons and Magic logos meet the standard for originality under *Feist*, while the Spurs logo does not.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claims in the Pistons and Magic logos. The Board now refers those works to the Registration Policy and Practice division for registration of these works, provided that all other application requirements are satisfied.

The Board affirms the refusal to register the copyright claim in the Spurs logo. 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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