



United States Copyright Office

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December 23, 2019

Maureen Beacom Gorman, Esq.
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223 S. Wacker Dr.
6300 Willis Tower
Chicago, IL 60606

**Re: Second Request for Reconsideration for Refusal to Register House Design;
Correspondence ID: 1-3GJWRSX; SR# 1-6354724381**

Dear Ms. Gorman:

The Review Board of the United States Copyright Office (the “Board”) has considered Relish Labs LLC’s (“Relish Labs”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “House Design” (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 design that consists of: (1) a grey asymmetrical pentagon appearing as an abstraction of a house; and (2) a grey three-prong fork and butter knife in the bottom-center of the pentagon. The Work is as follows:



II. ADMINISTRATIVE RECORD

On March 14, 2018, Relish Labs filed an application to register a copyright claim in the Work. On August 21, 2018, a Copyright Office registration specialist refused to register the claim, finding that the Work “lacked the authorship necessary to support a copyright claim.”

Letter from Examiner Stoner, Registration Specialist, to Danielle Johnson, Marshall, Gerstein & Borun LLP 1 (Aug. 21, 2018).

Relish Labs then requested that the Office reconsider its initial refusal to register the Work. Letter from Maureen Beacom Gorman, Marshall, Gerstein & Borun LLP, to U.S. Copyright Office (Oct. 22, 2018) (“First Request”). Relish Labs argued that works that include familiar symbols or designs can be eligible for registration, if those design elements are used in a creative manner, and that the Work’s design choices were made in such a manner. *Id.* at 1. 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 “did not contain the sufficient amount” of original and creative artistic or graphic authorship to support a copyright registration. Letter from Stephanie Mason, Attorney-Advisor, to Maureen Beacom Gorman, Marshall, Gerstein & Borun LLP 1 (Mar. 22, 2019).

In June 2019, Relish Labs 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 Maureen Beacom Gorman, Marshall, Gerstein & Borun LLP, to U.S. Copyright Office (Jun. 21, 2019) (“Second Request”). Relish Labs emphasized that the Work’s design elements as a whole exceeded the minimum threshold of creativity required for registration. It stated that the Work’s combination of shapes and figures possessed a creative spark “no matter how crude, humble or obvious it might be,” and that the combination of the shapes in different sizes resulted in a design that went “beyond the mere display of a few geometric shapes in a preordained or obvious arrangement.” *Id.* at 2 (citing U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 308.2, 906.1 (3D ED. 2014) (“COMPENDIUM (THIRD)”). Relish Labs argued that the *Compendium* does not identify fork and knife shapes as “familiar symbols or designs,” and that Relish Labs used the fork and knife design in a creative manner as incorporated into an “original, artistic drawing.” *Id.* at 3 (citing COMPENDIUM (THIRD) § 313.4 (J)). Relish Labs further claimed that reviewers perceive the Work’s pentagon element as a “house,” and thus it is more than a mere geometric shape or “familiar symbol or design.” *Id.*

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, “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 Copyright 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.” COMPENDIUM (THIRD) § 906.1; *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.

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 does not contain a sufficient amount of creativity elementally or as a whole. The house (whether described as a pentagon or as the abstraction of a house), fork, and knife that make up the Work are each common symbols, designs, or shapes. Common and familiar symbols, designs, and shapes are not copyrightable. 37 C.F.R. § 202.1(a); COMPENDIUM (THIRD) § 906.2. The *Compendium* includes pentagons in its non-exhaustive list of examples of uncopyrightable geometric shapes. COMPENDIUM (THIRD) § 906.1. The fork and knife similarly are not protectable because they include the bare minimum to show a knife and fork, without a copyrightable design. While copyright law can protect creative designs on flatware, *see Godinger Silver Art Co. v. Int'l Silver Co.*, No. 95 Civ. 9199 (LMM), 1995 U.S. Dist. LEXIS 17696, at *8 (S.D.N.Y. 1995), the fork and knife here have no designs attributable to the author. Common and familiar designs, such as a basic pentagon, fork, and knife, are available for all designers to use. Thus, the Board finds that the component parts of the Work are not sufficiently creative enough to support registration.

The Board also finds that Relish Labs did not select, combine, or arrange the design components in a way that warrants copyright protection. Merely combining independently unprotectable elements does not establish creativity if the combination is “simplistic, obvious and expected.” COMPENDIUM (THIRD) § 905. Positioning familiar designs within a larger common shape, without even minor linear or spatial variations, is a basic, garden-variety configuration. The arrangement of these few elements lacks the necessary creativity required to support a claim in copyright. *Id.* Using a pentagon as, essentially, a border does not elevate an otherwise common design to the level of creativity required for registration. *See id.* §§ 913.1; 1006.2.

While the requisite level of creativity required to support a copyright registration is not high, this does not mean that every work is entitled to copyright protection. Instead, “there remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.” 1 Melville Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 2.01 (2018). The Work falls into this narrow area. We find that the level of creative authorship involved in this combination of two unprotectable elements is, at best, *de minimis*, and too trivial to merit copyright registration.

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 the 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
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