



United States Copyright Office

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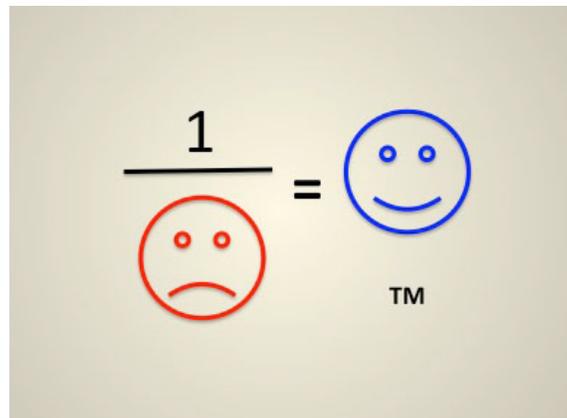
Re: Second Request for Reconsideration for Refusal to Register One Over Sad Equals Happy (OOSEH) and One Over Sad Equals Happy (OOSEH) Fabric Design; Correspondence ID: 1-2YIB3V4; SR #s: 1-4185237771, 1-4185237797

Dear Mr. Geller:

The Review Board of the United States Copyright Office (“Board”) has considered Alexander H. Slocum’s (“Slocum’s”) second request for reconsideration of the Registration Program’s refusal to register two-dimensional artwork claims in the works titled One Over Sad Equals Happy (OOSEH) (“OOSEH”) and One Over Sad Equals Happy (OOSEH) Fabric Design (“OOSEH Fabric Design”) (collectively, the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denials of registration.

I. DESCRIPTION OF THE WORKS

OOSEH is a two-dimensional visual work that depicts an equation with the number one divided by a red frowning face, an equal sign, and a blue smiley face. Both faces consist of four single lines constituting a circle for a head, two circles for eyes, and an arc for a mouth. OOSEH is depicted as follows:



OOSEH Fabric Design includes the same design but in white, printed in an evenly-spaced repeating pattern on blue fabric. OOSEH Fabric Design is depicted as follows:



II. ADMINISTRATIVE RECORD

On November 20, 2016, Slocum filed an application to register a copyright claim in the Works. In two August 30, 2017 letters, a Copyright Office registration specialist refused to register the claims, finding that they both “lack[] the authorship necessary to support a copyright claim.” Letters from A. Brown, Registration Specialist, to Debra Slocum 1 (Aug. 30, 2017).

In nearly identical letters dated November 13, 2017, Slocum requested that the Office reconsider its initial refusal to register the Works. Letters from Michael A. Geller to U.S. Copyright Office (Nov. 13, 2017) (“First Request”). After reviewing the Works in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Works “do[] not contain a sufficient amount of creativity to warrant registration.” Letter from Stephanie Mason, Attorney-Advisor, to Michael A. Geller, DLA Piper LLP 1 (Mar. 29, 2018). The Office noted that the Works are composed of common shapes or designs and that these unprotectable elements “are not combined in any way that differentiates them from their shape and design components.” *Id.* at 3.

Slocum then 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 Michael A. Geller, DLA Piper LLP, to U.S. Copyright Office (June 28, 2018) (“Second Request”). Slocum argued that the Works are both original and creative and should thus be afforded copyright protection. *Id.* at 1–3. The Second Request concedes that the elements that comprise the Works are “ordinary,” but argues that where those elements are combined with a “minimal degree of creativity,” the resulting work can be protected by copyright. *Id.* at 2 (citation omitted). Slocum states that level of creativity has been met, as “[t]he artist carefully created and arranged the elements of the

[Works] to combine the concepts of mathematics and art in a representation of a clear message: dividing the number one by sadness (inverting sadness) results in happiness. In other words, [Slocum], through this original work, is sending the message that you can turn your unhappiness into sadness [*sic*] by doing the opposite of what makes you unhappy.” *Id.*

The Second Request points to the Review Board’s decisions to register the works “Tricorn” and “Pattern for Paper and Textile Products,” *see* U.S. COPYRIGHT OFFICE, *Review Board Letters Online*, <https://www.copyright.gov/rulings-filings/review-board> (last visited Feb. 6, 2019), as examples of works that have “met the low level of creativity to be registerable.” Second Request at 3. Slocum suggests that the Works at issue with this appeal are “as creative, or more creative, than these works.” *Id.*

III. DISCUSSION

A. *The Legal Framework*

1) *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).

2) Distinction Between Ideas and Expression

Section 102(b) of the Copyright Act provides that copyright protection for expressive works does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b). Section 102(b) codifies the longstanding principle, known as the idea-expression dichotomy, that copyright law protects the original expression of ideas, but not the underlying ideas themselves.

