



United States Copyright Office

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July 11, 2018

Perkins Coie LLP
Attn: Thomas L. Holt
1201 Third Avenue, Suite 4900
Seattle, WA 98101

**Re: Second Request for Reconsideration for Refusal to Register LÄRABAR Packaging Design;
Correspondence ID: 1-2QPQQVP; SR 1-5692289421**

Dear Thomas Holt:

The Review Board of the United States Copyright Office (“Board”) has considered General Mills Specialty Products, LLC’s (“General Mills”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional art claim in the work titled “LÄRABAR Packaging Design” (the “Work”).¹ 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 design for the packaging of fruit and nut bars that is rectangular in shape and contains text providing the net weight, logo, flavor, and company slogan for individual fruit and nut bars; there are five color variations. A photographic reproduction of the Work, in the five different color schemes, is attached as Appendix A.

II. ADMINISTRATIVE RECORD

On August 4, 2017, General Mills filed an application to register a copyright claim in the Work. In an August 7, 2017, letter, a Copyright Office registration specialist refused to register the claim, finding that the Work “lacks the authorship necessary to support a copyright claim.” Letter from Kathryn S., Copyright Examiner, to Thomas Holt, at 1 (Aug. 7, 2017).

In a letter dated August 17, 2017, General Mills requested that the Office reconsider its initial refusal to register the Work. Letter from Thomas L. Holt to U.S. Copyright Office (Aug. 17, 2017)

¹ The applicant confirmed that it “seeks a registration for the 2-D artwork on the LÄRABAR packaging and not for the photographs of the packaging submitted with the application.” Letter from Thomas L. Holt, to U.S. Copyright Office at 1 n.1 (Feb. 1, 2018).

(“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 as a whole fails to rise to a level of copyrightable authorship.” Letter from Gina Giuffreda, Attorney-Advisor, to Thomas Holt, at 4 (Nov. 2, 2017).

In a letter dated February 1, 2018, General Mills 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 Thomas L. Holt to U.S. Copyright Office (Feb. 1, 2018) (“Second Request”). In that letter, General Mills claimed that the Copyright Office had disregarded many creative choices made in creating the Work and that the Office was incorrect in asserting that the Work is arranged in an expected and common configuration. *See id.* at 2. Moreover, General Mills argued that the Work closely parallels the wrapping paper design that the Office identifies as copyrightable in the *Compendium*, see COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (“COMPENDIUM (THIRD)”) § 906.1, and that the cases the Office cited in the November 2 letter do not support non-registrability. Second Request at 2–4.

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 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. *See 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 U.S. 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."); *Tompkins Graphics, Inc. v. Zipatone, Inc.*, No. 82-5438, 1983 WL 398, at *2 (E.D. Pa. Aug. 15, 1983) ("Variations of . . . circles and ellipses" are not protectable, as "[s]uch basic geometric shapes have long been in the public domain and therefore cannot be regulated by copyright."). 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 ("The [Copyright Office] will register this claim because it . . . goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement.").

Though "an original combination or arrangement of colors" may be copyrightable if it results in a visual work that qualifies as a work of authorship, mere variations of coloring are not sufficient for copyright protection. COMPENDIUM (THIRD) § 313.4(K); *see also Boisson v. Banian Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) ("[T]he author's choice in incorporating color with other elements may be copyrighted."). Moreover, "[t]he Office cannot register a claim to copyright in color in and of itself or a system for matching pairs and sets of colors." *Id.* As examples of unprotectable variations of coloring, the *Compendium* offers "[c]reating a new version of a fabric design where the colors red and blue are substituted for the colors yellow and green" or "[p]roducing three greeting cards containing the same visual and textual content where the only difference is that each card is printed in a different color." *Id.*

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 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 is a combination of words, simple shapes, and a set of basic color schemes. The applicant does not appear to dispute the Office’s conclusion that none of the individual elements are eligible for copyright protection. Rather, General Mills argues that “the selection, coordination, and arrangement of the various design elements” are sufficiently creative. Second Request at 2–3.

