



United States Copyright Office

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

December 4, 2019

Susan Upton Douglass, Esq.
Fross Zelnick Lehrman & Zissu, P.C.
4 Times Square, 17th Floor
New York, New York 10036

**Re: Second Request for Reconsideration for Refusal to Register Heart in Feet;
Correspondence ID: 1-2W3SLVJ; SR# 1-5174639191**

Dear Ms. Douglass:

The Review Board of the United States Copyright Office (“Board”) has considered Silver Star Brands, Inc.’s (“SSB’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “Heart in Feet” (the “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 two-dimensional rendering of two basic footprint shapes with the negative space at the footprints’ arches forming a heart. The Work is in black and white and is as follows:



II. ADMINISTRATIVE RECORD

On May 19, 2017, SSB filed an application to register a copyright claim in the Work. In a February 13, 2018 letter, the Chief of the Visual Arts Division refused to register the claim, finding that it “lacks the authorship necessary to support a copyright claim.” Letter from John H. Ashley, Chief, Visual Arts Division, to Susan Douglass, Fross Zelnick Lehrman & Zissu, P.C. 1 (Feb. 13, 2018).

In a letter dated April 19, 2018, SSB requested that the Office reconsider its initial refusal to register the Work. Letter from Susan Douglass, Fross Zelnick Lehrman & Zissu, P.C., to U.S. Copyright Office (Apr. 19, 2018) (“First Request”). In that letter, SSB argued that the level of creativity required for protection is extremely low, the highly stylized Work exceeds that level of creativity, and was not a familiar symbol or design. *Id.* at 1–3. SSB further stated that the design comprised four creative elements: stylized feet, toes, toe sizing, and a negative space comprising two separate heart halves. *Id.* at 3. SSB then stated that “[t]here are many ways to draw silhouettes of feet that also encompass a heart, but these designs do not look like the Work” and offered examples of designs with abstract feet combined with a heart or hearts, including multiple designs that use the negative space between two arches to form a heart. *Id.* at 4.

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 exhibit a sufficient amount of original and creative graphic authorship to support a copyright registration. Letter from Stephanie Mason, Attorney-Advisor, to Susan Douglass, Fross Zelnick Lehrman & Zissu, P.C. 1 (Aug. 30, 2018). The letter explained that “the feet and heart that make up this design are common and familiar shapes” and minor variations in such common and familiar shapes do not make the design protected by copyright. *Id.* at 1–2.

In a letter dated October 20, 2018, SSB 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 Susan Douglass, Fross Zelnick Lehrman & Zissu, P.C., to U.S. Copyright Office (Oct. 20, 2018) (“Second Request”). That letter reiterated the arguments from the First Request, namely that the highly stylized Work is not a familiar symbol or design and exceeds the required level of creativity for registration. *Id.* at 1–3.

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 Publications, Inc. v. Rural Telephone Service 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 “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”). 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. 2019) (“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's merger doctrine, which states that idea and expression merge together when the expression cannot be separated from the idea, is a closely related principle that bars copyrightability of certain works. *See Baker v. Selden*, 101 U.S. 99, 103 (1880) (explaining that if the "art" that a book "teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public"); *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 68 (2d Cir. 1994) ("[W]hen the expression is essential to the statement of the idea, the expression also will be unprotected, so as to insure free public access to the discussion of the idea.").

B. Analysis of the Work

After carefully examination and application of the legal standards discussed above, the Board finds that the Work does not contain the requisite separable authorship necessary to sustain a claim to copyright.

The Work is a combination of two elements, basic footprints and a heart, in abstract form and in black and white. Both design elements are common and familiar shapes that are ineligible for copyright protection. 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 313.4(J). Further, the abstract depiction of footprints is not determined by creative choices, but is dictated by human physiology. Just as *Satava* says that no artist can claim copyright in ideas first expressed in nature, no artist should be able to claim copyright in two basic, abstracted black and white footprints placed side-by-side. *See Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003). Similarly, in *Blehm v. Jacobs*, 702 F.3d 1193 (10th Cir. 2012), a case involving abstractions in the form of people drawn as stick figures, a court found that "common anatomical features, and natural poses are ideas that belong to the public domain." *Id.* at 1204. The only other design element in the Work here is a heart, which is a common or familiar shape. COMPENDIUM (THIRD) § 313.4(J) (listing a heart as an example of a common or familiar shape).

SSB is correct in suggesting that a work composed of common or familiar designs may be registered if the work as a whole contains a sufficient amount of creative expression. Second Request at 2; *see* COMPENDIUM (THIRD) §§ 313.4(J), 906.1. But here, the combination demonstrates only *de minimis* creativity, which is not protected under the Copyright Act. As an example of *de minimis* creativity, the *Compendium* offers the example of combining an outline of the state of South Carolina with a blue heart in the middle. *Id.* § 313.4(B). Here, combining the most abstract depiction of footprints with a heart in the middle is similarly a *de minimis* quantum of creative expression that is not protected under the Copyright Act. The combination of footprints and heart is an expression that follows from the natural physiology of foot arches forming curves that are similar to the curves in a standard heart design. It is common idea demonstrated by SSB's own Google search. Second Request at 3–4. Were the Office to allow SSB to protect the expression this idea in its most abstract form, it would allow SSB to monopolize the idea of combining these two commonly-merged elements.

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

Karyn A. Temple, Register of Copyrights
and Director, U.S. Copyright Office

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

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