"Mathematical principles, formulas, algorithms, or equations" are ineligible for copyright protection under section 102(b). *See* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.3(A) (3d ed. 2014) ("COMPENDIUM (THIRD)"). Though the Office is permitted to register a sufficiently original artistic description, explanation, or illustration of an idea, procedure, process, system, method of operation, concept, principle, or discovery, *see* H.R. Rep. No. 94-1476, at 56 (1976), "the registration would be limited to the copyrightable literary, musical, graphic, or artistic aspects of the work." COMPENDIUM (THIRD) § 313.3(A). This principle is manifested in the Office's regulations, which bar copyright protection for "[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing." 37 C.F.R. § 202.1(b).

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*, 101 U.S. at 103 (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).

B. Analysis of the Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that they do not contain the requisite creativity necessary to sustain a claim to copyright.

Slocum concedes that the elements in the Works are "ordinary." Second Request at 3. The Board agrees that smiley and frowning faces are not entitled to copyright protection because they are ordinary or, phrased another way, familiar symbols or designs. *See Blehm v. Jacobs*, 702 F.3d 1193, 1206 (10th Cir. 2012) (noting that "[a] smile can be drawn in various ways," but "the idea of a crescent-shaped smile is unprotected"); *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 214–15 (S.D.N.Y. 2015) (citing 37 C.F.R. § 202.1(a) and noting that "[c]ommon phrases and familiar designs are ordinarily not entitled to copyright protection"); Statement of Interest on Behalf of the U.S. Copyright Office at 4–5, 14–16, *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196 (S.D.N.Y. 2015) (No. 14 Civ. 7289 (GHW)). Similarly, mathematic symbols and equations are not protected by copyright. *See* 17 U.S.C. § 102(b); COMPENDIUM (THIRD) § 313.3(A).

As a whole, the combination of the Works' elements does not rise to the level of creativity to be protected by copyright. The OOSEH design consists merely of a blue smiley face, a red frowning face, and an inversion equation. The OOSEH Fabric Design simply repeats the OOSEH design in white and on a blue fabric, through a predictable, evenly spaced, repeating pattern. The Board agrees that some combinations of familiar symbols or designs can give rise to a work protected by copyright when the use of those elements results in a sufficiently creative work. *See* COMPENDIUM (THIRD) § 906.1. But the combination of the elements that respectively comprise the Works do not rise to that level.

Slocum emphasizes the author's choices made in creating the Works, stating that "[t]he artist carefully created and arranged the elements of the [Works] to combine the concepts of mathematics and art in a representation of a clear message: dividing the number one by sadness (inverting sadness) results in happiness." Second Request at 2. But the arrangement of these symbols is dictated, not by creative choice, but by the format of a standard inversion equation. Such equations are determined by function: as one element of the equation increases, the other decreases. *See Inverse*, DICTIONARY.COM (2018), <https://www.dictionary.com/browse/inverse> ("A term is said to be in inverse proportion to another term if it increases (or decreases) as the

other decreases (or increases).”). And as the Tenth Circuit stated in considering the copyrightability of stick figure drawings, “a copyright owner’s original stylistic choices qualify as protectable expression if the choices are not dictated by the underlying idea.” *Blehm*, 702 F.3d at 1201.

Slocum is attempting to register the idea of inversion, as applied to happiness and sadness, expressed as a simple equation, reduced to its most basic, and uncopyrightable, form. The idea that a smiley face is the opposite of a frowning face is a common idea and has been expressed in various creative contexts before. *See, e.g.*, CAROLYN CRAWFORD, MY SMILE IS JUST A FROWN (TURNED UPSIDE DOWN) (Motown Record Co. 1964). Even if that idea can be expressed in varying creative forms, the basic equation here is not one of those forms. The Seventh Circuit offers an illustrative explanation of this premise: “Einstein’s articles laying out the special and general theories of relativity were original works even though many of the core equations, such as the famous $E = mc^2$, express ‘facts’ and therefore are not copyrightable.” *ADA v. Delta Dental Plans Ass’n*, 126 F.3d 977, 979 (7th Cir. 1997).

Slocum further argues that the Works here are more creative than other works the Review Board registered after a second appeal. Second Request at 3–4. The Office, including the Board, does not compare works with other works that have been previously registered with the Office. COMPENDIUM (THIRD) § 309.1. “The determination of copyrightability will be made on a case-by-case basis” and “[a] decision to register a particular work has no precedential value and is not binding upon the Office when it examines any other application.” *Id.* at § 309.3. Even if the Board were to compare similar works, the Office is on record as indicating that simplistic combinations of smiley and frowning faces are not protected by copyright. *See* Statement of Interest on Behalf of the U.S. Copyright Office at 11–16, *Delta Galil USA*, 135 F. Supp. 3d 196 (S.D.N.Y. July 5, 2016) (No. 14-cv-07289-GHW); *see also Blehm*, 702 F.3d at 1206.

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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