The applicant asserts that the Office overlooked the “many creative choices reflected in the Work,” Second Request at 2, such as a “distinctive red banner having a beige border that features the unique LARABAR logo comprising all-capital, block letters in a beige color contrasting the background color and having a thin black outline.” Second Request at Ex. A. The applicant argues that “the Author’s selection of particular shapes, fonts, and colors” and “unique arrangement and combination of those elements” demonstrate at least a modicum of creativity. Second Request at 2. But the number of choices an author makes in combining simple shapes, fonts, and colors must be “sufficiently high” if that combination is going to weigh in favor of copyrightability. *Batiste v. Najm*, 28 F. Supp. 3d 595, 603 (E.D. La. 2014). The Work before the Board does not satisfy that threshold. *See Satava*, 323 F.3d at 811 (finding that “[t]he selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form, considered together, lacks the quantum of originality needed to merit copyright protection.”); *see also United States v. Hamilton*, 583 F.2d 448, 451 (9th Cir. 1978) (“Trivial elements of compilation and arrangement, of course, are not copyrightable because they fall below the threshold of originality.”).

The question before the Board is whether the combination of elements results in a design that, on its face, is copyrightable even though the individual elements are not.

In support of its claim, General Mills cites an example from the *Compendium* of a wrapping paper design eligible for registration because it “combines multiple types of geometric shapes in a variety of sizes and colors.” Second Request at 2 – 3 (quoting COMPENDIUM (THIRD) § 906.1). A depiction of the wrapping paper design follows:

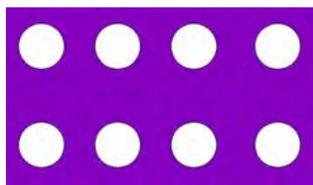


The Board finds the analogy unhelpful to the applicant. The wrapping paper design includes stars of five or six different sizes and in at least eight different colors; circles of four or five different

sizes; and triangles of four or five different sizes. Some of the shapes are stretched horizontally, others vertically; one triangle sits at an angle that parallels no edge, while the others all have a side that parallels an edge. And the various shapes are all arranged in a pattern that appears random. In short, the wrapping paper design exhibits creative authorship. The Board similarly finds unpersuasive the cases the applicant cites where a court found a combination of common elements to exhibit sufficient creativity. See Second Request at 4–5 (citing *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841 (9th Cir. 2012) (floral textile pattern); *Titlecraft, Inc. v. Nat’l Football League*, Civ. No. 10–758, 2010 WL 5209293 (D. Minn. Dec. 20, 2010) (Lombardi Trophy); *Prince Grp., Inc. v. MTS Prods.*, 967 F. Supp. 121 (S.D.N.Y. 1997) (polka dot design); *Runstadler Studios, Inc. v. MCM Ltd. P’ship*, 768 F. Supp.1292 (N.D. Ill. 1991) (“Spiral Motion” glass sculpture). Each of the works at issue in the cited cases exhibits more creativity than the Work before the Board.

By comparison, the LÄRABAR Packaging Design consists of horizontal text within and under a red banner surrounded by a beige frame, sitting atop one of five dominant package colors. General Mills is correct that “it is not common to find packaging comprising *the very composition and arrangement of the elements appearing*,” Second Request at 2, but that does not mean that the composition and arrangement is per se copyrightable. It may be unique in the sense that LÄRABAR is the only package design that uses this *exact* layout, but the general arrangement is common and any creative contribution is *de minimis*. See *Feist*, 499 U.S. at 345 (“Originality does not signify novelty[.]”); *Baker v. Seldon*, 101 U.S. 99, 102 (1879) (“The novelty of the art or thing described or explained has nothing to do with the validity of the copyright.”); COMPENDIUM (THIRD) § 310.1 (“The fact that a work may be novel, distinctive, innovative, or even unique is irrelevant to this analysis. . . . Conversely, the fact that a work is new, innovative, or even unique does not necessarily mean that it contains a sufficient amount of creative expression to satisfy the originality requirement.”).

Indeed, the better analogy for the Work from section 906.1 of the *Compendium* is the painting with a purple background and evenly spaced white circles, the combination of which “does not contain a sufficient amount of creative expression to warrant registration.” COMPENDIUM (THIRD) § 906.1. A depiction of the painting follows:



In the matter before the Board, the Work—a minimal combination of words, simple shapes, and a set of basic color schemes—lacks the modicum of creativity required by *Feist*.

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.



BY:

U.S. Copyright Office Review Board

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

Regan A. Smith, General Counsel and Associate
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Appendix A

